IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 45/2018
[2018] NZSC 67

BETWEEN	BEVIN HALL SKELTON Applicant
AND	CHARLES MICHAEL HOWCROFT First Respondent
	DARAN NAIR Second Respondent
	CHARLES HENRY BIRD Third Respondent

Court:	William Young, O'Regan and Ellen France JJ
Counsel:	Applicant in person B M Cunningham for First Respondent E J L Werry for Second Respondent
Judgment:	3 August 2018

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant (Mr Bevin Skelton as the trustee of a family trust) and the first and second respondents (Messrs Charles Howcroft and Daran Nair) have been involved in various proceedings. The first was settled. The second was struck out by Asher J, primarily on the basis that the claims were precluded by the settlement agreements.[1] Mr Skelton appealed against this decision to the Court of Appeal, but

1 *Skelton v Nair* [2015] NZHC 832.

this appeal did not proceed because he did not provide security for costs.[2] The third was against Mr Howcroft and this was struck out by Associate Judge Sargisson as precluded by the settlement agreements and barred by the Limitation Act 1950.[3] Mr Skelton applied to review this decision but eventually withdrew this application.

[2] Mr Skelton was adjudicated bankrupt on the application of Mr Howcroft for unpaid costs relating to the strike out proceedings heard by Associate Judge Sargisson.[4]

[3] Mr Skelton wishes to issue further proceedings against Messrs Howcroft and Nair and also a third person, Mr Charles Bird, who has been named as the third respondent. In anticipation of doing so, he has sought pre-commencement discovery against all three. Messrs Howcroft and Nair responded by seeking security for costs. At this point, the costs awarded against Mr Skelton in respect of the earlier proceedings are still unpaid and amount to $42,562.62.

[4] Mr Bird did not participate in the application for security for costs or the later appeal and thus is not party to the current dispute. Accordingly he ought not to have been named as a respondent to this application.

[5] In a judgment delivered on 30 May 2017, Paul Davison J ordered Mr Skelton to provide security for costs in the sum of $30,000.[5] He noted that the claims which Mr Skelton wishes to advance against Messrs Howcroft and Nair cover very much the same ground as the earlier proceedings which were struck out but also contain allegations of fraud. He described the allegations of fraud as "speculative" and lacking appropriate particulars.[6] More generally, he was of the view that the proposed claims faced "significant and probably insurmountable obstacles" and had "little prospect of success".[7] He also referred to Mr Skelton's "dogged persistence in pursuing

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2 See the decision of the Court of Appeal dismissing an application for review of the Registrar's decision refusing to dispense with security for costs: *Skelton v Nair* [2015] NZCA 343.
3 *Skelton v Howcroft* [2015] NZHC 1313.
4 *Howcroft v Skelton* [2016] NZHC 1389.
5 *Skelton v Howcroft* [2017] NZHC 1149.
6 At [21].
7 At [48].

unmeritorious claims"[8] against Messrs Howcroft and Nair and described his conduct as "having the hallmarks of being frivolous and vexatious".[9]

[6] Mr Skelton applied on 1 September 2017 for an extension of time to apply for rescission of the order made on 30 May 2017. This application was dismissed by Paul Davison J on 4 October 2017.[10] Mr Skelton then applied for leave to appeal to the Court of Appeal against the 4 October judgment which was dismissed on 29 November 2017 by the same Judge.[11]

[7] On 9 January 2018, Mr Skelton applied to the Court of Appeal for leave to appeal against the judgments of 30 May 2017, 4 October 2017 and 29 November 2017. This application, along with the earlier application to Paul Davison J, for leave to appeal were filed on the assumption that the Senior Courts Act 2016 (which requires leave to appeal to the Court of Appeal from interlocutory orders) applied to Mr Skelton's proceedings.[12] But when the case came before the Court of Appeal, Mr Skelton argued that his proceedings remained subject to the Judicature Act 1908 (as they had been commenced before the Senior Courts Act came into effect) which meant he had a right of appeal[13] and thus all that was required for his challenge to be heard in the Court of Appeal was an extension of time.

[8] The Court of Appeal, following its earlier decision in *Sutcliffe v Tarr*,[14] accepted that the case fell to be determined under the Judicature Act and that the question for determination was whether an extension of time should be granted.[15] This issue was addressed in terms of the principles discussed in *Almond v Read*[16] and was refused because of:

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8 At [51].
9 At [54].
10 *Skelton v Howcroft* [2017] NZHC 2425, [2017] NZAR 1614.
11 *Skelton v Howcroft* [2017] NZHC 2941.
12 Senior Courts Act 2016, s 56(3).
13 Judicature Act 1908, s 66.
14 *Sutcliffe v Tarr* [2017] NZCA 360, [2018] 2 NZLR 92.
15 *Skelton v Howcroft* [2018] NZCA 140 (French, Cooper and Winkelmann JJ) [*Skelton* (CA)].
16 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.

(a) The significance of the relevant delay between 30 May 2017 (when the judgment ordering security for costs was released) and 1 September 2017 (when the rescission application was filed).[17]

(b) The proposed appeal being manifestly without merit.[18]

[9] In his submissions in support of the application for leave to appeal, Mr Skelton challenges the approach adopted by the Court of Appeal to delay, contending that the primarily relevant period is between the date of the last High Court judgment (29 November 2017) and when the application for leave to appeal was filed in the Court of Appeal (9 January 2018). He says that his delay was explicable as he did not have ready access to legal authorities. He also asserts that there is no jurisdiction to order security for costs in respect of an application for pre-trial discovery. This argument proceeds on the basis that: (a) r 5.45 of the High Court Rules 2016 which provides for security for costs can be exercised only in respect of a "proceeding"; (b) "proceeding" is defined in r 1.3 so as to exclude an "interlocutory application"; and (c) r 8.20 requires an application for pre-trial discovery to be brought by way of "interlocutory application".

[10] As to delay, there was inaction on the part of Mr Skelton from the delivery of the judgment of 30 May until the application seeking an extension of time to apply for rescission was filed on 1 September. Mr Skelton's substantive complaint being directed at the 30 May judgment, the Court of Appeal was entitled to place primary reliance on the delay between those dates. The Court also expressly considered whether that delay was excusable on the basis that Mr Skelton is unrepresented and concluded that it was not.[19]

[11] There are two possible responses to Mr Skelton's argument as to jurisdiction to order security for costs. The first is that the r 1.3 definition of proceeding applies only if the context does not otherwise require. Where the only proceeding before the court is commenced by interlocutory application, the context requires that the word

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17 *Skelton* (CA), above n 15, at [12].
18 At [20].
19 At [13].

"proceeding" in r 5.45 encompass applications for pre-commencement discovery. The other is that if security for costs is not expressly authorised by r 5.45, the court nonetheless has jurisdiction to order security, as is contemplated by r 1.6(1) which provides:

> **Cases not provided for**
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> If any case arises for which no form of procedure is prescribed by any Act or rules or regulations or by these rules, the court must dispose of the case as nearly as may be practicable in accordance with the provisions of these rules affecting any similar case.

[12] Arguments substantially similar to that advanced by Mr Skelton have previously been rejected by the High Court in *Nelson v Dittmer*[20] (in respect of costs following the determination of an application for pre-trial discovery) and *Hetherington Ltd v Carpenter*[21] (application for security for costs in respect of such an application). Further, this argument was squarely addressed by the Court of Appeal on appeal.

[13] It may be nonetheless that the jurisdiction to order security for costs on an interlocutory application may raise a question of public or general importance. But we do not see this case as an appropriate one to address the point. The present case is very particular to its facts as it involves proceedings covering the same ground as earlier unsuccessful claims against Messrs Howcroft and Nair in respect of which there are unpaid costs. The issues which Mr Skelton wishes to raise are also very particular, being his complaint about the way the Court of Appeal dealt with delay and jurisdiction. Having considered these issues carefully, we do not see an appearance of a miscarriage of justice.

[14] Accordingly, the application for leave to appeal is dismissed. The respondents not having taken active steps to oppose the application, there is no order for costs.

Solicitors:
BSA Law, Auckland for First and Second Respondents

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20 *Nelson v Dittmer* [1986] 2 NZLR 48 (HC).
21 *Hetherington Ltd v Carpenter* (1993) 7 PRNZ 218 (HC).