IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-000716
[2017] NZHC 2425

BETWEEN	BEVIN HALL SKELTON Intending Plaintiff
AND	CHARLES MICHAEL HOWCROFT First Intended Defendant
AND	DARAN NAIR Second Intended Defendant
AND	CHARLES HENRY BIRD Third Intended Defendant

Hearing:	On the papers
Counsel/ Representation:	Intending Plaintiff in person B M Cunningham for First Intended Defendant E J L Werry for Second Intended Defendant
Judgment:	4 October 2017

JUDGMENT OF PAUL DAVISON J

This judgment was delivered by me on 4 October 2017 at 2.30pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
BSA Law, Auckland
McDonald Law, Auckland

[1] On 30 May 2017 I granted an application by Mr Howcroft and Mr Nair for orders that Mr Skelton give security for costs in relation to his application for pre-commencement discovery orders pursuant to High Court Rule 8.20.[1] I ordered that Mr Skelton give security for costs in the sum of $15,000 in respect of each of Mr Howcroft and Mr Nair and that, if security was not paid by 4 pm Friday 16 June 2017, the proceeding would be stayed until security was paid.

[2] Mr Skelton has now filed an application seeking an extension of time pursuant to r 1.19 to apply to the Court for variation or rescission of that interlocutory decision pursuant to r 7.49. Rule 7.49 provides that an application to vary or rescind an interlocutory order must be filed and served within five working days.

[3] Mr Skelton seeks an extension of time on the grounds that, in summary, the five day deadline was not achievable given his situation, the respondents withheld information, and that granting the application is in the interests of justice as the point appears to be novel. The substantive ground on which Mr Skelton seeks to have the decision varied or rescinded is that there is no jurisdiction to order security for costs on an application for pre-commencement discovery as there is no "proceeding" as required by r 8.20.

[4] Rule 5.45 confers power upon a Judge to order security for costs. Where a Judge is satisfied on the application of a defendant that there is reason to believe that a *plaintiff* or *defendant* will be unable to pay the costs of the defendant if unsuccessful in the plaintiff's proceeding, a Judge may where it is considered just in all the circumstances, order the giving of security for costs. Rule 5.45(6) provides:

> References in this rule to a **plaintiff** and **defendant** are references to the person (however described on the record) who, because of a document filed in the proceeding (for example, a counterclaim), is in the position of plaintiff or defendant.

[5] The power to make an order for security for costs extends to the hearing of an application for discovery before a proceeding is commenced. In *Hetherington Ltd v Carpenter* Neazor J considered the issue of jurisdiction to make an order for security

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1 *Skleton v Howcroft* [2017] NZHC 1149.

for costs against an intended plaintiff seeking a pre-commencement discovery order under the former High Court Rule 299.[2] His Honour noted that the intending plaintiff's argument was that as an application for pre-hearing discovery under r 299 was interlocutory in nature and was therefore made before any proceeding was in existence, r 60 did not apply and hence there was no jurisdiction to make an order for security for costs. His Honour referred to a decision of *Nelson v Dittmer* in which Heron J considered whether costs could be awarded to a successful applicant under r 299.[3] Heron J said:[4]

> I think the position is this. Once the interlocutory application is made by an intending plaintiff it is really the only proceeding before the Court, and to that extent and for a limited period the person from whom discovery is sought becomes a party to that application and therefore subject to the overriding discretion as to costs pursuant to R 46.

[6] Neazor J in *Hetherington Ltd v Carpenter* concluded that there was sufficient equivalence between r 60 as it relates to a proceeding and to r 46 relating to the making of an order for costs. Neazor J said:[5]

> I therefore differ from the view of the learned Master to the extent that I would hold that there is jurisdiction under r 60 to order security for costs in respect of a r 299 application.

[7] I consider that the reasoning of Neazor J in *Hetherington Ltd v Carpenter* is also applicable in the present case. In addition, I consider that the wording of r 5.45(6) further supports my conclusion that a Judge has jurisdiction to make an order for security for costs in respect of an application for pre-commencement discovery orders made pursuant to r 8.20. The applicant was described as "the intending plaintiff" and the three respondents were in each case described as an "intended defendant". I consider that both the intending plaintiff and the intended defendants were persons "in the position of plaintiff or defendant" for the purposes of r 5.45(6).

[8] Furthermore, I consider that the power contained in r 5.45(2) for the making of an order for security for costs where a Judge considers that it is "just in all the

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2 *Hetherington Ltd v Carpenter* (1993) 7 PRNZ 218 (HC).
3 *Nelson v Dittmer* [1986] 2 NZLR 48 (HC).
4 At 52.
5 At 222.

circumstances" provides further support for holding that a Judge has jurisdiction to make an order for security for costs in relation to an application for pre-commencement discovery under r 8.20.

[9] For these reasons I decline the application to extend the time for the filing of an application to rescind the interlocutory decision made in my judgment of 30 May 2017. The application is now made four months after the delivery of the judgment. The application is founded upon the grounds that the issue to be raised regarding jurisdiction to make an order in such circumstances appears to be novel. As the case of *Hetherington Ltd v Carpenter* illustrates, the matter has been considered in relation to the previous but closely analogous provisions of the High Court Rules. In all the circumstances I do not consider that it is in the interests of justice that an extension of time be granted. The application is dismissed.

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Paul Davison J