

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 101/2021
[2021] NZSC 171**

BETWEEN GARTH BOWKETT PATERSON
Applicant

AND LEPIONKA & COMPANY
INVESTMENTS LIMITED
First Respondent

STEFAN JOZEF JOHN LEPIONKA, JOE
DUNCAN AND GREGORY BERNARD
HORTON AS TRUSTEES OF THE
LEPIONKA BUSINESS TRUST
Second Respondents

LEPIONKA & COMPANY LIMITED
Third Respondent

STEFAN JOZEF JOHN LEPIONKA AND
NIGEL WARREN HUGHES AS
TRUSTEES OF THE SJ LEPIONKA
FAMILY TRUST
Fourth Respondents

STEFAN JOZEF JOHN LEPIONKA
Fifth Respondent

Court: William Young, Glazebrook and O'Regan JJ

Counsel: Applicant in person
M G Colson QC and S J Leslie for Respondents

Judgment: 3 December 2021

Reissued: 23 December 2021

Effective date
of Judgment: 3 December 2021

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B There is no order as to costs.

REASONS

[1] The litigation giving rise to the current application for leave to appeal arises out of a dispute between Garth Paterson (the applicant), Stefan Lepionka (the fifth respondent) and parties associated with them, in relation to the subdivision of land in Hawke's Bay by GLW Group Ltd, a company associated with Mr Paterson, and agreements for the sale of some of the proposed lots to interests associated with Mr Lepionka (the Lepionka agreements). GLW was unable to settle the Lepionka agreements due to obligations it owed to other purchasers. To protect his interests, Mr Lepionka formed a company, Lepionka & Company Investments Ltd (LCIL), which acquired the debt owed by GLW to its financier and the associated securities. LCIL adopted the Lepionka agreements and later refused to allow GLW to redeem the mortgage.

[2] These events resulted in proceedings by GLW and Mr Paterson against LCIL, the Lepionka purchasers and Mr Lepionka (the first mortgagee proceedings). These were issued in September 2015. Mr Paterson claimed, among other things, that LCIL had breached its statutory and equitable duties as mortgagee in adopting the Lepionka agreements and refusing to allow GLW to redeem the mortgage. At an interlocutory stage of that litigation, Mr Paterson and GLW withdrew an application seeking an interim injunction against LCIL, so on 1 October 2015 the High Court awarded costs in relation to the withdrawn application against Mr Paterson and GLW jointly and severally in the sum of \$8,875.24.

[3] Mr Paterson was adjudicated bankrupt on 5 April 2016, on the application of LCIL, for unpaid costs.¹ The application was unopposed. Mr Paterson's applications to annul the adjudication on the basis that he should not have been adjudicated bankrupt were dismissed on 16 June 2016 (by Associate Judge

¹ *Lepionka & Co Investments Ltd v Paterson* HC Wellington CIV-2015-485-973, 5 April 2016 (Minute of Associate Judge Osborne).

Osborne)² and 21 November 2018 (by Associate Judge Johnston).³ An appeal against the second judgment was dismissed by the Court of Appeal in November 2019.⁴ We will refer to this as the first bankruptcy litigation.

[4] In January 2017, the Official Assignee disclaimed all rights, interests and claims that Mr Paterson had as a plaintiff in the first mortgagee proceedings. An application by Mr Paterson to have the disclaimed causes of action vested in him was dismissed in May 2017.⁵ This meant that when the first mortgagee proceedings went to trial in July and August 2017, it was pursued only on behalf of GLW.

[5] Judgment in the first mortgagee proceedings was delivered on 14 December 2017 (the liability judgment).⁶ GLW achieved a measure of success, with Fitzgerald J holding that the adoption by LCIL of the Lepionka agreements was in breach of its equitable duties as mortgagee.⁷ But rather than setting aside the agreements, she saw damages as the appropriate remedy.⁸ GLW appealed against aspects of the judgment which were unfavourable to it. This litigation came to an end as GLW went into voluntary liquidation (in July 2018) and LCIL and the liquidator of GLW settled the dispute in December 2018.

[6] Mr Paterson (or people associated with him) have sought to advance claims or arguments against Mr Lepionka, LCIL and associated parties which overlap (substantially or completely) with those addressed in the first bankruptcy litigation and first mortgagee proceedings. The history of this is reviewed at length in the Court of Appeal judgment that Mr Paterson seeks to appeal,⁹ and it is necessary to refer only to the proceedings directly relevant to the current application. They are:

- (a) Proceedings commenced in November 2019 by Mr Paterson, in the claimed capacity as the trustee of “the Garth Paterson Family Trust”,

² *Paterson v Lepionka & Co Investments Ltd* [2016] NZHC 1331.

³ *Paterson v Lepionka & Co Investments Ltd* [2018] NZHC 3022.

⁴ *Paterson v Lepionka & Co Investments Ltd* [2019] NZCA 548.

⁵ *AFI Management Pty Ltd v Lepionka & Co Investments Ltd* [2017] NZHC 1176 at [167].

⁶ *AFI Management Pty Ltd v Lepionka & Co Investments Ltd* [2017] NZHC 3116.

⁷ At [494(d)].

⁸ At [494(h)].

⁹ *Paterson v Lepionka & Co Investments Ltd* [2021] NZCA 364 (Clifford and Gilbert JJ) [CA judgment].

against LCIL (the second mortgagee proceedings). These proceedings largely cover the same ground as the first mortgagee proceedings. These proceedings were struck out by Doogue J.¹⁰

- (b) Proceedings commenced in June 2020 by Mr Paterson, in his personal capacity, against LCIL, alleging malicious prosecution in relation to its role in the first bankruptcy litigation against him (malicious prosecution proceedings). He later filed an amended statement of claim pleading two additional causes of action: abuse of process and dishonest assistance. These proceedings were struck out.¹¹ As well, the Judge made an order restraining Mr Paterson (in any capacity) commencing or continuing any civil proceedings in relation to various matters listed in her judgment (s 166 orders).¹²
- (c) In December 2020, Mr Paterson was again adjudicated bankrupt; this also on the application of LCIL and for costs.¹³ We will refer to this as the second adjudication. Mr Paterson's opposition to the bankruptcy is based essentially on the same contentions as were addressed in the first mortgagee and second mortgagee proceedings.

The appeals and applications for leave to appeal dealt with by the Court of Appeal in its judgment of 3 August 2021

[7] In its judgment of 3 August 2021, the Court of Appeal struck out the appeals against the striking out of the second mortgagee and malicious prosecution proceedings¹⁴ and against the second adjudication,¹⁵ but allowed the appeal in relation to the s 166 orders to proceed.¹⁶

¹⁰ *Paterson v Lepionka & Co Investments Ltd* [2020] NZHC 2184 at [168].

¹¹ At [169].

¹² At [170].

¹³ *Lepionka & Co Investments Ltd v Paterson* [2020] NZHC 3332 (Associate Judge Johnston).

¹⁴ CA judgment, above n 9, at [47].

¹⁵ At [52].

¹⁶ At [49].

The proposed appeals

[8] The arguments advanced by Mr Paterson are confined to the striking out of the appeals in relation to the malicious prosecution proceedings and the second adjudication.

Malicious prosecution proceedings

[9] The arguments which Mr Paterson wishes to advance are substantially the same as those addressed to Associate Judge Osborne in 2016, Associate Judge Johnston in 2018 and the Court of Appeal in 2019. For this reason, they are an abuse of process. As well, with the adjudication never having been set aside, the first bankruptcy litigation was not resolved in Mr Paterson's favour. This makes the claim for malicious prosecution untenable.

Appeal against second adjudication

[10] Mr Paterson's opposition to the second adjudication and the basis of his proposed appeal substantially repeat the contentions which have been resolved in earlier litigation. The Court of Appeal was therefore correct to characterise the proposed appeal as an abuse of process.

Result

[11] The application for leave to appeal is dismissed. Given the second adjudication, there is no point in making an order for costs.

Solicitors:
Bell Gully, Wellington for Respondents