IN THE SUPREME COURT OF NEW ZEALAND

SC 9/2011
[2012] NZSC 71

	BETWEEN	GARY OWEN BURGESS Appellant
	AND	SUSAN NATALIE BEAVEN Respondent

Hearing: 23 April 2012

Court: Elias CJ, Blanchard, Tipping, William Young and Chambers JJ

Counsel: Appellant in person
S J Shamy and A M Corry for Respondent

Judgment: 9 August 2012

JUDGMENT OF THE COURT

A **The appeal is allowed and the cross-appeal is dismissed.**

B **Orders B, C and D of the decision of the Court of Appeal [2010] NZCA 625 are set aside.**

C **The awards of costs made against Mr Burgess by John Hansen J in the Stream A litigation are set aside and in their place Mr Burgess is awarded $5,000 costs in respect of the first appeal to the High Court heard by John Hansen J.**

D **Ms Beaven's gross liability to Mr Burgess is:**

(a)	**Balance due on division of property**	**3,716.10**
(b)	**Refund of money paid to Ms Beaven**	**36,804.31**
(c)	**Costs and disbursements on first appeal**	**5,000**
Total		**45,520.41**

E **Ms Beaven is entitled to set off outstanding awards of costs in her favour totalling $15,474.16 against her gross**

liability producing a net figure which she must pay, and on which Mr Burgess may now execute judgment of $30,046.25. Interest will run on that sum from the date of this judgment in terms of r 11.27 of the High Court Rules.

F Ms Beaven is to pay Mr Burgess usual disbursements in relation to this appeal.

REASONS

(Given by William Young J)

The appeal

[1] In the judgment under appeal, the Court of Appeal[1] (a) allowed Mr Burgess' challenge to an unequal division of relationship property under the Property (Relationships) Act 1976 as directed by the Family Court[2] and upheld by the High Court,[3] (b) divided the relationship property based on separation date valuations rather than the hearing date approach adopted by the courts below and (c) made certain consequential orders.

[2] Mr Burgess' further appeal to this Court is directed at the separation date approach adopted by the Court of Appeal, which is the primary point of principle on which leave to appeal was granted.[4] If the Court of Appeal's separation date approach to valuation is wrong, it will be necessary to provide for a division of property based on the correct valuation date and to determine what, if any, consequential orders are required. As will become apparent, such division must proceed on the basis that (a) all assets were relationship property, (b) all debts were relationship debts and (c) the contributions of the parties were roughly equal.[5] As well, there is one additional aspect of the case, a claim for compensation by Mr Burgess against Ms Beaven, which we will also address.

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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 *Burgess v Beaven* HC Christchurch CIV-2007-409-1361, 27 November 2007.
4 *Burgess v Beaven* [2011] NZSC 114, (2011) 28 FRNZ 736.
5 This Court declined to grant Ms Beaven leave to challenge the Court of Appeal's conclusion that the relationship property is required to be divided equally.

The facts

[3] Mr Burgess and Ms Beaven married on 18 May 2002. They both owned properties in Christchurch. Mr Burgess' property was in Wychbury Street (Wychbury), while Ms Beaven's was in Woodbury Street (Woodbury). Wychbury was subject to a mortgage (of around $55,000) whereas Woodbury was unencumbered. Ms Beaven, however, owed her mother $40,000 which was treated as a relationship debt[6] within the meaning of s 20(1) of the Act.[7] Both properties were of approximately equal value as at the date of acquisition[8] and if Woodbury is treated as encumbered by the debt to Ms Beaven's mother, there was not much difference in the net equity each brought to the marriage.

[4] Mr Burgess and Ms Beaven decided to pool their financial resources to purchase Medbury, a run-down North Canterbury rural property of around 23 hectares. They were interested in developing a vineyard and also contemplated operating a homestay business. An informal partnership was formed for these purposes. Mr Burgess sold Wychbury in July 2002. This produced a net $69,000 which funded part of the $144,000 purchase price. The balance, some $75,000, was borrowed. Working capital and plant were funded by a GST refund and assistance from Ms Beaven's parents.

[5] A caravan was put on the site. A small vineyard was developed and Mr Burgess ran a small flock of sheep. When working on the property, Mr Burgess and Ms Beaven stayed in the caravan. For the balance of the time, they occupied Woodbury. In March 2003, about two months before separation, Ms Beaven entered into an agreement to sell that property.

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6 The judgments in the courts below did not explicitly address the status of this debt as to whether it was relationship or personal, but in the division of property as finalised, it was deducted from the value of the relationship property which Ms Beaven retained, a deduction which must have proceeded on the basis that it was a relationship debt.

7 It was appropriately so treated if the money had been advanced for purposes associated with Woodbury Street as was probably the case. It is, in any event, too late to reconsider this categorisation and we were not invited to do so by Mr Burgess whose argument in the Family Court proceeded on the basis that the advance was effectively a charge against Woodbury.

8 The conclusion that the properties were of approximately equal value is based on September 2001 government valuation figures. The evidence on this point, as with some other aspects of the case, was not very precise.

[6] Settlement of the Woodbury sale was effected in June 2003, the month after separation. After discharge of debts and payment of costs of sale, Ms Beaven received a net sum of $156,642.11. In September 2003, Ms Beaven used $110,000 of the proceeds of sale to buy a property in Cranford Street, Christchurch. She sold it three years later, in November 2006, and received $166,113.09 (net of commission and other expenses). The balance of the Woodbury sale proceeds were not kept separate. It is, however, clear that Ms Beaven did meet a joint liability of $4,000 on the cancelled purchase of relocatable homes and it has been held that she repaid her mother the $40,000 advance.[9] Complicating the picture slightly is that some of the Woodbury proceeds of sale[10] were put to the purchase of a property in Geraldine. No valuation of this property was provided and it was not taken into account in the division of relationship property. As will become apparent later,[11] all but a little over $2,000 of the Woodbury proceeds can be accounted for and given this, there would be little point in trying to analyse the possible relevance of the Geraldine property to the division.[12]

[7] Between separation (May 2003) and the hearing (January 2007) Mr Burgess occupied Medbury. He met the outgoings and incurred various maintenance expenses. His standard of living was low (given the absence of a house and Ms Beaven's removal of the caravan which had been placed there) and he plainly worked hard on the property. By January 2007 (which is when the hearing in the Family Court commenced) the property was worth $252,000 not including stock and plant, which was $77,000 more than it had been worth as at separation (which was $175,000). It was subject to a mortgage of approximately $75,000. Mr Burgess accepted that the appreciable increase in value between May 2003 and January 2007 was largely due to a general lift in rural property values over that period. On the other hand, as he pointed out, that increase in value would not have been available for division without his efforts which ensured that the property was retained.

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9 See *Burgess v Beaven* FC Christchurch FAM-2005-009-3126, 16 May 2007 at [23] and *Burgess v Beaven* HC Christchurch CIV-2007-409-1361, 27 November 2007 at [7]–[15]. The evidence about how this loan was extinguished was not entirely satisfactory. But given that we consider that it must be regarded as a relationship debt (see n 6 and 7), it does not make any difference whether she repaid it or not.

10 $8,000.

11 See [33].

12 In the Family Court, it was excluded on the basis that the account, from which the $8,000 used in relation to the Geraldine purchase was derived, was later reimbursed for this payment.

The process to date

[8] In the first substantive judgment this dispute has generated, Judge Strettell addressed Ms Beaven's argument that for the purposes of s 14 of the Act, her contribution to the relationship had been "clearly disproportionately greater" than that of Mr Burgess.[13] In quantifying the respective contributions of the parties, Judge Strettell valued (a) Mr Burgess' contribution through Wychbury at the net price for which it was sold early in the marriage but (b) Ms Beaven's contribution through Woodbury by reference to the sale price later received (which included inflationary gains).[14] And in carrying out this exercise, he did not allow anything to Mr Burgess for the increase in value of the Medbury property as at the date of separation over its acquisition cost.[15] These conclusions provided the foundation for his finding that Ms Beaven's contribution to the relationship had "clearly been disproportionately greater" than that of Mr Burgess[16] and his decision that the relationship property should be divided 65:35 in her favour.[17]

[9] Mr Burgess appealed to John Hansen J against Judge Strettell's decision but was only modestly successful. The result was an order for a limited rehearing before Judge Strettell.[18] Mr Burgess later applied to John Hansen J to recall his judgment and for leave to appeal but both applications were declined.[19]

[10] When the case came back to Judge Strettell, that Judge revised his assessment of the respective contributions slightly, to 62:38.[20] The Judge directed that Medbury was to be sold forthwith unless within seven days of the judgment Mr Burgess gave notice of his intention to retain the property. Mr Burgess did indicate that he wished to retain the property and the parties subsequently agreed that on the basis of the findings of the Judge, Mr Burgess was to pay Ms Beaven $36,250. We note in passing that this calculation must have encompassed a payment of $3,852 which Ms Beaven made before the second hearing towards mortgage arrears.

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13 *Burgess v Beaven* FC Christchurch FAM-2005-009-3126, 16 May 2007 at [79].
14 At [67]–[73].
15 At [106].
16 At [79]. See s 14(2)(c) of the Property (Relationships) Act 1976.
17 At [80].
18 *Burgess v Beaven* HC Christchurch CIV-2007-409-1361, 27 November 2007 at [28]–[30].
19 *Burgess v Beaven* HC Christchurch CIV-2007-409-1361, 9 April 2008.
20 *Burgess v Beaven* FC Christchurch FAM-2005-009-3126, 30 June 2008 at [33].

[11] Mr Burgess appealed against the second judgment of Judge Strettell. But before this appeal could be heard, he and Ms Burgess reached an interim settlement (intended to be implemented by consent orders) to facilitate Mr Burgess refinancing Medbury (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, namely the $36,250 we have already mentioned. This sum was to be held by Mr Burgess' solicitors pending the outcome of the appeal against the second judgment of Judge Strettell. As well, it was agreed that Mr Burgess was to pay $9,000 for costs 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 Medbury, 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 claim or caveat against the title.[21]

[12] By reason of what seems to have been an oversight, 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.[22]

[13] Mr Burgess' appeal against Judge Strettell's second judgment was dismissed by Fogarty J[23] and an application for leave to appeal against this latter judgment was subsequently dismissed by Chisholm J.[24] Consistently with the proposed consent orders, Mr Burgess' solicitors paid $36,250 and accrued interest to Ms Beaven's solicitors.[25] But she was not paid the costs of $9,000 which had been provided for, apparently because the money which Mr Burgess had paid to his solicitor for this purpose was applied by his solicitor for his own fees.[26]

[14] 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

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21 The history is more fully set out, with copies of the proposed consent orders, in *Gary Owen Burgess v Susan Natalie Beaven* FC Christchurch FAM-2005-009-3126, 23 April 2010 at [20].
22 *Burgess v Beaven* HC Christchurch CIV-2010-409-876, 4 October 2010 at [20].
23 *Burgess v Beaven* HC Christchurch CIV-2007-409-1361, 15 December 2008.
24 *Burgess v Beaven* HC Christchurch CIV-2007-409-1361, 11 February 2009.
25 *Burgess v Beaven* HC Christchurch CIV-2010-409-876, 4 October 2010 at [22].
26 At [23] and [29].

relation to the judgment of Fogarty J but granted leave in respect of the judgment of John Hansen J.[27] In doing so, it made it clear that there was real substance to Mr Burgess' 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.[28] Importantly the Court saw the grant of leave as being in the nature of an indulgence. It considered that, at most, approximately $40,000 was in issue.[29] As well, although the grant of leave was not restricted in terms of what could be argued, the terms of the leave judgment make it clear that the issue which the Court of Appeal saw as warranting leave was confined to the assessment of contributions. The grant of leave was not an open-ended invitation to revisit every aspect of the litigation.

[15] Mr Burgess then 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).[30] The Judge declined the application and Mr Burgess filed an appeal. Before the appeal could be heard, the refinanced mortgage fell into arrears and Medbury 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.[31]

[16] As the parties did not resolve the dispute, the Court of Appeal was later required to determine the appeal against the judgment of John Hansen J which predictably, given what had been foreshadowed in the leave judgment, was allowed. But less predictably, the Court of Appeal's recalculation of the property division proceeded on the basis of separation, and not hearing, date values. The resulting adjustment in favour of Mr Burgess was quantified by the Court of Appeal at

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27 *Burgess v Beaven* [2009] NZCA 229.

28 At [27].

29 A very accurate assessment as it turned out, see the figures arrived at later in this judgment at [40].

30 *Gary Owen Burgess v Susan Natalie Beaven* FC Christchurch FAM-2005-009-3126, 23 April 2010 at [64] and [65].

31 *Burgess v Beaven* HC Christchurch CIV-2010-409-876, 4 October 2010.

$22,000 which Ms Beaven was required to pay to Mr Burgess. We note in passing that Mr Burgess paid $4,470 by way of security for costs in relation to the substantive appeal which has yet to be paid out to him, possibly because he has not paid costs awarded against him on the applications for leave to appeal. Since the orders we are making will address those costs, this money (and any accrued interest) should now be returned to Mr Burgess.

[17] For the sake of completeness we note that Mr Burgess has also applied unsuccessfully to French J[32] and later to the Court of Appeal[33] for leave to appeal against her decision on the appeal from the judgment of Judge Somerville.

[18] There have thus been three "streams" of judgments 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.

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

The approach of the Court of Appeal

[19] The Court of Appeal did not give very specific reasons for adopting a separation date approach. In part it may simply have been a function of the Court's

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[32] *Burgess v Beaven* HC Christchurch CIV-2010-409-876, 24 May 2011 (which also dealt with an attempt by Mr Burgess to have Ms Beaven's lawyers disqualified from acting).

[33] *Burgess v Beaven* [2011] NZCA 422.

detailed analysis of the respective contributions of the parties for the purpose of the s 14 assessment which was focused on separation date values. The Court also apparently saw separation date valuations as a pragmatic way of resolving the problems associated with the lengthy delay between separation and hearing and avoiding issues associated with post-separation dealings with relationship property. This is certainly what we take from the following passages from the judgment:[34]

> [42] Viewed at the date of separation, there was no material difference between the financial contributions of the spouses. Each had provided a property. Wychbury had been used for a joint purpose. The increases in value for both Woodbury and Medbury, as at the date of separation, were due to inflation, in which both spouses should have shared equally. In the absence of any finding by Judge Strettell that there was any inequality of contribution in a non-financial sense, in our view, the presumption of equal sharing was not displaced on application of s 14(2)(c) of the Act.
>
> [43] The final calculations made by Judge Strettell in his second judgment can be used for adjustment purposes. When calculating relationship property it is necessary:
>
> a) to remove the sale proceeds of Cranford Street and, to replace that with the sale price of Woodbury.
>
> b) to change the date at which Medbury was valued from the date of the first hearing in the Family Court to the date of separation. ...
>
> [44] By removing the sale proceeds of Cranford Street and replacing that element of the equation with the sale price of Woodbury, Ms Beaven's post-separation dealings with the proceeds of Woodbury are not confused with relationship property actually owned by the parties at the date of separation.

[20] The result of that exercise was summarised by the Court in this way:[35]

> [51] We order that Mr Burgess is entitled to receive from Ms Beaven a sum of $22,000, to reflect the difference between our analysis and the orders made in the Family Court. That sum shall be paid within three months of the date of this judgment. Ms Beaven is entitled to retain the benefit of her post-separation dealings with Woodbury.

[21] The details of the exercise carried out by the Court of Appeal were challenged by both parties on the basis of alleged errors of fact or logic. For reasons which will become apparent, however, there is no need for us to engage with these challenges.

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[34] Footnotes omitted.
[35] Footnotes omitted.

Issues

[22] The case gives rise to the following questions:

(a) Should the relationship property be valued as at separation date? If not:

(b) What is the appropriate valuation date?

(c) Allowing for the relationship property each party has taken, what orders are required to achieve equality?

(d) What, if any, additional or consequential orders should be made in relation to the Stream A litigation?

(e) Should any consequential orders be made in relation to the Stream B and Stream C litigation?

(f) Should Mr Burgess be awarded compensation associated with the mortgagee sale of Medbury?

(g) What order for costs should be made in this Court?

Should the relationship property be valued as at separation date?

[23] Section 2G of the Property (Relationships) Act provides:

> **2G Date at which value of property to be determined**
>
> (1) For the purposes of this Act, the value of any property to which an application under this Act relates is to be determined as at the date of the hearing of that application by the Court of first instance.
>
> (2) However, the Court of first instance or, on an appeal the High Court, Court of Appeal, or Supreme Court may, in its discretion, decide that the value of the property is to be determined as at another date.
>
> …

This section is broadly similar to its precursor, s 2(2) in the originally enacted Matrimonial Property Act 1976, which was in these terms:

> For the purposes of this Act the value of any property to which an application under this Act relates shall, subject to sections 12 and 21 of this Act, be its value as at the date of the hearing, unless the Court in its discretion otherwise decides.

Section 2(2) was amended by the Matrimonial Property Amendment Act (No. 2) 1983 in respects which are not material for present purposes.

[24] The courts used the s 2(2) discretion to value property otherwise than at hearing date primarily to allow for post-separation contributions whether positive (debt reduction, property maintenance or improvements) or negative (reduction in the value of the property as a result of the actions of one of the partners).[36] The general approach, however, was that hearing date values were conducive of equity and in particular that both parties should usually share increases in values associated with inflation (as opposed to personal effort).[37]

[25] Although the language of s 2G does not differ much from its precursors, it operates in a very different statutory environment. This is because the 1976 Act, as first enacted, did not explicitly provide for allowances for post-separation contributions to, or dissipation of, relationship property, thus necessarily leaving considerable and necessary scope for the exercise of the s 2(2) discretion. This lacuna has now been filled by ss 18B and 18C which specifically address post-separation contributions and dissipation. Given the enactment of these two sections, there is less need than in the past to depart from the default position of hearing date valuation.

[26] In the Family Court, Judge Strettell had divided the relationship property using hearing date values (or, as we have noted, in some instances proxies for such values). The parties had not invited the Court of Appeal to proceed on any other basis. The Court of Appeal judgment did not specifically address the statutory default position provided for by s 2G and did not, at least in any specific terms, set

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[36] The leading case was *Meikle v Meikle* [1979] 1 NZLR 137 (CA).
[37] See for instance *Jorna v Jorna* [1982] 1 NZLR 507 (CA).

out its justification for departing from that position. That the Court had focused on separation values in relation to the contributions issue under s 14 did not justify such a departure. As the Court recognised, the practical effect of the separation date approach was to exclude changes in value due to inflation associated with Ms Beaven's post-separation dealings with the relationship property derived from the Woodbury sale.[38] But this was not a reason for departing from a hearing date valuation. To the contrary, Ms Beaven's post-separation inflationary gains from her dealings with relationship property were a very good reason for insisting on a hearing date valuation. Mr Shamy, who represented Ms Beaven before us, but who had not previously appeared, recognised that there were difficulties defending the Court of Appeal's approach, particularly given his acknowledgment that Ms Beaven had always contended for hearing date valuations.

[27] It follows that the Court of Appeal was wrong to adopt a separation date valuation approach.

What is the appropriate valuation date?

[28] In his written submissions, Mr Burgess postulated a number of possible valuation dates, including the hearing dates of the appeals in the High Court, Court of Appeal and this Court. In substance, however, he primarily contended for a Family Court hearing date valuation, albeit that he saw this as a reference to the June 2008 hearing (which was the second of the hearings in the Family Court, see [10] above) as opposed to the January 2007 hearing. We are satisfied that the case must be decided on the basis of January 2007 values. This was when the case was heard substantively in the Family Court and treating that hearing as fixing the valuation date is in accordance with usual practice.[39] The evidence relevant to valuation was primarily addressed to the position as at January 2007 and subsequent proceedings (prior to the judgment of the Court of Appeal) worked off that evidence.

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38 *Burgess v Beaven*, above n 1, at [42].

39 See Robert Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, LexisNexis) at [19.47].

Allowing for the relationship property each party has taken, what orders are required to achieve equality?

A preliminary comment

[29] Although there are some evidential loose ends and a need for some general assessments, an equalisation exercise based on values of the relationship property at hearing date does not pose any major difficulties. This exercise must be based on (a) Mr Burgess taking over Medbury and the associated stock and plant with responsibility for the associated debt and (b) Ms Beaven keeping the remaining assets.

Value of the net assets taken by Mr Burgess

[30] Medbury was assessed by the Judge as being worth $252,000.[40] Before us, values of $2,118 and $10,533 were attributed to stock and plant respectively. The stock figure was a book value, taken from the partnership accounts and broadly referable to separation date. Despite a higher hearing date value for the stock (of $5,134), the $2,118 was accepted by Ms Beaven at the hearing before Judge Strettell as appropriate to give Mr Burgess some allowance for post-separation contributions, a topic to which we will revert shortly. The figure for plant was a book value taken from the 31 March 2004 accounts. Although this is hardly satisfactory evidence of value at hearing date, there is no dispute as to this figure, and, as far as we are aware, no better evidence was adduced on this point. The precise hearing date debt figure in relation to the advance over Medbury was not established in evidence. We are satisfied, however, that must have been in the vicinity of $75,000.[41] On this basis the net figure attributable to Mr Burgess is $189,651. We note in passing that the corresponding global figure of Judge Strettell was $196,534.[42] Unfortunately, with

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[40] Based on a 12 January 2007 valuation. Mr Burgess had produced a valuation of $250,000 which was dated 30 January 2006.

[41] There was no evidence as to the precise figure at the hearing date as the relevant accounts stopped at 20 December 2006, when the figure was $74,892.47. But given the straitened circumstances of Mr Burgess, it is implausible in the extreme to imagine that it would have been any less.

[42] See [106] of his first judgment (*Burgess and Beaven* FC Christchurch FAM-2005-009-3126, 16 May 2007) and [39] of the second judgment (*Burgess v Beaven* FC Christchurch FAM-2005-009-3126, 30 June 2008).

the exception of the $252,000 valuation of the land, the Judge did not explain the make up of this figure. It does, however, correspond to a calculation advanced by Mr Burgess in his submissions to Judge Strettell which probably was not intended to represent a hearing date assessment of value and which, in any event, could not accurately be relied on for that purpose.[43]

[31] We calculate the net value of the assets taken over by Mr Burgess as follows:

(a)	Medbury	252,000
(b)	Stock	2,118
(c)	Plant	10,533
		264,651
	Less Mortgage	75,000
	Total	189,651

Value of the net assets taken by Ms Beaven

[32] The assets to be attributed to Ms Beaven are the proceeds of sale of Cranford Street (which had been acquired using relationship property in the form of the proceeds of sale of Woodbury), the unaccounted for balance of the Woodbury proceeds of sale and the caravan.

[33] The net proceeds of sale of Cranford Street were $166,113.09. The Cranford Street acquisition accounted for $110,580 of the Woodbury sale proceeds (which were $156,642.11, see [6] above) leaving a balance of $46,062.11. The evidence as to this balance was not entirely coherent and in the circumstances we think the best and fairest approach is to make allowances for the debt of $40,000 to Ms Beaven's

[43] The calculation brought into account the $252,000 value of the land and $75,000 owed on the mortgage, together with the plant at 31 March 2002 (presumably book) value of $19,390, stock at $5,134 and "other debt" of $4,990 which was not explained in the calculation. In adopting this figure the Judge did not allow for what he acknowledged was a concession by Ms Beaven in relation to stock (see first judgment at [97]) and chose a plant figure "valued" at a date which preceded the hearing by nearly five years. The "other debt" was not discussed in any detail by Mr Burgess in his arguments in this Court and may (although we are not sure) reflect liabilities which were addressed separately by way of post-separation contributions.

mother and the $4,000 paid by way of damages (or loss of deposit) on the relocatable homes. This leaves a balance of s $2,062.11. The caravan was valued by the Judge at $1,500[44] and we see no reason (and indeed were not invited) to differ from this assessment.

[34] We calculate the value of the assets taken by Ms Beaven as follows:

(a)	Net proceeds of sale of Cranford Street	166,113.09
(b)	Balance of proceeds of sale of Woodbury Street	2,062.11
(c)	Caravan	1,500
Total		169,675.20

Allowance for the post-separation contributions of Mr Burgess

[35] Section 18B of the Property (Relationships) Act provides:

> **18B Compensation for contributions made after separation**
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> (1) In this section, **relevant period**, in relation to a marriage, civil union, or de facto relationship, means the period after the marriage, civil union, or de facto relationship has ended (other than by the death of one of the spouses or partners) but before the date of the hearing of an application under this Act by the Court of first instance.
>
> (2) If, during the relevant period, a spouse or partner (**party A**) has done anything that would have been a contribution to the marriage, civil union, or de facto relationship if the marriage, civil union, or de facto relationship had not ended, the Court, if it considers it just, may for the purposes of compensating party A—
>
> (a) order the other spouse or partner (**party B**) to pay party A a sum of money:
>
> (b) order party B to transfer to party A any property, whether the property is relationship property or separate property.
>
> …

[44] See [44] of his second judgment.

Using this section, Judge Strettell allowed $35,112 for the post-separation contributions of Mr Burgess. This comprised $25,000 for mortgage, rates and insurance payments and $15,112 being the actual maintenance payments less an allowance of $5,000 for sales.

[36] As is already apparent, the Medbury property appreciated in value between the separation and hearing dates. The separation date value was assessed at $175,000 meaning that between the separation and hearing dates the property increased in value by around $77,000. While this was mainly a result of property price inflation, it was necessarily also a function of the retention of the property, which in turn was a consequence of the efforts of Mr Burgess, who took on financial and physical responsibility for the property. Associated with this was a good deal of work, poor living conditions and financial hardship.

[37] There was no precise way to calculate an allowance for post-separation contributions and it would be possible to raise some quibbles as to the precise logic of the Judge's approach. It may be that, as Mr Burgess maintains, the end result was on the light side. But it is also appropriate to recognise that the separation date (as opposed to hearing date) valuation of livestock provided an additional allowance (of nearly $3,000) for his contributions. As well, and although there was no evidence on the point, it stands to reason that Ms Beaven must have met insurance and rates payments on the Cranford Street property. Given this, and the broad brush nature of the required assessment, we are not disposed to differ from the figure adopted by the Judge.

Final calculations

[38] On the basis of these assessments, the value of the relationship property taken by the parties was as follows:

(a)	Taken by Mr Burgess	189,651
(b)	Taken by Ms Beaven	169,675.20
Total		359,326.20
Half share		179,663.10

So before allowances and adjustments Mr Burgess is to pay Ms Beaven $9,987.90.

[39] Allowing for Mr Burgess' post-separation contributions but also for the $3,852 which Ms Beaven paid towards mortgage arrears prior to the second hearing before Judge Strettell, the net balance payable by Ms Beaven to Mr Burgess is as follows:

(a)	Half of allowance of $35,112		17,556
(b)	Less		
	(i)	provisional sum in [38]	9,987.90
	(ii)	payment to mortgagee	3,852
So Ms Beaven owes Mr Burgess			3,716.10

[40] It follows that Ms Beaven must pay Mr Burgess:

(a) The amount owed on hearing date assessment of $3,716.10; and

(b) A refund of the $36,250 and interest paid to Ms Beaven.

What if any additional or consequential orders should be made in relation to the Stream A litigation?

[41] We consider it appropriate to set aside any orders for costs made against Mr Burgess in the Stream A litigation and to direct that in respect of hearings in

which costs were awarded against Mr Burgess, he should be awarded costs on the same basis as awarded to Ms Beaven in relation to steps where he was legally represented which, as far as we can tell, is confined to the first hearing before John Hansen J.

[42] This means that awards of costs made by John Hansen J on the appeal and application for leave to appeal and recall applications ($5,000 and $4,000 respectively) are set aside. Mr Burgess is awarded costs of $5,000 in relation to the appeal.[45] He was not represented on the application for leave to appeal and the recall application and we do not propose to make any order for costs in relation to that application.

Should any consequential orders be made in relation to the Stream B and Stream C litigation?

[43] The Court of Appeal did not grant leave to appeal in relation to the judgment of Fogarty J which for practical purposes ended the Stream B litigation and the Stream C litigation was never in issue before the Court of Appeal at all. So we have distinct reservations whether we have jurisdiction to entertain challenges to costs judgments associated with what we have called the Stream B and Stream C litigation. In the interests of ending this litigation, however, we think it right to express a conclusion as to what should happen in relation to the costs awarded in relation to these two litigation streams.

[44] We accept that the Steam B litigation was made necessary by reason of Ms Beaven's success on the contributions issue and the judgment given by John Hansen J which was reversed by the Court of Appeal in the judgment under appeal. It is perfectly understandable therefore that Mr Burgess should seek (a) the setting aside of the costs orders imposed in those proceedings and (b) orders in his favour for disbursements and costs (in relation to steps in respect of which he was represented). On the other hand, given that Mr Burgess was well advanced with the

[45] As far as we can tell, after inquiry made of both Mr Burgess and the Christchurch Registry of the High Court, Mr Burgess has not paid any disbursements. Court fees were waived.

Stream B litigation before seeking leave to appeal from the Court of Appeal,[46] he received a considerable indulgence from that Court when he was granted leave to appeal. That indulgence, and the associated reality that the costs wasted on the Stream B litigation would not have been incurred if Mr Burgess had gone promptly to the Court of Appeal, provide a cogent basis for declining to interfere with the relevant cost awards. On balance we think that it would be wrong to disturb those awards.

[45] We can see no substantial point at all in the proceedings which Mr Burgess took before French J and the Court of Appeal and, more generally, we are satisfied that the orders for costs made in the Stream C litigation should not be disturbed.

[46] The unpaid orders for costs are as follows:

(a)	By Fogarty J, on second appeal	5,440
(b)	By Chisholm J, refusing leave to appeal	2,373.96[47]
(c)	By Court of Appeal refusing an application for leave to appeal the judgments of John Hansen J and Fogarty J	4,850
(d)	By Court of Appeal, refusing leave to appeal from French J	2,810.20
	Total	15,474.16

[47] There are outstanding issues as to costs as follows:

(a) Appeal to French J from the judgment of Judge Somerville. Ms Beaven is seeking an award of $3,620 (calculated on the 2B basis provisionally indicated by French J).

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[46] In his written submissions to us, Mr Burgess contended that Judge Strettell went ahead with the second hearing "before the outcome of leave to appeal against John Hansen J's decision had been known". We do not understand the basis of this contention. According to the material we have seen, John Hansen J declined leave to appeal to the Court of Appeal on 9 April 2008. Although Judge Strettell's second judgment does not record the date of the second hearing, it was obviously after 9 April 2008. The application to the Court of Appeal for leave to appeal was not made until 10 February 2009, which post-dated both the second judgment of Judge Strettell and the dismissal by Fogarty J of Mr Burgess' appeal from that judgment.

[47] After allowing for payment of $800, by way of security for costs, which together with, presumably, interest of $26.04, has been received by Ms Beaven.

(b) Hearings before French J as to application for leave to appeal and to dismiss Ms Beaven's counsel. Costs have been awarded against Mr Burgess on a 2B basis but not yet quantified by the Court. Ms Beaven is seeking costs of $3,364.

(c) An unquantified 1A award of costs by Judge Somerville.

(d) An unresolved application for costs in relation to the second hearing before Judge Strettell.

Should Mr Burgess be awarded compensation associated with the mortgagee sale of Medbury?

[48] Mr Burgess seeks compensation for his losses associated with the mortgagee sale of Medbury. His position as to this broadly is as follows. From the outset, he had been prepared to settle the case on a basis which would have been slightly more favourable to Ms Beaven than the result we have arrived at. Ms Beaven apparently agreed informally to settle on these terms but then changed her mind. The Family Court division of property was wrong as were the costs awards on the initial appeal to the High Court and the application for leave to appeal. But because of the judgments of the Family Court, he was required to borrow to pay money we have held was not payable and to submit to a notice of claim which limited his ability to deal with Medbury to best advantage. He claims that the mortgagee sale was a result of unreasonable insistence by Ms Beaven on her rights under the judgments and orders made in the Family Court at a time when, given the terms of the leave judgment of the Court of Appeal, it was very likely that Mr Burgess' appeal would succeed.

[49] There are two initial and serious problems with this aspect of Mr Burgess' argument. The first is that it does not arise directly out of the stream A litigation which is all that was before the Court of Appeal. So once again, our jurisdiction to entertain it is doubtful to say the least. Secondly, Mr Burgess did not point to a statutory basis for the compensation he was seeking. We imagine he may have had in mind s 18C (which deals with compensation for dissipation of relationship

property after separation) but this section could have no application to the actions of Ms Beaven which he complains about as they occurred after the Family Court hearings of the substantive application.[48]

[50] More generally, we consider that it would not be just to seek to apportion blame for the loss of Medbury and, on the basis of such apportionment, order financial adjustments. Given the time which has elapsed since separation (nine years) and the Family Court hearing (five years), conducting an exercise of the kind contended for by Mr Burgess would be distinctly unfair to Ms Beaven. It would, retrospectively, make her a hostage to Mr Burgess' entrepreneurial activity in relation to Medbury despite Mr Burgess having elected to take title to Medbury at a time when the second judgment of Judge Strettell was in place and he was thus well-positioned to assess the financial implications, and thus the risks, of doing so. Despite his success in the Court of Appeal – and his greater success in this Court notwithstanding – he has been over-litigious and not always focused on what is truly relevant and he has undoubtedly contributed to the imbroglio. In any event, his contention that Ms Beaven acted unreasonably is not entirely convincing. She was, after all, merely insisting on enforcement of the judgments in her favour which were then in place. Notwithstanding the terms of the Court of Appeal's leave judgment, she was entitled to do so. Or, to put this another way, her insistence on enforcing the judgments in her favour does not give rise to a claim against her for the consequences.

What order for costs should be made in this Court?

[51] Mr Burgess is entitled to recover usual disbursements on his appeal to this Court.

Tying up the loose ends

[52] We would like this judgment to be as final a resolution of this unhappy case as is possible, given the outstanding issues as to costs identified in [47] above.

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[48] See s 18C(2) referring back to the definition of "relevant period" in s 18B which is reproduced in [35].

[53] The awards in favour of Mr Burgess are:

(a)	Balance due on division of property	3,716.10
(b)	Refund of money paid to Ms Beaven	36,804.31
(c)	Costs and disbursement on first appeal	5,000
Total		45,520.41

[54] The costs awards in favour of Ms Beaven total $15,474.16. She is entitled to set off those costs against the $45,520.41, producing a net figure which she must pay, and on which Mr Burgess may now execute judgment of $30,046.25. We recognise that there are other claims for costs, see [47] above. Ms Beaven is, of course, entitled to pursue those claims.

[55] Time value of money issues also arise but given the comparatively small sums of money involved, the liabilities to Ms Beaven in relation to costs which have yet to be quantified but are no doubt associated with expenses she has already had to meet and the significant contribution Mr Burgess has made to the complexity and delays associated with the litigation, we consider it inappropriate to make any orders as to interest.

[56] Accordingly, we make the following orders:

A The appeal is allowed and the cross-appeal is dismissed.

B The awards of costs made against Mr Burgess by John Hansen J in the Stream A litigation are set aside and in respect of the first appeal. Mr Burgess is awarded $5,000 costs.

C Ms Beaven's gross liability to Mr Burgess is:

(a)	Balance due on division of property	3,716.10

(b)	Refund of money paid to Ms Beaven	36,804.31
(c)	Costs and disbursement on first appeal	5,000
Total		45,520.41

D Ms Beaven is entitled to set off outstanding awards of costs in her favour totalling $15,474.16 against her gross liability producing a net figure which she must pay, and on which Mr Burgess may now execute judgment of $30,046.25.

E Ms Beaven is to pay Mr Burgess usual disbursements in relation to this appeal.

Solicitors:
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