

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 89/2021
[2021] NZSC 128

IN THE MATTER OF Applications by GARY OWEN
BURGESS

Court: William Young, Glazebrook and Williams JJ

Counsel: Applicant in person

Judgment: 5 October 2021

JUDGMENT OF THE COURT

- A The application for an extension of time to apply for leave to appeal is granted.**
 - B The application for leave to appeal is dismissed.**
 - C There is no order as to costs.**
-

REASONS

[1] The applicant, Mr Burgess, was engaged in a relationship property dispute with his former wife. The substantive dispute (which began in 2005) culminated in an appeal in this Court in 2012.¹ Although Mr Burgess had been unsuccessful in the Family Court,² largely unsuccessful in the High Court³ and only partially successful in the Court of Appeal,⁴ he succeeded in this Court. In the event, his success was pyrrhic. The mortgagee of the former couple's property had in 2010 enforced the

¹ *Burgess v Beaven* [2012] NZSC 71, [2013] 1 NZLR 129.

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* [2010] NZCA 625, [2011] NZFLR 609.

mortgage and the property was sold. Mr Burgess was subsequently bankrupted on the application of his former solicitors in 2017.⁵

[2] In August 2018, he filed proceedings in the High Court against his former wife and her solicitors. His causes of action were in fraud, breach of fiduciary duty, dishonest receipt, unjust enrichment, abuse of process, procuring judgment by fraud, unlawful interference in business, malicious or reckless use of civil proceedings, and breach of obligation as co-owner or obligor on the mortgage. His argument was essentially that his ex-wife and her lawyers had purposefully and improperly dragged out their dispute, which deprived him of his entitlement under the Property (Relationships) Act 1976.

[3] The proceeding was initially struck out as it had not been brought by the Official Assignee in place of Mr Burgess.⁶ In October 2018, the Official Assignee disclaimed any interest in the proceeding, and Mr Burgess then applied to have the litigation rights vested in him pursuant to s 119 of the Insolvency Act 2006.

[4] The High Court, having heard from Mr Burgess and a court-appointed contradictor, concluded that the proposed claims were not reasonably arguable. The Court declined to make the order.⁷ On appeal to the Court of Appeal (which also heard from the contradictor), the appeal was dismissed.⁸ The Court found that the proposed causes of action were “wholly untenable” and had “no prospect of success whatsoever”.⁹

[5] Mr Burgess now seeks leave to appeal to this Court. His application was four days out of time, but the delay is minor and has been adequately explained, so we grant an extension of time.

[6] Mr Burgess essentially rehearses in his application to this Court the arguments advanced in the Court of Appeal: his ex-wife (and her lawyers) advanced her case

⁵ *Malley & Co v Burgess* [2017] NZHC 2581.

⁶ *Burgess v Beaven* [2018] NZHC 2793.

⁷ *Burgess v Beaven* [2020] NZHC 497 (Associate Judge Lester) at [29] and [37]–[38].

⁸ *Re Burgess* [2021] NZCA 300 (French, Thomas and Muir JJ).

⁹ At [5].

without a proper foundation, and therefore maliciously, fraudulently and/or negligently caused him loss. He submits that the rejection of his arguments in the Court of Appeal produced a miscarriage of justice and his proposed appeal raises important questions of principle with respect to “how the Courts should approach this issue in a multi-stage, multi-court dispute, and what weight (if any) should be given to judicial decisions subsequently found to be in error”.

[7] For the reasons outlined by the Court of Appeal, none of the arguments proposed to be advanced has sufficient prospects of success to warrant granting leave to appeal to this Court. There is therefore no appearance that a substantial miscarriage of justice has occurred or may occur.¹⁰ Nor does any matter of general or public importance arise.¹¹

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

[9] There being no respondent, there will be no order for costs.

¹⁰ Senior Courts Act 2016, s 74(2)(b); and *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [4]–[5].

¹¹ Section 74(2)(a).