

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA238/2023  
[2023] NZCA 464**

BETWEEN SPARK NEW ZEALAND TRADING  
LIMITED  
Applicant  
AND SEAN DAVID BRYAN  
Respondent

Court: Goddard and Wylie JJ  
Counsel: Z G Kennedy and J W Yu for Applicant  
T J Rainey for Respondent  
Judgment: 22 September 2023 at 11.00 am  
(On the papers)

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**JUDGMENT OF THE COURT**

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- A The application for leave to appeal to this Court is granted.**  
**B Costs are reserved.**
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**REASONS OF THE COURT**

(Given by Goddard J)

**Background**

[1] Mr Bryan was the sole shareholder and director of Victory IT Ltd (Victory). Victory was placed in liquidation, and it appears that it has now been removed from the Companies Register. Victory formerly carried on business as a provider of information technology testing services. Victory provided testing services to

Spark New Zealand Trading Ltd (Spark), and was paid substantial amounts by Spark for those services.

[2] Spark was encouraged to procure testing services from Victory by Mr Lester, a consultant working for Spark. Mr Lester provided consulting services to Spark through his company Spud Consulting Ltd (Spud), of which he was the sole shareholder and director. In 2017 Spark discovered irregularities in the performance by Mr Lester of his responsibilities. Spark terminated its contract with Mr Lester and Spud. After making further inquiries, and becoming aware of substantial payments made by Victory to Spud, Spark terminated its contract with Victory.

[3] In 2018 Spark brought separate arbitration proceedings against Victory, and against Spud and Mr Lester. The two arbitration proceedings were consolidated and heard by the Hon Rodney Hansen KC. On 4 August 2021 an award was issued that found Victory, Spud and Mr Lester liable to pay compensation to Spark of \$3,578,365. Victory was held to be liable to Spark in claims for the tort of conspiracy by unlawful means, and for dishonestly assisting Spud and Mr Lester to breach fiduciary duties owed to Spark. Victory was found to be entitled to set off the sum of \$1,242,402.50 against its liability to Spark.

### **The current proceedings**

[4] In 2021 Spark filed proceedings in the High Court against Mr Bryan. In those proceedings it advances claims based on the two causes of action that were upheld against Victory in the arbitration: conspiracy by unlawful means, and dishonest assistance in breaches of fiduciary duty.

[5] Spark sought summary judgment against Mr Bryan in reliance on the findings made in the arbitral award. Spark argued that Mr Bryan was bound by those findings as a privy of Victory.<sup>1</sup>

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<sup>1</sup> Spark advanced this argument in reliance on a number of authorities on res judicata including *Shiels v Blakeley* [1986] 2 NZLR 262 (CA) and *Victoria Street Apartments Ltd (in liq) v Sharma* HC Auckland CIV-2009-404-8377, 21 September 2011.

## High Court judgment declining summary judgment

[6] Spark's application for summary judgment was declined.<sup>2</sup> Associate Judge Taylor considered that Mr Bryan had an arguable case that he was not the privy of Victory for the purposes of the arbitral award.<sup>3</sup> The Judge also considered that it was arguable that the elements of the two causes of action against Mr Bryan had not been finally determined by the arbitral award.<sup>4</sup> Because it was arguable that Mr Bryan was not subject to a cause of action estoppel or issue estoppel arising out of the arbitral award, Spark had not established that Mr Bryan had no defence to the two causes of action pursued against him.<sup>5</sup>

## Application for leave to appeal

[7] Spark applied to the High Court under s 56(3) of the Senior Courts Act 2016 for leave to appeal to this Court from the refusal of summary judgment. The Judge declined to grant leave to appeal.<sup>6</sup>

[8] Spark now applies to this Court for leave to appeal under s 56(5) of the Senior Courts Act. That application is opposed by Mr Bryan.

## Discussion

[9] We are satisfied that it is in the interests of justice for leave to appeal to be granted.<sup>7</sup> Spark has identified arguable errors of law in the High Court judgment. In particular, it is arguable that there are no outstanding disputes of fact relevant to determination of whether Mr Bryan was a privy of Victory for the purposes of the arbitral award. If there are no unresolved material questions of fact, then determining whether or not Mr Bryan is Victory's privy is a question of law which appears likely to be capable of determination in the context of a summary judgment application.<sup>8</sup>

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<sup>2</sup> *Spark New Zealand Trading Ltd v Bryan* [2022] NZHC 2397.

<sup>3</sup> At [48].

<sup>4</sup> At [55].

<sup>5</sup> At [58] and [65].

<sup>6</sup> *Spark New Zealand Trading Ltd v Bryan* [2023] NZHC 759.

<sup>7</sup> *Greendrake v District Court of New Zealand* [2020] NZCA 122 at [6(e)].

<sup>8</sup> See *Pemberton v Chappell* [1987] 1 NZLR 1 (CA) at 4; and Jessica Gorman and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HR12.2.02].

[10] We are satisfied that the question whether the arbitral award gives rise to issue estoppels as between Spark and Mr Bryan is of wider commercial significance. And it is of substantial private importance to both parties.

[11] In circumstances where we have decided that leave should be granted, it would be inappropriate to discuss the parties' respective contentions in more detail. Their arguments will be considered by this Court in the context of the appeal.

[12] Rule 53G(3) of the Court of Appeal (Civil) Rules 2005 provides that where leave is granted, and the need to apply for leave does not result from a default on the applicant's part, the Court will normally reserve costs pending the outcome of the appeal. There is no reason to depart from that approach in the present case.

### **Result**

[13] The application for leave to appeal to this Court is granted.

[14] Costs are reserved.

Solicitors:  
MinterEllisonRuddWatts, Auckland for Applicant  
Stainton Chellew, Auckland for Respondent