

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC UR 9/2026
[2026] NZSC 123

RE

JAMES PHILIP DONELLAN
Applicant

Court: Ellen France and Cooke JJ

Counsel: Applicant in person

Judgment: 7 September 2026

JUDGMENT OF THE COURT

**The application for recall of this Court’s judgment of
3 June 2026 (*Re Dunstan* [2026] NZSC 71) is dismissed.**

REASONS

[1] Mr Donellan seeks recall of a judgment of this Court dismissing an application for review of a decision of Kós J (the review decision).¹ Kós J had upheld a Deputy Registrar’s decision to refuse to accept for filing a proposed application for leave to appeal direct from the High Court.²

[2] The present application has its genesis in an application for habeas corpus presented in the High Court by a person described as “Melanie Rolls”. The habeas corpus application concerned two children. The children’s mother, Tanya Dunstan, filed an affidavit in support of the habeas corpus application. Ms Dunstan is the subject of a civil restraint order under s 166 of the Senior Courts Act 2016. That means that she must obtain leave before filing any application in the High Court.

¹ *Re Dunstan* [2026] NZSC 71 (Ellen France, Miller and Cooke JJ). As Miller J has since retired, the present application is being dealt with by the two panel members remaining.

² *Re Dunstan* [2026] NZSC 4.

[3] The High Court considered leave was required to file the habeas corpus application because the “real” applicant was Ms Dunstan.³ The Court noted in that respect that, in determining who the “real” party is, the Court will:⁴

... exercise caution before concluding that the named party is involved only as a device to avoid the effect of a s 166 order. Where that is clearly the case however, the Court will not prefer form over substance.

[4] While of the view that leave was required, the High Court nonetheless considered the merits of the application for habeas corpus but dismissed it on the basis that it could not succeed. The High Court noted the matter had “been previously litigated all the way to” this Court.⁵

[5] An application for leave to appeal to this Court was then presented to this Court in Mr Donellan’s name. The Deputy Registrar rejected the application for leave to appeal for filing because the real applicant was Ms Dunstan, not Mr Donellan. The Deputy Registrar noted that Ms Dunstan is subject to a general order under s 166 of the Senior Courts Act and did not obtain leave of the High Court to bring the proceeding.

[6] The decision of the Deputy Registrar was upheld on review by Kós J. Kós J, in dismissing the application for review of the decision not to accept the matter for filing, said this:⁶

[5] ... First, I am satisfied that the proceeding was filed in the High Court in breach of the s 166 order against Ms Dunstan/Rolls. Secondly, that proceeding cannot then be given substance by its carriage being assumed instead by a third person, even assuming Mr Donellan has separate legal identity from Ms Dunstan/Rolls.

[7] In dismissing the application for review of the decision of Kós J, the Court said this:⁷

³ *Dunstan v Attorney-General* [2026] NZHC 6 (Wilkinson-Smith J) [HC judgment], citing *Mawhinney v Auckland Council* [2021] NZCA 144, [2021] 3 NZLR 519; and *CFC 26 Ltd v Brown Shipley & Co Ltd* [2017] EWHC 1594 (Ch), [2017] 1 WLR 4589.

⁴ HC judgment, above n 3, at [8].

⁵ At [17].

⁶ *Re Dunstan*, above n 2.

⁷ *Re Dunstan*, above n 1.

[5] The relief sought relates to the alleged detention of Ms Dunstan's children, who are subject to an order prohibiting their removal from New Zealand. There is no pleading identifying a relationship between the children and either Mr Donellan or Melanie Rolls (who ostensibly brought the application in the High Court). There is no reason to doubt that Ms Rolls and Mr Donellan are either pseudonyms or persons who have lent their names to Ms Dunstan's cause. Either way, she is the real applicant. The proposed appeal is an abuse of process because it is an attempt to evade the s 166 order.

[8] Mr Donellan in seeking a recall of this judgment has provided an affidavit in which he says, amongst other matters, he is in a relationship with Ms Dunstan, is "happy to be a joint legal guardian" of the two children named in the habeas corpus application, and that the children have agreed he can be their litigation guardian. He annexes a photograph of his passport to his application.

[9] Recall of the judgment is sought on the basis the two children are in fact the parties and this Court has proceeded on an irrational and prejudicial basis. Recusal of the Judges who determined both review decisions is sought.

[10] Dealing with the latter point first, there is no basis for recusal. Nothing advanced by the applicant provides "some real ground for doubting the ability" of the Judges involved in the decisions to date "to bring an objective judgment to bear".⁸

[11] The underlying complaint with respect to both the recusal and the recall applications is that the Court has been wrong to treat the application for leave as one within the scope of the s 166 order. It is submitted that this is because the application for leave to this Court is not in fact a device to avoid that order. That proposition is essentially an attempt to relitigate the merits of the review decision and does not provide a very special reason for recall.⁹ This Court reached the view that, regardless of Mr Donellan's status, the cause being pursued in these proceedings is that of Ms Dunstan and is encompassed within the s 166 order. That view is supported by the

⁸ *Jessop v R* [2007] NZSC 96 at [6] citing *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 (CA) at 480; and see *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76 at [4] referring to *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72, [2010] 1 NZLR 35.

⁹ *Saxmere*, above n 8, at [2] citing *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633.

pleading in the High Court, as Kós J said, and by the terms of Ms Dunstan's affidavit filed in the High Court.

Result

[12] The application for recall of this Court's judgment of 3 June 2026 (*Re Dunstan* [2026] NZSC 71) is dismissed.