

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 138/2019  
[2020] NZSC 35

BETWEEN CHRISTOPHER LORRAINE PICKERING  
First Applicant

AQATAR LIMITED  
Second Applicant

AND DETECTION SERVICES PTY LIMITED  
First Respondent

DETECTION SOLUTIONS PTY LIMITED  
Second Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: A R B Barker QC and G B Lewis for Applicants  
M A Corlett QC and R D Butler for Respondents

Judgment: 17 April 2020

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JUDGMENT OF THE COURT

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**A The application for leave to appeal is dismissed.**

**B The applicants must pay costs of \$2,500 to the respondents.**

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REASONS

[1] The applicants seek leave to appeal against a decision of the Court of Appeal,<sup>1</sup> which had dismissed their cross-appeal against a decision of the High Court.<sup>2</sup>

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<sup>1</sup> *Detection Services Pty Ltd v Pickering* [2019] NZCA 575 (Gilbert, Duffy and Wylie JJ) [CA judgment].

<sup>2</sup> *Detection Services Ltd v Pickering* [2018] NZHC 3310, [2019] NZAR 515 (Woolford J) [HC judgment].

## **Background**

[2] Mr Simmons, who lives in Sydney, is the founder of the Detection Services group of companies which specialise in detecting leaks in water pipes. The group comprises the two respondent companies, both based in Australia, and two related New Zealand companies. As in the Courts below, we call them collectively Detection Services.

[3] The first applicant, Mr Pickering, lives in Auckland. He is the founder of the second applicant, Aqatar Ltd, a company incorporated in New Zealand in January 2010. Mr Pickering has expertise in computer software development.

[4] Mr Simmons and Mr Pickering are in dispute over the ownership of a new computer-controlled leak detection system. The High Court found that this was designed and built for the exclusive use of Detection Services in a joint venture between the parties, formed some time before December 2008.<sup>3</sup>

[5] In late 2009, Mr Pickering was employed as the general manager of Detection Services. He took up this position from January 2010, reporting to Mr Simmons as managing director. Mr Pickering developed and built in New Zealand, mostly in his own time, a prototype of the new system with technical assistance from Detection Services in Australia.

[6] Mr Pickering met the cost of the development from his own resources on the basis that Detection Services would reimburse him for these costs and pay reasonable recompense for his time.<sup>4</sup> Mr Pickering was to retain the intellectual property rights in the computer software and interface.<sup>5</sup>

[7] Upon completion of the prototype in mid-2011, Mr Simmons sought urgent delivery of it to Australia. Mr Pickering then claimed sole ownership of the entire system and refused to deliver it to Detection Services until agreement was reached on price and other terms governing its future use.

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<sup>3</sup> HC judgment, above n 2, at [26], [36] and [38(e)].

<sup>4</sup> At [38(d)].

<sup>5</sup> At [38(b)].

[8] The parties were unable to reach agreement. Mr Simmons terminated Mr Pickering's employment as general manager of Detection Services. Mr Pickering placed the system in storage.

[9] Detection Services subsequently developed a new system and issued proceedings claiming the costs of developing the new system and lost profits suffered in the interim, alleging there was a joint venture and that Mr Pickering breached a fiduciary duty owed in that joint venture. The applicants, Mr Pickering and Aqatar Ltd, counterclaimed in contract for the costs they incurred in developing the original system. (From now on, when we refer to Mr Pickering, this should be taken as also referring to Aqatar Ltd unless the context requires otherwise.)

## **Procedural history**

### *High Court*

[10] Detection Services' claims and Mr Pickering's counterclaims both failed following trial in the High Court. The High Court held there was a joint venture and that a fiduciary relationship arose from that.<sup>6</sup> However, the High Court found that both Mr Pickering and Detection Services had breached the fiduciary duty of loyalty owed to each other.<sup>7</sup>

[11] To the extent that the terms of the joint venture did not specify the terms of the transfer from Mr Pickering to Detection Services, the Judge held that the parties had an obligation to negotiate and settle the terms in good faith. Both failed to do so.<sup>8</sup> In particular the Judge referred to Mr Pickering's claim of ownership of the whole system and the failure to supply invoices to back up the claims for the payment of third party costs. The Judge also pointed to a letter written by Detection Services on 4 July 2011 wrongly claiming ownership of the whole system, including the intellectual property.

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<sup>6</sup> At [40]–[45].

<sup>7</sup> At [63] and [65]. Mr Pickering's breaches are set out at [50]–[53] and [57], and Detection Services' breaches are set out at [58]–[62].

<sup>8</sup> At [48]–[49].

[12] As a result, the High Court declined to grant any relief on the basis that Detection Services came to equity with unclean hands.<sup>9</sup> The Judge rejected Detection Services' claim in contract because there was no sale and purchase agreement but only a joint venture under which Mr Pickering was obliged to negotiate the transfer of the system. The Judge ruled that, having developed and paid for it, Mr Pickering was entitled to dispose of the system as he saw fit.

### *Court of Appeal*

[13] Detection Services appealed against the High Court decision and Mr Pickering cross appealed. The Court of Appeal allowed Detection Services' appeal but dismissed Mr Pickering's cross-appeal.

[14] The Court of Appeal held that Mr Pickering "unquestionably breached" obligations owed to Detection Services by claiming sole ownership of the system, refusing to disclose third party costs, and refusing to deliver the system to Detection Services for their exclusive use. However, these obligations were better framed as "non-fiduciary obligations assumed under the joint venture and contractual in nature".<sup>10</sup> The Court of Appeal therefore saw no room for the application of the equitable clean hands doctrine.<sup>11</sup>

[15] In the Court of Appeal's view, the operative breach was the failure to deliver the prototype to Detection Services in Australia so that it could be exploited commercially. Mr Pickering had no right to retain the system pending a successful negotiation as to price.<sup>12</sup> The Court remitted to the High Court the determination of quantum of damages caused by the breach.<sup>13</sup>

[16] On the cross-appeal, the Court of Appeal held that Mr Pickering had failed to establish the pleaded contract and his cross-appeal was therefore dismissed.<sup>14</sup>

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<sup>9</sup> At [66]–[69].

<sup>10</sup> CA judgment, above n 1, at [41].

<sup>11</sup> At [56].

<sup>12</sup> At [38]–[39].

<sup>13</sup> At [66] and [70].

<sup>14</sup> At [63]–[65].

### **Applicants' submissions**

[17] Mr Pickering submits that the appeal will raise issues of general commercial importance concerning the equitable doctrine of clean hands in that the Court of Appeal judgment "raises difficult issues as to the application of that doctrine". It is submitted that this raises other important issues such as:

- (a) the nature of the doctrine and how it applies where the conduct giving rise to its application arises out of the same transaction that is the basis of a plaintiff's claim;
- (b) whether the contractual equivalent of the doctrine of clean hands applies in the same way (if the obligations in this case are characterised as contractual);
- (c) the nature of the necessary causal relationship between a defendant's wrongful conduct and the vitiating conduct on the part of a plaintiff; and
- (d) whether the defence must be positively pleaded or whether the doctrine is part of the Court's discretion in the exercise of granting equitable relief.

[18] The applicants also submit that the Court of Appeal fundamentally misunderstood the decision in the High Court, to the extent that the decision in the Court of Appeal involves a miscarriage of justice.

### **Respondents' submissions**

[19] Detection Services submit that there are concurrent findings in the High Court and the Court of Appeal to the effect that, in May 2011, Mr Pickering wrongly asserted exclusive ownership over the new system and refused to deliver it to Detection Services when he was obliged to do so. In Detection Services' submission, the operation of the clean hands doctrine is well understood, was not in dispute in the Court of Appeal and does not arise in this case.

## **Our assessment**

[20] We accept Detection Services' submission that the issues in this proposed appeal are largely factual. No issue of general or public importance or commercial significance arises.<sup>15</sup> Nor does anything raised by the applicants suggest a risk of a miscarriage of justice.<sup>16</sup>

## **Result**

[21] The application for leave to appeal is dismissed.

[22] The applicants must pay costs of \$2,500 to the respondents.

Solicitors:  
Grimshaw & Co, Auckland for Applicants  
Mackenzie Elvin Law, Tauranga for Respondents

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<sup>15</sup> Senior Courts Act 2016, s 74(2)(a) and (c).

<sup>16</sup> Section 74(2)(b), in the sense required in civil cases: see *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [4]–[5]; and *Shell (Petroleum Mining) Co Ltd v Todd Petroleum Mining Co Ltd* [2008] NZSC 26, (2008) 18 PRNZ 855 at [4].