IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA22/2018
[2018] NZCA 140

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

Hearing:	30 April 2018
Court:	French, Cooper and Winkelmann JJ
Counsel:	Applicant in Person B M Cunningham for First and Second Respondents
Judgment:	7 May 2018 at 3 pm

JUDGMENT OF THE COURT

A The application for special leave is treated as an application for extension of time to appeal.

B The application for extension of time to appeal is declined.

C The applicant must pay the first respondent costs for a standard application on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Winkelmann J)

[1] Mr Skelton applies for special leave to appeal against judgments of Davison J dated 30 May 2017,[1] 4 October 2017[2] and 29 November 2017.[3] In those judgments Davison J ordered that Mr Skelton pay security for costs on his application seeking pre-commencement discovery from the first and second respondents Messrs Howcroft and Nair (May judgment), declined Mr Skelton's application to extend time to apply to rescind the May judgment (October judgment) and, finally, declined Mr Skelton leave to appeal the October judgment (November judgment).

[2] Mr Skelton's application for special leave was brought on the basis that each of the judgments related to an interlocutory application so that, pursuant to the Senior Courts Act 2016, leave to appeal the decision was required.[4] Under the Senior Courts Act, leave is required to appeal a judgment determining an interlocutory application.[5] The Senior Courts Act came into force on 1 March 2017 but Mr Skelton's application for pre-commencement discovery was filed in the High Court prior to that date.[6] The Senior Courts Act's statutory predecessor, the Judicature Act 1908, allowed appeals against such decisions as of right.[7] Because the application for pre-commencement discovery was filed in the High Court prior to 1 March 2017, counsel were asked to address at the hearing of the application for special leave whether, in light of the transitional provisions contained in the Senior Courts Act and its Schedules, the proposed appeal was governed by the provisions of the Senior Courts Act, or rather by the Judicature Act.

[3] At the hearing of the application for special leave Mr Skelton argued that, contrary to what had been assumed to be the position up to that point, the Judicature Act continued to apply to these proceedings. Leave to appeal was not therefore required. Mr Skelton invited us to extend time to enable him to appeal the judgments.

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1 *Skelton v Howcroft* [2017] NZHC 1149.
2 *Skelton v Howcroft* [2017] NZHC 2425.
3 *Skelton v Howcroft* [2017] NZHC 2941.
4 Mr Skelton had in fact brought an application in the High Court seeking leave to appeal to the Court of Appeal again on the assumption that the Senior Courts Act required leave. That application was declined, and accordingly, if the Senior Courts Act was applied, then Mr Skelton would require special leave of this Court for the bringing of the appeal.
5 Senior Courts Act 2016, s 56.
6 Senior Courts Act, s 2.
7 Judicature Act 1908, s 66.

[4] Counsel for the first respondent, Mr Cunningham, submitted that the Senior Courts Act applies to these appeals so that leave is required, and should be declined. In any case, if there is a right of appeal he argued, the extension of time Mr Skelton seeks should be declined because the proposed appeal has no merit. The second respondent did not appear at the hearing of the application for leave, but filed a memorandum adopting the submissions made for the first respondent.

[5] The issues that arise on this application are therefore as follows:

(a) Is the proposed appeal governed by the provisions of the Judicature Act or by the provision of the Senior Courts Act? and

(b) Should the leave, or extension of time, be granted?

Judicature Act or Senior Courts Act?

[6] Section 56 of the Senior Courts Act provides that no appeal to the Court of Appeal lies against orders made in the High Court on an interlocutory application in respect of any civil proceeding, unless leave to appeal is given by the High Court (although there are limited exceptions to this rule, contained in s 56(4), they do not apply to this case). As noted prior to the coming into force of this Act, there was no requirement under the Judicature Act for leave. Clauses 10 and 11 of Schedule 5 to the Senior Courts Act set out the transitional provisions for proceedings pending or in progress when the Senior Courts Act came into force. Clause 10(1) is the critical provision and states:

> **10 Proceedings, etc, continue under relevant Act**
>
> (1) All proceedings pending or in progress in a court operating under the relevant Act immediately before the commencement of this clause may be continued, completed, and enforced only under the relevant Act (including the relevant rules of court) as if that Act had not been repealed by this Act.

[7] The transitional provisions were the subject of detailed consideration by this Court in *Sutcliffe v Tarr*.[8] This Court concluded as follows:

> [33] This leads us to the conclusion that the transitional provisions of the Senior Courts Act have the effect that all proceedings commenced in the High Court prior to 1 March are to continue under the former Judicature Act regime, and that includes appeals from those proceedings to this Court or the Supreme Court.

[8] This passage is authority for the argument Mr Skelton advances that the Judicature Act continues to apply. But Mr Cunningham invites us to reconsider the decision in *Sutcliffe v Tarr* on the basis that the Court erred in its interpretation of the transitional provisions to this proceeding. His argument is that cl 10(1) applies to proceedings pending or in progress in *a* court, but not outside the court, so that the appeal and application for leave to appeal, filed in the Court of Appeal, are new proceedings for the purposes of cl 10(1).

[9] The argument advanced by Mr Cunningham was addressed and, in a fully reasoned judgment, rejected by this Court in *Sutcliffe v Tarr*.[9] We adopt the reasons of the Court set out there, and conclude that the provisions of the Judicature Act continued to regulate the right to appeal the judgments that are the subject of this proceeding in this Court. It follows then that the November judgment determined a procedurally misconceived application, since leave to appeal the May and October judgments was not required.[10] We therefore treat the application for special leave as an application to extend time to appeal the judgments.

Application to extend time

[10] The relevant factors for the exercise of this Court's discretion to grant an extension of time are as set out in *Almond v Read*.[11] The interests of justice are the core consideration. Relevant to that are the following issues:[12]

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8 *Sutcliffe v Tarr* [2017] NZCA 360, [2018] 3 NZLR 92.
9 At [20]–[33].
10 The November judgment is therefore irrelevant to Mr Skelton's challenge to the award of security for costs. We nevertheless address it in our formal orders, as the original application related to each of the three judgments.
11 *Almond v Read* [2017] NZSC 80, [2017] 1 NZLR 801.
12 At [38].

(a) the length of delay;

(b) the reasons for the delay;

(c) the conduct of the parties, particularly of the applicant;

(d) any prejudice or hardship to the respondent or to others with a legitimate interest in the outcome; and

(e) the significance of the issues raised by the proposed appeal, both to the parties and more generally.

[11] The merits are also relevant to the exercise of the discretion to extend time.[13] Since consideration of the merits is necessarily superficial at this preliminary point of the proceeding, it follows that it is only where the appeal is clearly hopeless that a decision to refuse to extend time should be substantially based on a lack of merit.[14]

[12] In this case the delay is considerable. The original decision ordering security for costs was issued on 30 May 2017, some seven months before the present application for special leave was filed by Mr Skelton, and six months out of time. We accept that some of that delay is attributable to procedural confusion as to which Act governs the right of appeal in this case, and that the confusion does not seem to have been confined to Mr Skelton. We also accept that in September 2017, Mr Skelton attempted to have the security for costs order rescinded because it was made without jurisdiction — in other words, he did not entirely sit on his rights. All in all, we think it fair to Mr Skelton to proceed on the basis that the delay is in the order of three months (on a conservative basis), as this represents periods of inactivity on his part not explained by procedural confusion.

[13] Mr Skelton says that all the delay is explicable, and should be excused, because he is unrepresented. He cannot afford representation because he is bankrupt. While

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13 Although the Court observed that the merits will not generally be relevant to an application to extend time where there had been an insignificant delay as a result of an error as to process, this is not a case where the delay can be characterised as insignificant or wholly due to errors in process. See *Almond v Read,* above n 11, at [39(b)].

14 See *Almond v Read,* above n 11, at [39(c)].

he brings this proceeding on behalf of a Trust, it has no assets to fund legal representation. He says that if he had been able to afford a lawyer he would have proceeded in a more timely fashion. Whilst we accept that some minor delay may be excused on the basis that a party is unrepresented, the time limit contained in the rules strike a balance between the interests of the parties. The fact that one party is not represented cannot excuse the lengthy delay which has occurred in this case.

[14] The other factor relevant to the exercise of the discretion is the merit of the proposed appeal. Mr Cunningham argues that it has no merit, and on that ground alone, the extension of time should be declined.

[15] A short background to the present application provides useful context to the proposed appeal. The respondents have been defending proceedings brought by Mr Skelton arising out of the same subject matter over a course of many years. This history is set out in the judgment of Davison J of 30 May 2017.[15] The proceedings have been resolved against Mr Skelton and he has been bankrupted as a result of a failure to pay costs. Mr Skelton now proposes to bring a further claim (the intended proceeding) against Messrs Howcroft and Nair and another proposed defendant, Mr Bird. The intended proceeding relates to the same subject matter as the earlier proceedings, but Mr Skelton intends to make new allegations about those events, including allegations of fraud.

[16] Before commencing the intended proceeding, Mr Skelton applied for orders against Messrs Howcroft and Nair requiring them to make particular discovery. Messrs Howcroft and Nair applied for security for costs for that application, arguing that they had been involved in protracted litigation over the same series of events, unsuccessfully pursued by Mr Skelton, an impecunious plaintiff, and costs awarded in their favour remained outstanding. Against that background they should be protected from being exposed to the cost of further meritless litigation.

[17] In the May judgment, Davison J expressed himself satisfied that the intended proceeding had little or no realistic prospect of success and that "having regard to what I consider to be … [Mr Skelton's] dogged persistence in pursuing unmeritorious

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15 *Skelton v Howcroft,* above n 1, at [3]–[14].

claims, it is just in all the circumstances to order that he give security for costs".[16] The Judge observed that as an undischarged bankrupt Mr Skelton had little or no personal ability to satisfy an order. He rejected an argument that the intended defendants' conduct had caused Mr Skelton's impecuniosity, a factor which may be relevant in some cases as to whether or not security for costs should be ordered.

[18] In the October judgment, Davison J addressed Mr Skelton's argument that the order for security for costs had been made without jurisdiction.[17] It is this issue Mr Skelton wishes to pursue on this appeal. His argument is as follows:

(a) Rule 5.45 of the High Court Rules 2016 confers jurisdiction on the Court to order security for costs on the application of a defendant in certain circumstances and if the Court is satisfied "that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding".

(b) The definition of proceeding in r 1.3 is "… any application to the court for the exercise of the civil jurisdiction of the court other than an interlocutory application".

(c) Rule 8.20 requires applications for pre-commencement particular discovery to be brought by interlocutory application.

(d) Since the application for pre-commencement discovery is not a proceeding, there was no jurisdiction under r 5.45 for Davison J to order security for costs.

[19] In the October judgment Davison J rejected that argument, applying the earlier decisions of *Nelson v Dittmer*[18] and *Hetherington Ltd v Carpenter*[19] in which the Court treated applications for pre-commencement discovery as "proceedings" for the purposes of costs (*Nelson*) and security for costs (*Hetherington*).

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16 At [51].
17 *Skelton v Howcroft,* above n 2, at [3]–[9].
18 [1986] 2 NZLR 48 (HC).
19 (1993) 7 PRNZ 218 (HC).

Mr Skelton wishes to argue that this line of authority was wrongly decided on the basis that it cannot be reconciled with the wording of the rules, and in particular with the definition of proceeding in r 1.3 and the power under r 5.45 to order security for costs in proceedings.

[20] We accept Mr Cunningham's argument that the proposed appeal is manifestly without merit. We see no basis upon which the line of authority Mr Skelton wishes to overturn could be departed from, or the appeal against Davison J's May judgment allowed. Rule 1.3 expressly provides that the context may require a different interpretation of the word "proceeding". Since in an application for pre-commencement discovery the application is the only proceeding before the court, the context requires that the word "proceeding" in r 5.45 encompass applications for pre-commencement discovery. Secondly, even were that not the case, r 1.6 provides that in cases not provided for in the High Court Rules, "the court must dispose of the case as nearly as may be practicable in accordance with the provision of these rules affecting any similar case", in a manner that the court thinks best calculated to promote the objects of these rules. The purpose of the jurisdiction to award security for costs is to protect parties in the position of a defendant (r 5.45(6)) from the risk of barren awards of costs. As Davison J found, in the circumstances of the case, an order for security for costs was required for that purpose.

[21] To conclude on this issue, the delay in the filing of the appeal was substantial in relation to the May and October judgments. There is no adequate explanation for that delay and accordingly in seeking an extension of time, Mr Skelton seeks an indulgence of the Court to pursue his appeal. The proposed merits of the appeal are relevant to whether that indulgence should be granted. We are satisfied that the proposed appeal being manifestly without merit, the extension of time to appeal should not be granted.

Costs on the application

[22] Mr Skelton argued that if he were unsuccessful, costs should not be awarded against him as he is bankrupt. That is no reason not to award costs.[20] Mr Skelton is

[20] See *Rabson v Chapman* [2016] NZCA 45 at [13].

to pay the first respondent costs for a standard application on a band A basis, together with usual disbursements. We make no award of costs in favour of the second respondent, who took only limited steps in relation to the application.

Result

[23] The application for special leave is treated as an application for extension of time to appeal.

[24] The application for extension of time to appeal is declined.

[25] The applicant must pay the first respondent costs for a standard application on a band A basis and usual disbursements.

Solicitors:
Brett Cunningham Barrister, Auckland for First and Second Respondents