

IN THE SUPREME COURT OF NEW ZEALAND

SC 100/2015
[2016] NZSC 2

BETWEEN GARY OWEN BURGESS
 Applicant

AND TSB BANK LIMITED
 Respondent

Court: Elias CJ, William Young and O'Regan JJ

Counsel: Applicant in person
 D M Lester for the Respondent

Judgment: 3 February 2016

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicant must pay the respondent costs on an indemnity basis.**
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REASONS

[1] The applicant mortgaged his rural property to the respondent (TSB) to secure two loans made to him by TSB. He fell into arrears with both loans and TSB served a notice under s 119 of the Property Law Act 2007. The applicant did not comply with this notice and TSB exercised its power of sale of the rural property. The proceeds of sale were insufficient to meet the applicant's indebtedness to TSB which commenced proceedings to recover the shortfall. After a two day trial, Gendall J entered judgment against the applicant for \$22,911.70 plus interest.¹

¹ *TSB Bank Ltd v Burgess* [2013] NZHC 3291 [*Burgess* HC]. He also awarded indemnity costs, in accordance with the contractual arrangements between the applicant and TSB. The case was transferred to the High Court from the District Court because of a counterclaim that exceeded the District Court's jurisdiction. It was not disputed that Mr Burgess was in default of his payment obligations and unable to pay: *Burgess* HC at [53].

[2] Mr Burgess appealed to the Court of Appeal. His arguments essentially repeated those he had made in the High Court. With some differences of reasoning the Court of Appeal upheld all aspects of the High Court decision.²

[3] Mr Burgess now seeks leave to appeal to this Court.

[4] The Court of Appeal grouped Mr Burgess's arguments in relation to the notice into three categories and it is convenient to adopt those categories in the consideration of Mr Burgess's application for leave. The three categories are:³

- His claim that the notice did not adequately inform him of the action required to remedy the defaults;
- His claim that the notice wrongly required him to pay interest that was not yet due at the time of the notice; and
- His claim that the notice failed to specify adequately the consequences of not remedying the default.

[5] As to the first and third of these, the arguments Mr Burgess seeks to raise in this Court are factual matters raising no point of public or commercial importance. We see no risk of a miscarriage if leave is refused on either ground.

[6] As to the second, we accept that the question as to whether a notice may require payments of interest that is not owing at the date of the notice may be a point of commercial significance. But we do not see this case as an appropriate case for consideration of the point in this Court. As the Court of Appeal pointed out, the notice clearly stated the extent of the default.⁴ It then had an additional provision dealing with interest becoming due after the date of the notice. This additional provision did not suggest that a default had occurred in relation to interest obligations that had not yet been incurred. In those circumstances we see no miscarriage in declining leave on this point. We are fortified in that conclusion by

² *Burgess v TSB Bank Ltd* [2015] NZCA 361 (Cooper, Mallon and Dobson JJ).

³ At [26].

⁴ At [59].

the fact that the mortgagee sale of the property occurred some years ago with the consequence that the buyer obtained an indefeasible title (contrary to Mr Burgess's submission that a defect in the notice would invalidate the sale). That means the practical significance of the proposed appeal is limited.

[7] The applicant also seeks to challenge the costs award, which was based on the contractual entitlement of TSB under the security documentation. We see no point of public importance arising in this context either, nor do we see any risk of miscarriage.

[8] In these circumstances we dismiss the application for leave to appeal. We award indemnity costs in accordance with the terms of the security documents, on the same basis as was done in the High Court and Court of Appeal.

Solicitors:
Clendons, Auckland for the Respondent