NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980

IN THE SUPREME COURT OF NEW ZEALAND

SC 9/2011
[2011] NZSC 114

BETWEEN	GARY OWEN BURGESS Applicant
AND	SUSAN NATALIE BEAVEN Respondent

Court: Elias CJ, Blanchard and William Young JJ

Counsel: Applicant in person
S J Shamy for Respondent

Judgment: 22 September 2011

JUDGMENT OF THE COURT

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1 We grant leave to appeal and cross-appeal (and an extension of time in relation to the cross-appeal).

2 The approved grounds of appeal and cross-appeal proceed on the basis that the Court of Appeal's assessment under s 14(2)(c) of the Property (Relationships) Act 1976 in favour of equal sharing was correct and are as follows:

(a) was the Court of Appeal in error in adopting separation date values;

(b) was there any logical or arithmetical error in the Court of Appeal's identification and valuation of the relationship property and its allowances for post-separation contributions;

(c) should the Court of Appeal have made consequential orders in respect of the costs ordered in relation to earlier judgments and money paid by Mr Burgess to Ms Beaven; and

(d) what, if any, additional or other orders are required.

REASONS

[1] Mr Burgess seeks leave to appeal and Ms Beaven leave to cross-appeal (in her case out of time) against a judgment delivered on 20 December 2010 in which the Court of Appeal allowed an appeal by Mr Burgess in litigation between the parties as to their relationship property.[1] The dispute between Mr Burgess and Ms Beaven has been long drawn out (a factor which itself has caused difficulty) and has also been much litigated in the Family Court, High Court and Court of Appeal; this despite the sums of money actually in issue being comparatively modest.

[2] Mr Burgess and Ms Beaven each owned a house when they married. His house was sold to acquire a rural property and Ms Beaven's house was retained until separation. In quantifying the respective contributions of the parties, Judge Strettell valued (a) Mr Burgess's contribution via his house at the net price for which it was sold early in the marriage, but (b) Ms Beaven's contribution via her house by reference to the sale price later received (which included inflationary gains).[2] And in carrying out this exercise, he did not allow anything to Mr Burgess for the increase in value of the rural property as at the date of separation over its acquisition cost.[3] The associated conclusions provided the foundation for a finding by the Judge that Ms Beaven's contribution to the marriage partnership had clearly been disproportionately greater than that of Mr Burgess and he directed a division of the relationship property on a 65:35 basis in her favour.[4] Mr Burgess's appeal to John Hansen J against Judge Strettell's decision was successful on other points but not in relation to this issue.[5] Mr Burgess later applied to John Hansen J to recall his judgment and for leave to appeal but both applications were declined.[6]

[3] When the case came back to Judge Strettell, that Judge declined to revisit his approach to the timing of the valuation of the contributions but revised his

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1 *Burgess v Beaven* [2010] NZCA 625, [2011] NZFLR 609.
2 *Burgess v Beaven* FC Christchurch FAM-2005-009-3126, 16 May 2007.
3 See [67]–[73].
4 At [79]–[80]. See s 14(2)(c) of the Property (Relationships) Act 1976.
5 *Burgess v Beaven* HC Christchurch CIV-2007-409-1361, 27 November 2007. See [17]–[20].
6 *Burgess v Beaven* HC Christchurch CIV-2007-409-1361, 9 April 2008.

assessment of the respective contributions slightly, to 62:38.[7] Mr Burgess's appeal against Judge Strettell's second judgment was dismissed by Fogarty J.[8] An application for leave to appeal against this latter judgment was dismissed by Chisholm J.[9]

[4] Mr Burgess then sought leave to appeal to the Court of Appeal against the judgments of John Hansen J and Fogarty J. The Court of Appeal refused leave in relation to the judgment of Fogarty J but granted leave in respect of the judgment of John Hansen J.[10] In doing so, it made it clear that there was real substance to Mr Burgess's complaint about the assessment of contributions. It also suggested that, given the modest amount of money involved, the parties should attempt to settle the case.

[5] As the parties did not resolve the dispute, the Court of Appeal, in the judgment under appeal, was later required to determine the appeal, which predictably, given what had been foreshadowed in the leave judgment, was allowed.[11] This required an adjustment in favour of Mr Burgess which was quantified by the Court of Appeal in the sum of $22,000 which Ms Beaven was required to pay to Mr Burgess.

[6] Mr Burgess and Ms Beaven are both dissatisfied with this judgment.

[7] In the case of Ms Beaven, this dissatisfaction is primarily focussed on the conclusion that the relationship property was to be equally shared,[12] but she also challenges some of the arithmetic leading to the quantification of what she must pay Mr Burgess.

[8] Mr Burgess's complaints are that the Court of Appeal:

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7 *Burgess v Beaven* FC Christchurch FAM-2005-009-3126, 30 June 2008 at [33].
8 *Burgess v Beaven* HC Christchurch CIV-2007-409-1361, 15 December 2008.
9 *Burgess v Beaven* HC Christchurch CIV-2007-409-1361, 11 February 2009.
10 *Burgess v Beaven* [2009] NZCA 229.
11 *Burgess v Beaven* [2010] NZCA 625, [2011] NZFLR 609.
12 At [42].

(a) allowed Ms Beaven to retain, as her separate property, gains she made from the proceeds of sale of her house by substituting a separation date valuation for the hearing date valuation adopted in the Family Court (which counsel for Ms Beaven notes was uncontested);

(b) made no order for costs in favour of Mr Burgess; and

(c) did not address the orders for costs made against (and other problems suffered by) Mr Burgess associated with the implementation of the second judgment of Judge Strettell, discussed above at [3].

In order to explain this last point we should briefly mention what happened in relation to the second judgment of Judge Strettell.

[9] Before the appeal before Fogarty J was heard, the parties reached an interim settlement (intended to be implemented by consent orders) to facilitate Mr Burgess refinancing the rural property (on the basis that it would eventually be his absolutely) but in the meantime providing security for Ms Beaven for what she was owed under the second judgment of Judge Strettell, some $36,250. This sum was to be held by Mr Burgess's solicitors pending the outcome of the appeal against the second judgment of Judge Strettell. As well, it was agreed that Mr Burgess and his solicitors were to pay $9,000 which had already been awarded to Ms Beaven (or such lesser sum as should be appropriate on the determination of the appeal). The proposed consent orders provided that the money owed to Ms Beaven, along with any other costs ordered, were to be secured against the rural property, which was to be transferred to Mr Burgess and to be held by him on trust for both parties with Ms Beaven entitled to lodge a notice of claim or caveat against the title.[13]

[10] By reason of what seems to have been an oversight, the consent memorandum was not filed and the consent orders envisaged were not formally made. But the rural property was transferred into the name of Mr Burgess, the refinancing occurred and a notice of claim was registered.[14]

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13 The history is more fully set out, with copies of the proposed consent orders, in *GOB v SNB* FC Christchurch FAM-2005-009-3126, 23 April 2010.

14 As detailed in *Burgess v Beaven* HC Christchurch CIV-2010-409-876, 4 October 2010.

[11] As noted at [3] above, the appeal to Fogarty J was dismissed. Consistently with the proposed consent orders, Mr Burgess's solicitors paid $36,250 and accrued interest to Ms Beaven's solicitors.[15] But she was not paid the costs of $9,000 which had been provided for, nor the additional costs awarded against Mr Burgess by (a) Fogarty J on the dismissal of the appeal, (b) Chisholm J who refused leave to appeal against that decision, or (c) by the Court of Appeal when refusing leave to appeal against the judgment of Fogarty J.

[12] Despite non-payment of these sums, Mr Burgess sought an order from Judge Somerville removing the notice of claim so that he could fund the prosecution of his appeal to the Court of Appeal against the judgment of John Hansen J (and in particular pay the setting down fee and security for costs).[16] The Judge declined the application and Mr Burgess filed an appeal. Before the appeal could be heard, the refinanced mortgage fell into arrears and the property was sold by the mortgagee. So by the time this appeal came to be dealt with by French J, the underlying issue might be thought to have become moot. French J, nonetheless, and at the urging of Mr Burgess, heard and determined the appeal, in the end dismissing it and indicating a provisional view that Mr Burgess should pay costs.[17] Mr Burgess's applied unsuccessfully to French J[18] and later to the Court of Appeal[19] for leave to appeal against that decision.

[13] There have thus been three "streams" of litigation and appeals:

(a) "Stream A"; the first judgment of Judge Strettell, the judgment of John Hansen J, the applications to him for a recall of his judgment and for leave to appeal, the application to the Court of Appeal for leave to appeal and the substantive Court of Appeal judgment.

(b) "Stream B", the second judgment of Judge Strettell, the judgment of Fogarty J, and the judgments of Chisholm J and the Court of Appeal refusing leave to appeal.

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15 *Burgess v Beaven* HC Christchurch CIV-2010-409-876, 4 October 2010 at [22].
16 *GOB v SNB* FC Christchurch FAM-2005-009-3126, 23 April 2010
17 *Burgess v Beaven* HC Christchurch CIV-2010-409-876, 4 October 2010.
18 *Burgess v Beaven* HC Christchurch CIV-2010-409-876, 24 May 2011.
19 *Burgess v Beaven* [2011] NZCA 422.

(c) Stream C", the judgment of Judge Somerville, the judgment of French J dismissing the appeal and the subsequent judgments by French J and the Court of Appeal refusing leave to appeal from the latter judgment. These last two judgments were delivered after the judgment under appeal.

[14] The Court of Appeal, in the judgment under appeal, only had jurisdiction to address the costs orders made in the "Stream A" litigation and those are the only orders for costs which could be addressed in this Court. There is, however, the money which has been paid under the second judgment of Judge Strettell[20] and depending on the result of the appeal that may have to be dealt with in terms of the final division of property.

[15] Save for that clarification as to what is comprehended under the third ground of appeal, we deliberately do not discuss the points upon which we have granted leave and therefore address only Ms Beaven's challenge to the s 14(2)(c) determination of the Court of Appeal and her application for an extension of time to cross-appeal.

[16] Contrary to the argument advanced by Ms Beaven, we think it reasonably clear that at the first hearing before Judge Strettell, Mr Burgess did argue that the value of the houses of the parties should be assessed at the times when those houses became relationship property.[21] In essence, this is the argument on which his appeal to the Court of Appeal succeeded. It is true that the appellant also advanced (at least before John Hansen J[22]) the conceptually similar but different argument that the value of his home should be uplifted to allow for inflation but we do not see this as particularly significant. We recognise that the evidence that the two houses were of approximately equal value was limited[23] and the Court of Appeal judgment did not deal, at least explicitly, with the debt which was secured against

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20 See [9] above.
21 See [68] of Judge Strettell's first judgment.
22 See [18] of John Hansen J's first judgment.
23 It consisted of rating valuations which pre-dated the marriage and put the two properties within approximately $2,000 of each other. .

Mr Burgess's home.[24] But the problem from Ms Beaven's point of view is that on the question whether her contribution to the marriage had clearly been disproportionately greater than Mr Burgess's contribution, it was practically incumbent on her to ensure that all relevant financial details were before the Court.

[17] Leave to appeal on this point is not justified.

[18] Ms Beaven's application for leave to cross-appeal is out of time but unless an extension is granted the inquiry, which is necessitated by Mr Burgess's challenges to the Court of Appeal judgment, would be artificially strictured. We say this because we presently have the impression that such errors of logic or arithmetic as there may be in the Court of Appeal judgment may go both ways. This is why we grant an extension of time.

[19] With the equality of contributions issue now finally resolved, in accordance with the Court of Appeal's conclusions in the judgment under appeal, what remains of the dispute should be largely a matter of calculation. At the hearing of the substantive appeal, we will require the parties to provide calculations as to division of relationship property based on both separation date and hearing date values. It would be sensible for Mr Burgess and Mr Shamy to get on with the preparation of these calculations, which they should discuss with each other with a view to reaching agreement where possible. This process should serve to define and limit the areas of controversy. Indeed, providing the parties act pragmatically, they should be able to settle the case; this despite the very unhappy history of the litigation.

Solicitors:
Dawson Innes, Christchurch for Respondent

[24] Reading the leave judgment in conjunction with the substantive judgment rather suggests that the Court treated the mortgage over Mr Burgess's house as largely off-set by a debt owed by Ms Beaven to her mother (or a family trust).