

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 11/2020  
[2020] NZSC 46

BETWEEN                      DAVID WILLIAM PHILLIPS  
   Applicant  
  
AND                              NGATI TAMA CUSTODIAN TRUSTEE  
   LIMITED  
   Respondent

Court:                      Glazebrook, O'Regan and Ellen France JJ  
  
Counsel:                      Applicant in person  
   D M Hughes, H L Quinlan and R A Idoine for Respondent  
  
Judgment:                      12 May 2020

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**JUDGMENT OF THE COURT**

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- A      The application for leave to appeal is dismissed.**
- B      The applicant must pay costs of \$2,500 to the respondent.**
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**REASONS**

**Introduction**

[1]      The applicant, Mr Phillips, seeks leave to appeal against the decision of the Court of Appeal granting summary judgment to Ngati Tama Custodian Trustee Ltd (Ngati Tama), the respondent.<sup>1</sup> The Court of Appeal allowed Ngati Tama's appeal from the judgment of Courtney J dismissing the application for summary judgment.<sup>2</sup>

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<sup>1</sup>      *Ngati Tama Custodian Trustee Ltd v Phillips* [2019] NZCA 647 (Williams, Peters and Gendall JJ) [CA judgment].

<sup>2</sup>      *Ngati Tama Custodian Trustee Ltd v Phillips* [2018] NZHC 304 [HC judgment].

## Background

[2] The background facts are described in detail in the judgments below.<sup>3</sup> For present purposes it is sufficient to note that the proposed appeal relates to the meaning of a deed of settlement executed in March 2013 under which Ngati Tama and its associated parties resolved a dispute with Mr Phillips and his associated parties. Broadly speaking, the matters in dispute relate to a company called MyVirtualHome International Ltd (MVHI) in which both of the groups had shareholdings. In particular, issues arose about the intellectual property rights associated with the MyVirtualHome system.<sup>4</sup> Relevantly, in the deed of settlement Mr Phillips agreed not to bring any further claims against Ngati Tama concerning “the Dispute”, “the Consolidated Proceedings”, or “any other matter howsoever arising” out of either of those terms.<sup>5</sup>

[3] In May 2016 Mr Phillips on behalf of himself and another company (Open Group Ltd) issued a notice requiring Ngati Tama to cease its use of intellectual property rights which Mr Phillips and Open Group Ltd asserted belonged to them. The May notice was later retracted and in October 2016 Mr Phillips issued a second notice on behalf of Hambletonian Ltd, a company of which Mr Phillips was the sole director (the October notice).

[4] Ngati Tama’s response was that the notices breached the deed of settlement. They brought proceedings which sought, amongst other matters, a declaration that Mr Phillips was prohibited from commencing any proceeding against Ngati Tama or any other party to the deed “in relation to the [MyVirtualHome] system proceedings or any other matter arising out of the [MyVirtualHome] system proceedings”. Ngati Tama then applied for summary judgment in these proceedings.

[5] In dismissing the application for summary judgment, Courtney J focussed on Mr Phillips’ claim that the subject matter of the notices was outside the ambit of the deed of settlement. Mr Phillips’ argument was summarised in this way:

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<sup>3</sup> CA judgment, above n 1, at [4]–[30]; and HC judgment, above n 2, at [6]–[30].

<sup>4</sup> The MyVirtualHome programme allows users to create a three-dimensional image of a proposed house design and can also provide information about various products, services and pricing.

<sup>5</sup> There were relevant proceedings under two High Court CIV numbers which were later consolidated.

[31] Mr Phillips says that the notices that are the subject of the summary judgment application are directed towards the business systems IP [intellectual property].<sup>6</sup> He maintains that since the intellectual property in the business systems IP was owned by MVHI and sold to KGB [Ltd (a company controlled by Mr Phillips)] before the deed of settlement was entered into it is not captured by it. Therefore the notices do not breach the deed of settlement.

[6] Courtney J expressed Ngati Tama's argument in this way:

[32] Ngati Tama argue that the assertions contained in the notices mirror those contained in the pleadings and therefore arise out of the consolidated proceedings that were settled by the deed of settlement. As a result, the business systems IP are captured by the deed, Mr Phillips has no further claim to them and the notices amount to a breach of the deed.

[7] Courtney J considered that the available material indicated that the business systems IP were not subject to the deed of settlement as the ownership of the business systems IP was not a live issue between the parties at the relevant time.

[8] The Court of Appeal took a different view as to what was a live issue in terms of the ownership of the relevant intellectual property rights at the time. The Court said it based its conclusion, that the ownership of these rights were in issue, in large part on "documents generated by Mr Phillips or his interests" including the relief sought in the relevant pleadings.<sup>7</sup> Contrary to Mr Phillips' submission, the Court found that relief had been sought in the form of damages for loss which must have included the alleged sale of MVHI's key relevant asset (its monetisation strategy). In this respect, the Court noted the width of the deed of settlement which encompassed relevant matters "howsoever arising" out of the Dispute and the Consolidated Proceedings.

[9] The Court did not see it as significant that the claim reflected in the October notice was not "strictly" that of Mr Phillips or of the company on whose behalf Mr Phillips had filed the initial notice. That was because the October notice was made on behalf of Mr Phillips "in the sense intended by [cl 3.2 of the deed]".<sup>8</sup>

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<sup>6</sup> Courtney J used the term "business systems IP" to collectively refer to the network platforms, business systems information, communication systems, income stream systems and the MyVirtualHome website: HC judgment, above n 2, at [8].

<sup>7</sup> CA judgment, above n 1, at [70].

<sup>8</sup> At [73]. Clause 3.2 of the deed of settlement provided that "[t]his Deed may be pleaded as a full and complete defence by the parties to any claim commenced, continued, or taken by another party to this Deed or on its behalf to any of the matters referred to in this Deed".

## **The proposed appeal**

[10] In essence, Mr Phillips supports the approach taken by Courtney J and says that the Court of Appeal erred in a number of respects in allowing Ngati Tama's appeal. Mr Phillips wishes to raise a number of points in support of the proposed appeal. The list which follows sets out, in summary form, what we see as the key matters on which Mr Phillips says the Court of Appeal erred.

- (a) Costs – Mr Phillips was legally aided in the Court of Appeal but costs were awarded against him.
- (b) Mandate – Mr Phillips says there was no mandate for Ngati Tama to issue proceedings challenging the 2016 notices.
- (c) Copyright – Mr Phillips contends that the Court of Appeal erred in the approach to copyright issues, for example, by ignoring the fact the separate business systems had separate ownership of intellectual property.
- (d) The Contractual Remedies Act 1979 (now the Contract and Commercial Law Act 2017) – Mr Phillips submits that the 1979 Act allows for cancellation and that the deed had been lawfully cancelled in 2016.
- (e) Company law – Mr Phillips says that the Court of Appeal incorrectly treated Hambletonian Ltd and its director as though they were one and the same. He says this was inconsistent with company law principles (and contrary to rights affirmed in the New Zealand Bill of Rights Act 1990 as Hambletonian Ltd did not have the opportunity to be heard even though the Court of Appeal's judgment impacted Hambletonian Ltd's rights).
- (f) Breach of natural justice – Mr Phillips refers to the fact that the Court of Appeal referred to a pleading filed by Mr Phillips in an earlier Court

of Appeal case,<sup>9</sup> which Mr Phillips says he did not have the opportunity of addressing on this appeal.

[11] In addition, Mr Phillips points to what he says are factual errors in the Court of Appeal's judgment. He also alleges bias on the part of various persons associated with the case.

### **Our assessment**

[12] After considering the written submissions, we consider we can deal with the application for leave on the papers and that an oral hearing is not necessary.<sup>10</sup>

[13] The proposed appeal would address whether the Court of Appeal was correct to grant summary judgment. That question in turn would be determined by the interpretation of the deed of settlement. As to that, there is no challenge to either the principles that apply to an application for summary judgment or to the principles of contractual interpretation adopted. Rather Mr Phillips says that the relevant principles have not been applied fairly in this case. The proposed appeal would therefore turn on the facts specific to the wording of this particular deed. No question of general or public importance or of general commercial importance accordingly arises.<sup>11</sup>

[14] Nor do the matters raised by Mr Phillips give rise to the appearance of a miscarriage of justice in the Court of Appeal's approach to these matters.<sup>12</sup> We add that many of the points Mr Phillips wishes to pursue are not in any event directed towards the question of whether there was a breach of the settlement deed. Further, on the natural justice issue Mr Phillips wishes to advance, the pleading filed in the earlier appeal was not treated as determinative. Finally, it should be noted that the Court of Appeal has recalled that part of its judgment dealing with costs.<sup>13</sup> We understand the parties have filed further submissions on costs so that matter is now before the Court of Appeal.

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<sup>9</sup> *Phillips v Ngati Tama Custodian Trustee Ltd* [2011] NZCA 650.

<sup>10</sup> Senior Courts Act 2016, s 76(2).

<sup>11</sup> Section 74(2)(a) and (c).

<sup>12</sup> Section 74(2)(b); and see *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [4]–[5].

<sup>13</sup> *Ngati Tama Custodian Trustee Ltd v Phillips* [2020] NZCA 34 at [5].

[15] For these reasons, the application for leave to appeal is dismissed. Mr Phillips must pay costs of \$2,500 to the respondent.

Solicitors:  
Anthony Harper, Auckland for Respondent