

IN THE SUPREME COURT OF NEW ZEALAND

SC 5/2017
[2017] NZSC 38

BETWEEN GARY OWEN BURGESS
 Applicant

AND MALLEY & CO
 Respondent

Court: William Young, Glazebrook and Arnold JJ

Counsel: Applicant in person
 J Eckford for Respondent

Judgment: 27 March 2017

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B The applicant must pay the respondent costs of \$2,500.**
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REASONS

[1] This is an application for leave to appeal arising from the judgment of the Court of Appeal in *Burgess v Malley & Co*, which dealt with three applications made by Mr Burgess.¹ One was an application to extend time for the payment of security for costs, which was granted because Mr Burgess had an extant application for leave to appeal to this Court against the judgment of Miller J fixing security. This Court dismissed that application in *Burgess v Malley & Co*.² Mr Burgess now seeks leave to appeal against the Court of Appeal's dismissal of another of his applications, namely an application to remove Parker Cowan as lawyers for the respondents, Malley & Co.

¹ *Burgess v Malley & Co* [2016] NZCA 585 [*Burgess* (CA)].

² *Burgess v Malley & Co* [2017] NZSC 9.

[2] The background to the underlying dispute is summarised briefly in this Court’s earlier decision and we will not repeat it here.³ It is sufficient to record that Parker Cowan issued proceedings on behalf of Malley & Co for the recovery of their legal fees and have acted for the firm ever since. In the course of those proceedings (which Gendall J resolved in favour of Malley & Co), Mr Burgess:

- (a) advised the Court that he had concerns about Parker Cowan representing Malley & Co at the hearing on the basis that they had been involved in the “reckless and malicious use of a civil proceeding”.⁴ However, ultimately Mr Burgess did not pursue his objection to Mr Parker’s appearance;⁵ and
- (b) purported to outline a claim against Parker Cowan. As the claim had not been pursued in any formal way, Gendall J dismissed it.⁶

In addition, at some point Mr Burgess attempted to issue a witness summons against a member of Parker Cowan to give evidence at the hearing.

[3] Parker Cowan continued to act for Malley & Co on the appeal against Gendall J’s judgment. It was in that context that Mr Burgess applied to the Court of Appeal for an order that Parker Cowan be removed as the firm’s legal representatives. The Court of Appeal dismissed the application in the following terms:⁷

The threshold for removal of a party’s chosen representative is a high one and this Court will not countenance such applications being used for tactical or delaying reasons. The mere fact Mr Burgess chooses to make an allegation without proper evidential foundation is obviously not of itself enough. As regards the witness summons, we note that in any event any evidence a member of Parker Cowan could have given that was not already part of the record might well be covered by solicitor-client privilege.

[4] Nothing in the submissions made by Mr Burgess casts doubt on the correctness of this analysis. The application raises no arguable point of public or

³ At [1]–[4].

⁴ *Malley & Co v Burgess* [2016] NZHC 907 at [12].

⁵ At [14]–[15].

⁶ At [73]–[74].

⁷ *Burgess* (CA), above n 1, at [9] (footnote omitted).

general importance nor does it appear to involve any risk of a substantial miscarriage of justice. In these circumstances the application must be dismissed.

[5] The application for leave to appeal is dismissed. The applicant must pay the respondent costs of \$2,500.

Solicitors:
Parker Cowan Lawyers, Queenstown for Respondent