**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA294/2015**
**[2015] NZCA 343**

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| BETWEEN | BEVIN HALL SKELTON<br>Applicant |
| AND | DARAN NAIR<br>Respondent |

Counsel: Applicant in person
E J L Werry for Respondent

Judgment: (On the papers) 31 July 2015 at 2 pm

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**JUDGMENT OF WINKELMANN J**
**(Review of Registrar's Decision)**

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**A The application to review the Registrar's decision refusing to dispense with security for costs is dismissed.**

**B The applicant is to pay the sum of $5,880 by way of security for costs within 20 working days of the date of this judgment.**

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**REASONS**

## Introduction

[1] Mr Skelton appealed a judgment of Asher J striking out his proceeding against the respondent, Mr Nair.[1] He now seeks to review the Registrar's decision refusing to dispense with the requirement that he pay security for costs on that appeal.

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1 *Skelton v Nair* [2005] NZHC 832.

**Background**

[2] The background to the proceeding stretches back over many years. In 2006 Mr Skelton and his wife were involved in litigation. Mr Nair, a chartered accountant, was appointed as a receiver of a partnership known as the Urban and Country Partnership (UCP) which was in effect a partnership of Mr and Mrs Skelton's trusts.

[3] As receiver of UCP, Mr Nair commenced a proceeding against Mr Skelton's trust and another associated trust, seeking recovery against the trustees of $439,000. There was a settlement conference on 4 August 2008 before an Associate Judge at which settlement of the claim was reached, and a Heads of Agreement executed by the parties. There were then two later deeds of settlement dated 30 August 2008 (the 2008 deed) and February 2009 (the 2009 deed), in implementation of the Heads of Agreement.

[4] Mr Skelton filed the proceeding the subject of this appeal in July 2014. The original statement of claim was 17 pages in length and contained hundreds of clauses and sub-clauses. Mr Nair applied to strike-out on the basis of that pleading, but Mr Skelton was given an opportunity to file an amended statement of claim before the application was heard.

[5] In an amended statement of claim filed in November 2014 (the Amended Claim), Mr Skelton pleads that on 18 May 2007 Mr Nair entered into an agreement to sell the half share in an apartment owned by Mr Skelton's interests to a Mr Howcroft, another apartment owner, and his spouse (the Howcroft agreement).

[6] Mr Skelton alleges that Mr Nair did not disclose the existence of this agreement to Mr Skelton, so that when he entered into the Heads of Agreement he believed that the apartment was only subject to offer and the sale of the one-half share had not yet occurred. Mr Skelton alleges that Mr Nair had a duty to disclose to him as a trustee all material information, including in relation to the sale of the one-half share in the apartment. Had he been aware of the state of affairs, he would not have signed the Heads of Agreement, settling all claims that he had or may have against the other parties including Mr Nair. He seeks to set aside or step around the

various documents he has executed to enable him to pursue his claim against Mr Nair on the grounds of this non-disclosure.

[7] The claim is based on the allegation that at the time of the sale to Mr Howcroft, there was another buyer who was willing to pay more for the half share. Mr Nair therefore failed to make an adequate effort to obtain the best sale price, and was selling the apartment at an undervalue. Mr Skelton estimates the extent of the undervaluation to be AUD $69,975 and therefore claims a half share of AUD $34,987.50.

**Judgment in the High Court**

[8] Asher J granted the application to strike-out. He noted that Mr Skelton did not contest that he had signed the settlement agreements referred to.[2] The August 2008 and February 2009 deeds contained a final settlement clause broad enough to encompass claims relating to the Howcroft agreement, then existing or arising in the future.

[9] The Judge also referred to evidence that when Mr Skelton entered into the deeds he knew of the agreement to sell to Mr Howcroft. Further, the Judge said that in the recitals in the Heads of Agreement entered into at the judicial settlement conference, there was reference to the receiver completing the sale.[3] There was also reference in that agreement to the parties signing all documents and doing all things necessary to facilitate completion. He referred to an affidavit of Mr Skelton sworn on 25 March 2008, some months before the 2008 deed, in which Mr Skelton expressly referred to the Howcroft agreement, and alleged that the receiver had not obtained the best price for the property. Against that background the Judge said:

> [20] It seems plain then that the very issue that Mr Skelton now complains about, namely impropriety or negligence of the sale to Howcroft, was at issue in the early proceedings and expressly settled on a final basis in the settlement agreements. Further, the settlement was expressed in the broadest terms that covered all matters at issue between Mr Nair and Mr Skelton.

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2 *Skelton v Nair*, above n1, at [15].
3 At [16].

[10] The Judge said that the pleadings had not specified information that should have been disclosed but was not disclosed, noting that in submissions Mr Skelton had said that he would need discovery to find out the necessary details.

[11] The Judge also considered that it was an abuse of procedure to pursue court claims that had been compromised by binding settlement and that there were "various hallmarks indicating this proceeding is a frivolous and vexatious proceeding".[4] The hallmarks he identified were the unexplained delay in issuing the proceedings and the initial pleading which was prolix and diffuse. Although the Amended Claim was more focused, it addressed an issue that had already been the subject of litigation which had been settled, and raised speculative and unspecified allegations. He was satisfied that the proceeding could not succeed and struck it out.[5]

[12] On 22 May 2015 Mr Skelton filed a notice of appeal, specifying the following grounds of appeal:

(a) That the Judge had directed his attention to the Amended Claim filed in the proceeding, but that pleading had been superseded by a second amended statement of claim (Second Amended Claim).

(b) The Judge did not address the principal ground for the application to set aside the Heads of Agreement document on which Mr Nair relied, namely that Mr Nair had concealed from him relevant facts which he had a duty to disclose, and if he had disclosed those facts, that would have resulted in Mr Skelton not entering into the Heads of Agreement.

(c) The Judge contradicted himself in the judgment. He narrated the allegation that Mr Nair had a duty to disclose the existence of the Howcroft agreement, but then said that Mr Skelton "did not specify any information that should have been disclosed but was not disclosed."[6]

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4 At [24].
5 At [25].
6 At [22].

(d) In concluding the proceeding was "frivolous and vexatious" the Judge took into account irrelevant considerations, namely delay in issuing the proceedings when the proceedings were issued within the time contemplated by the relevant Limitation Act, and the first statement of claim and the Amended Claim when there was a Second Amended Claim on file.

**The Registrar's decision**

[13] On 29 June 2015 the Registrar of the Court of Appeal declined an application to dispense with the security for costs in respect of this appeal. The Registrar's decision records the basis for Mr Skelton's claim that he is impecunious, and observes the absence of evidence to corroborate that claim beyond an assertion of impecuniosity, and the production of a national superannuation gold card. Although the Registrar noted that she had the option to request Mr Skelton to provide further information regarding his financial position, she did not do so because she considered that the application should be declined on other grounds, namely that it was not right to require the respondent to defend the judgment under challenge without the usual protection as to costs provided by security. She took this approach because she considered that the merits of the appeal were very weak, there was nothing in the appeal of public importance or significance, and because the High Court Judge had considered that the proceedings were an abuse of process.

**The review**

[14] On 14 July 2015 Mr Skelton filed an application for review of that decision. In support of the application Mr Skelton provides further evidence to corroborate his claim to impecuniosity. However, the principal argument Mr Skelton advances in support of the review application is that the appeal is not hopeless. He asserts that the Judge determined the strike-out application on the basis of the wrong statement of claim and continues to assert that the original settlement agreements were obtained by fraud or non-disclosure on the part of Mr Nair. He provides more detail of that allegation. He also says that he has never been involved in any civil litigation before his disputes with Mr Nair, and therefore denies that he is a vexatious litigant.

**General principles of security for costs**

[15] The default position is that security for costs is to be provided in relation to appeals.[7] If an appellant wishes to apply to the Registrar for a waiver of security, he or she must do so within 20 days of filing the appeal.[8] The Registrar may vary or waive security "if satisfied that the circumstances warrant it".[9] A party who is dissatisfied with the Registrar's decision may apply to a judge for review of the Registrar's decision.[10]

[16] The Registrar should only dispense with security if of the view it is right to require the respondent to defend the judgment under challenge without the usual protection as to costs provided by security.[11]

[17] In *Reekie v Attorney-General* the Supreme Court said of the discretion to dispense with security:

> [35] Against that background, we consider that the discretion to dispense with security should be exercised so as to:
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> (a) Preserve access to the Court of Appeal by an impecunious appellant in the case of an appeal which a solvent appellant would reasonably wish to prosecute; and
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> (b) Prevent the use of impecuniosity to secure the advantage of being able to prosecute an appeal which would not be sensibly pursued by a solvent litigant.
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> A reasonable and solvent litigant would not proceed with an appeal which is hopeless. Nor would a reasonable and solvent litigant proceed with an appeal where the benefits (economic or otherwise) to be obtained are outweighed by the costs (economic and otherwise) of the exercise (including the potential liability to contribute to the respondent's costs if unsuccessful). As should be apparent from what we have just said, analysis of costs and benefits should not be confined to those which can be measured in money.

**Analysis**

[18] The Registrar was correct that this is not one of those cases where it is right to require a respondent to defend the judgment under challenge without the usual

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7 Court of Appeal (Civil) Rules 2005, r 35(2).
8 r 35(6) and (7).
9 r 35(6).
10 r 7(2) and (3).
11 *Reekie v Attorney-General* [2014] NZSC 63, [2014] 1 NZLR 737 at [21].

protection as to costs provided by security. The prospects of success for Mr Skelton are at best slight. He faces the almost insurmountable hurdle that he has entered into two deeds in full and final settlement of the claim that he now attempts to bring. He says he should not be bound by those deeds because relevant facts were concealed from him when he entered into the settlement agreements. But Asher J refers to evidence, embodied in the text of the Heads of Agreement, and contained in an affidavit sworn by Mr Skelton himself, which establishes that Mr Skelton did know before he entered into the Heads of Agreement and the subsequent settlement deeds, of the existence of the Howcroft agreement. That being the case, his argument that he is not bound by the complete settlement clauses seems doomed to fail.

[19] Mr Skelton's notice of appeal also says that the Judge addressed the wrong statement of claim and the Second Amended Claim was not referred to. Even if that is the case, the claim that Mr Skelton continues to articulate both through his notice of appeal, and his application for review, remains unchanged from that addressed by the Judge.

[20] Mr Skelton also contends that there is a contradiction in the judgment under appeal because the Judge dismissed Mr Skelton's claim that there was non-disclosure in respect of the apartment sale, but then said Mr Skelton had not particularised any information that should have been disclosed. The Judge's remark that Mr Skelton had not identified any information which should have been disclosed but was not flows on from the Judge's earlier discussion of the evidence which showed that Mr Skelton was aware of the existence of the Howcroft agreement. These are not contradictory statements.

[21] Mr Skelton challenges the Judge's and the Registrar's classification of this proceeding as vexatious and an abuse of process. However, the matters the Judge identified were relevant to his assessment that the proceedings are vexatious or an abuse of process. Although proceedings may be brought within relevant limitation periods, even so the delay in bringing the proceedings may indicate they are vexatious. This is especially the case here where the proceeding attempts to step around an existing settlement of proceedings and where there is no explanation for the delay.

**Result**

[22] The application to review the Registrar's decision refusing to dispense with security for costs is dismissed. Mr Skelton must pay the sum of $5,880 by way of security for costs within 20 working days of the date of this judgment.