IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2016-404-000716
[2017] NZHC 1149

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: 7 February 2017

Counsel: Intending Plaintiff in person
B M Cunningham for First Intended Defendant
E J L Werry for Second Intended Defendant

Judgment: 30 May 2017

JUDGMENT OF PAUL DAVISON J

This judgment was delivered by me on 30 May 2017at 2.15pm
pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
BSA Law, Auckland
McDonald Law, Auckland

[1] This is an application by the first intended defendant, C M Howcroft (Mr Howcroft), and the second intended defendant, D Nair (Mr Nair), by which they seek an order that the intending plaintiff, Mr Skelton give security for costs in relation to the intending plaintiff's application for pre-commencement discovery orders pursuant to High Court Rule 8.20. The third intended defendant, Mr Bird, is not an applicant in relation to the current application. Both applicants also apply for an order staying the proceeding until any security for costs ordered is either paid or security provided. The applicants base their application on the grounds that Mr Skelton is an undischarged bankrupt who will be unable to pay costs if his claim against them is unsuccessful. Further, the applicants say that Mr Skelton's proposed proceedings are ill-founded and his application for pre-commencement discovery is nothing more than a "fishing expedition". They say that Mr Skelton's claim has little chance of success, and that they ought to be protected in terms of costs from being drawn into the litigation he is proposing to pursue.

Background

[2] There is a long history of litigation between Mr Skelton, Mr Howcroft and Mr Nair.

[3] In order to put Mr Skelton's application for particular pre-commencement discovery in context, it is necessary to briefly summarise what is an extensive litigation history.

[4] On 11 September 2006 the High Court made and order appointing Mr Nair as receiver of the Urban and Country Partnership,[1] which was a partnership of two trusts each representing the respective interests of Mr Skelton and his former wife. Subsequently Mr Nair in his capacity as receiver commenced a proceeding against Mr Skelton's trust. There was a settlement conference held on 4 August 2008 before an Associate Judge. Settlement was reached and a written heads of agreement was executed by the parties. Two deeds of settlement were subsequently entered into.

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1 *Skelton v Skelton* HC Auckland CIV-2006-404-002924, 11 September 2006.

[5] Mr Skelton years later commenced proceedings against Mr Nair. His claim related to the sale by Mr Nair as receiver of a half interest in a residential apartment on the Gold Coast, Queensland, that was owned by Mr Skelton's former wife's trust, to Mr Howcroft and his wife. Mr Howcroft and his wife were the existing owners of the other half interest in the property before their purchase from the receiver, Mr Nair. Mr Skelton's claim was struck out by Asher J in a judgment delivered on 24 April 2105.[2] Asher J held that the claim was precluded by reason of the settlement agreements entered into following the previous litigation:

> [16] The settlement agreement reached through a judicial settlement conference after the entering into of the agreement to sell to Mr Howcroft, referred in the recitals to the receiver completing the sale and the parties signing all documents and doing all things necessary to facilitate completion. It contained this clause at paragraph 14:
>
> > This agreement and completion of settlement in its terms are accepted by all parties in full satisfaction of all claims and obligations now or in the future inter parties, as between the trusts referred to herein and as between the Receiver, the trusts and parties herein or by Bevin or Marie against any family trust of which the other has been a beneficiary.
>
> And at paragraph 19:
>
> > The parties to this deed acknowledge that all claims they may have whether present or future, arising out of the receivership and the Receiver's entry into this Deed of Settlement are fully and finally settled upon execution of this deed.
>
> [17] It was stated in the variation of 30 August 2008 that the terms and conditions of the earlier agreement would remain in full force and effect. In the agreement of 25 February 2009 there was a new final settlement clause which provided as follows:
>
> > This agreement and completion of the settlement in its terms and the subsisting terms of the agreement dated 4 August 2008 and 30 August 2008 are accepted by all parties in full and final satisfaction of all claims and obligations now or in the future as between the trusts referred to herein and as between the receiver, the trusts and parties herein or by either Bevin or Marie against any family trust of which the other is or has been a beneficiary.
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> [18] These agreements were signed by Mr Skelton "in all capacities". They unambiguously settled between Mr Nair and Mr Skelton all claims that relate to the sale to Mr Howcroft.
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> [19] In addition to the settlement agreement referring to the Howcroft agreement, Mr Skelton in an affidavit sworn on 25 March 2008, some

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

months before the first settlement agreement, expressly referred to the Howcroft agreement and stated:

> I do not consider that the receiver has sought to obtain the best price for the Main Beach property.

Strike out

[20] It seems plain then that the very issue that Mr Skelton now complains about, namely impropriety or negligence in the sale to Howcroft, was at issue in the earlier 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.

….

[23] While it could be said that a notional cause of action was disclosed of sale by Mr Nair at an undervalue, Mr Nair appears to have a defence that is uncontestable and certain to succeed, namely that any claims relating to the Howcroft agreement were settled. It is an abuse of procedure to pursue court claims that have been compromised by a binding settlement.[3]

[6] Asher J also observed that Mr Skelton's claim against Mr Nair had hallmarks of being frivolous and vexatious:

> [24] Further, there are various hallmarks indicating this proceeding is a frivolous and vexatious proceeding. The delay in issuing these proceedings was not explained. The first statement of claim was extraordinarily prolix and diffuse. The amended statement of claim was more focused, but it addresses an issue that has already been the subject of litigation which has been settled, and raises speculative and unspecified allegations. Plainly it cannot succeed.

[7] Mr Skelton also brought proceedings against Mr Howcroft. In that proceeding he claimed that Mr Howcroft had breached fiduciary duties owed by him as a partner in the property and as a trustee of the Bevin Hall Skelton Children's Trust (the BHSCT), and specifically in connection with a loan Mr Howcroft arranged for the BHSCT for $70,000 from Mr Bird, the third intended defendant in this matter. Mr Bird was in the finance business as a lender. Mr Skelton alleged that Mr Howcroft did not have authority to arrange the borrowing or to sign a mortgage required by the lender to secure the loan. He further alleged that the BHSCT had not received the loan proceeds and had derived no benefit from the loan advance. In reply to these claims, Mr Howcroft said that he had been authorised and directed by

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[3] See for example *Peterson v Lucas Mills Pty Ltd* [2014] NZCA 6 at [6].

Mr Skelton to execute the mortgage and loan documents. He further said that in any event the claim was statute barred by the Limitation Act as being brought over nine years after the cause of action arose, being the execution of the loan contract on 15 September 2005. These proceedings were also struck out. In a judgment delivered by Associate Judge Sargisson on 11 June 2015, the Associate Judge upheld Mr Howcroft's submission that the claim was both precluded by the terms of settlement entered into and recorded in the heads of agreement of 4 August 2008, and statute barred by the Limitation Act 1950.[4]

[8] Mr Skelton appealed the judgement of Asher J, and unsuccessfully applied to the Registrar of the Court of Appeal for a waiver of the filing and hearing fees, and for the giving of security to be dispensed with. He then unsuccessfully applied for a review of the Registrar's decision. In the Court of Appeal's judgment dismissing Mr Skelton's application for review, Winkelmann J said:[5]

> [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 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 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.

[9] Mr Skelton then applied to the Supreme Court for leave to appeal against Winkelmann J's decision dismissing his application for review of the Registrar of the Court of Appeal's decision refusing a waiver of the requirement to pay security for costs. That application was dismissed by the Supreme Court in a judgment delivered on 9 November 2015.[6]

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4 *Skelton v Howcroft* [2015] NZHC 1313.
5 *Skelton v Nair* [2015] NZCA 343.
6 *Skelton v Nair* [2015] NZSC 169.

[10] Mr Skelton also applied to the High Court for a review of the decision of Sargisson AJ striking out his claim against Mr Howcroft. At a hearing before Muir J on 18 February 2016, Mr Skelton withdrew his application.[7]

[11] Mr Howcroft served a bankruptcy notice on Mr Skelton on 27 July 2015. On 29 April 2016 Doogue AJ dismissed an application by Mr Skelton to set aside the bankruptcy notice.[8]

[12] On 11 April 2016 Mr Skelton filed the originating application (subsequently amended), seeking a pre-commencement discovery order against Mr Howcroft.

[13] On 23 June 2016 Mr Skelton was adjudicated bankrupt on the application of Mr Howcroft on the basis of his failure to pay costs totalling $16,485.36 to Mr Howcroft in relation to the striking out of the proceeding against Mr Howcroft by Sargisson AJ on 11 June 2015.[9] In delivering judgment making the order adjudicating Mr Skelton as a bankrupt Venning J said:[10]

> Essentially Mr Skelton, the judgment debtor, submits that bankruptcy would have the effect of preventing the BH Skelton Children's Trust (the Trust) from pursuing three proceedings. Those proceedings are as I understand it, effectively the only assets of the Trust. The relevance of that to his case is that he, along with his children, are, I am told, discretionary beneficiaries of the Trust.
>
> Those three assets are, in his words:
>
> (a) first, the application for pre-commencement discovery against the judgment creditor, who was previously solicitor and co-trustee for the Trust, which as noted, is for hearing in August;
>
> (b) next, a claim against Mr Nair, a matrimonial property receiver, (which claim I apprehend was dismissed by this Court because it was the subject of an appeal to the Court of Appeal). That appeal hearing was heard on 16 June; and
>
> (c) finally, a proceeding against Mr Bird, which again I apprehend was unsuccessful as it has an appeal to the Court of Appeal for hearing on 1 August 2016.

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7 *Skelton v Howcroft* HC Auckland CIV-2014-404-1897, 18 February 2016 (Minute No 2 of Muir J).

8 *Howcroft v Skelton* [2016] NZHC 838.

9 *Howcroft v Skelton* [2016] NZHC 1389.

10 *Howcroft v Skelton* [2016] NZHC 1389 at [14], [15].

Venning J commented on the three claims said by Mr Skelton to be assets of the BHSCT capable of producing funds in the following terms:[11]

> In relation to that it is relevant to consider the proposed claims briefly. First, the claim for pre-commencement discovery follows the strike-out application in this case. The strike-out was successful, largely on the basis of a limitation defence. The only response or answer to that would be an allegation of fraud. It is for that reason that the Trust seeks pre-commencement discovery against the judgment creditor.
>
> It has to be said that despite everything Mr Skelton has advanced in support of the argument for the Trust for fraud that on the information before the Court the proposed claim is at best speculative. Clearly, it is still in its early stages. No proceedings have been issued.
>
> Next, the other two proceedings were cases where the Trust was unsuccessful before the High Court and are currently subject to appeal.
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> Again on the information currently before the Court, the Court cannot be satisfied that there is any particular merit in those claims, such that the adjudication should be halted, particularly as they are not personal to Mr Skelton and are not against the judgment creditor.

[14] As well as litigation against Mr Nair and Mr Howcroft, Mr Skelton has also been involved in extensive litigation with Mr Bird. For present purposes, I merely note that as background. The third intended defendant, Mr Bird, has not joined the present application for security for costs made by Mr Nair and Mr Howcroft.

Mr Skelton's proposed claim against the intended defendants

[15] Against that background, Mr Skelton now proposes to bring a yet further claim against Messrs Nair, Howcroft and Bird, and has filed an application seeking orders against the three intended defendants requiring them to make particular discovery before he commences the intended proceeding. He initially sought a pre-commencement order only against Mr Howcroft, but has since filed an amended application in which he also seeks discovery orders against Mr Nair and Mr Bird. Mr Skelton has also filed a draft statement of claim in which he has set out the allegations he proposes to make after obtaining the particular discovery sought by his application.[12]

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[11] At [18] – [21].

[12] Entitled DRAFT INDISTINCTLY PARTICULARISED STATEMENT OF CLAIM FOR THE PURPOSE OF THE NARRATIVE CONCERNING THE EXISTANCE [sic] OF THE EXISTANCE [sic] OF A CASE FOR PRE-COMMENCEMENT DISCOVERY.

[16] In his draft statement of claim Mr Skelton sets out four causes of action. The first cause of action against Mr Howcroft and Mr Bird relates to the $70,000 loan made by Mr Bird to the BHSCT arranged by Mr Howcroft. Mr Skelton alleges that he has suffered losses arising from Mr Howcroft's fraudulent breaches of trust as co-trustee and fiduciary duties as solicitor, and Mr Bird's fraudulent breach of contractual duties. The propriety of Mr Howcroft's involvement with the $70,000 loan was included within the issues raised by the previous litigation which were settled, and which was the subject of the claim struck out by Sargisson AJ

[17] The second cause of action is also against Mr Howcroft and Mr Bird and involves allegations of fraud and mismanagement of the funds of the various "Skelton entities". This cause of action alleges breaches of duty by Mr Howcroft as solicitor for Mr Skelton and his family entities, and by Mr Bird and Mr Howcroft by failing to account for funds held and transacted by them on trust for Mr Skelton and his family entities.

[18] The third cause of action is against Mr Howcroft and Mr Nair and relates to the sale by Mr Nair of the half interest in the Gold Coast apartment property. Mr Skelton here alleges:

> fraud jointly and severally by Mr Nair and Mr Howcroft in respectively purportedly without authority buying and selling a half apartment between each other for their own private purposes and of being complicit in each other's frauds by un-justifiably [sic] obtaining payment of all the resulting legal fees from their frauds from the U&CP [Urban and Country Partnership] trust funds by misleading Mr Skelton by concealing relevant matters including the purported sale itself when he signed the Heads of Agreement on 4 August 2008.

[19] The fourth cause of action also alleges fraud by Mr Nair and Mr Howcroft by means of their pursuit of "litigation against each other for their own private purposes and by being complicit in each other's frauds by un-justifiably [sic] obtaining payment of all the resulting legal fees from their frauds from the U & CP trusts' funds by misleading Mr Skelton by concealing relevant matters including the litigation itself when he signed the Heads of Agreement on 4 August 2008." Mr Skelton further alleges that the agreement for sale and purchase of the half interest in the Gold Coast apartment required the net purchase price of AUD300,025 to be paid

into the trust account of the receiver's solicitors, Patel Nand Law, on 17 May 2007. It is alleged that contrary to that requirement, the purchase money was paid by Mr Howcroft directly to Mr Nair who banked it into his own bank account.

[20] The relief sought by Mr Skelton includes an order setting aside the heads of agreement dated 4 August 2008, the provision of accounts, damages and aggravated damages, together with interest and costs.

[21] As is apparent from the recitation of the litigation history, the matters that Mr Skelton proposes to raise as a basis for his claim against the intended defendants all arise from substantially the same events that were previously the subject of the earlier proceedings and which were comprehensively and finally settled. However, Mr Skelton now alleges fraud on the part of the intended defendants, no doubt in order to contend that the statute of limitations should not prohibit his claim. However his allegations of fraud are speculative and despite the extensive nature of his draft pleadings, they contain no particulars of fraud such as would satisfy the requirement that a claim of fraud must be fully and precisely pleaded and particularised.

Mr Skelton's application for pre-commencement discovery orders

[22] Mr Skelton's application for pre-commencement discovery seeks financial records in the hands of third parties, specifically and in terms of his application:

> (a) Mr Nair's discovery of the Skelton entities done in 2008 when he was a Matrimonial Property Receiver. …
>
> (b) Mr Nair's dealing with Mr Howcroft's funds of NZ$425,000.00, being allegedly the purchase of price [sic] of the half apartment and what he did with those funds may not have been in Mr Howcroft's hands.
>
> (c) Mr Bird's records of his receipt and payment inter se with Mr Howcroft are important but there may be no grounds for the belief that those records as to what Mr Bird did with them were in Mr Howcroft's hands.
>
> also the BNZ records and statement for the Skelton entitles [sic].

[23] In the amended interlocutory application for pre-commencement discovery Mr Skelton says:

> Once pre-commencement discovery of Mr Howcroft's financial records of his dealings with the Skelton entities are completed it will hopefully enable the distinct particularisation of that part of the claim for the purposes of a claim for fraud or mistake. A professional forensic accountant will reconcile the information. At that point there may be a problem with Mr Nair and Mr Bird. If so they could be added later as intended defendants. **This is why a staged approach and different deadlines may be necessary.**
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> (Emphasis in original).

The first and second intended defendants' submissions

[24] Mr Cunningham, for Mr Howcroft, and Mr Werry, for Mr Nair, have made joint submissions in support of their clients' application. Their first submission is that although purporting to and ostensibly acting in his capacity as trustee of the BHSCT Mr Skelton, as intending plaintiff, is an undischarged bankrupt with an extensive history of failing to pay Court costs in accordance with Court orders. They refer to Mr Skelton being adjudicated bankrupt on 23 June 2016 following his failure to comply with the bankruptcy notice which sought the payment of approximately $16,000 of legal costs that he was ordered to pay in relation to the striking out of his claim against Mr Howcroft. In addition Mr Skelton has also failed to pay costs of $7,379.49 to Mr Howcroft in relation to the discontinuance of his application for review of the order striking out his claim. Mr Skelton also failed to pay costs in the sum of $4,198, being costs and disbursements on the order adjudicating him bankrupt on 23 June 2016. Furthermore, Mr Skelton has failed to pay costs of $8,970 which he was ordered to pay on the striking out of his claim against Mr Nair on 24 April 2015. Mr Skelton has also failed to pay the costs of $2,500 which he was ordered to pay by the Supreme Court in its order dismissing his application for leave to appeal against the Court of Appeal's decision of 31 July 2015.

[25] Having regard to that catalogue of instances of failure to comply with court orders and failure to pay costs, counsel submit that it is clear and indeed obvious that Mr Skelton will be unable to meet any order for costs made against him in relation to the current pre-hearing application and the proposed proceedings.

[26] Counsel further submit that the BHSCT, of which Mr Skelton is a trustee, has insufficient assets to meet any order for costs. Apart from some household furniture of modest value, the assets of the trust are said by Mr Skelton to consist of the recovery of money by means of the claims he proposes to make against Mr Howcroft, Mr Nair and Mr Bird. Counsel say that the parlous financial position of the trust was confirmed by Mr Skelton in his submissions to the High Court on 23 June 2016.[13]

[27] Counsel for the applicants, Mr Howcroft and Mr Nair, submit that Mr Skelton's proposed claims have little prospect of success, particularly as previous claims based on the same or substantially the same alleged facts have been struck out by the Court. The claims remain subject to both estoppel and limitation defences.

[28] As regards the first cause of action, counsel refer to email exchanges evidenced by emails produced to the Court which they submit is incontrovertible evidence that Mr Skelton authorised Mr Howcroft to execute the loan for the amount of $70,000. Specifically counsel refer to emails dated 13 and 15 September 2005 showing exchanges between Mr Skelton and Ms Bentinck-Stokes regarding the arrangements for Mr Howcroft to execute the mortgage pursuant to a power of attorney. Ms Bentinck-Stokes was a solicitor at Mr Howcroft's law firm who was attending to the execution of a second mortgage over the BHSCT's property to secure an advance of $70,000. Mr Skelton emailed Ms Bentinck-Stokes on 15 September 2005 saying "Mike can sign if he doesn't charge. I will post him his cheque. Cheers Bevin." The applicants submit that, having authorised Mr Howcroft to execute the mortgage, the BHSCT is estopped from now asserting that Mr Howcroft did not have authority to proceed to execute the mortgage.

[29] In his second cause of action Mr Skelton alleges that in or about 1998 he and his former spouse Marie Skelton entered into a partnership with Mr Howcroft and his spouse to purchase the other half share in the Gold Coast apartment. The pleading alleges that Mr Howcroft, in breach of fiduciary duties owed as a partner in the property ownership, failed to disclose to Mr Skelton the existence of a sale and purchase agreement dated 18 May 2007 for the sale of an undivided half interest in

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[13] See [13] above.

the apartment property from Mr Nair as receiver for the sum of $380,000. The applicants say that there was never any evidence or notification that the BHSCT ever had an interest in the Gold Coast apartment and consequently the intending plaintiff as trustee of the BHSCT has no standing to bring a claim in respect of the sale of the apartment. They also say that, in any event, the sale was effected on a bona fide basis and for full value. Furthermore, the applicants say that any claim relating to the sale of the apartment or failure to disclose the existence of the sale and purchase agreement is time barred.

[30] The limitation issue was addressed by Sargisson AJ in her judgment of 11 June 2015 in which she struck out Mr Skelton's claim. Sargisson AJ said in relation to limitation:[14]

> As to whether the claim is time-barred, the agreement for the supposed sale at undervalue was entered into on or about 18 May 2007. Mr Skelton does not say when he realised the effect of the agreement, but it is clear that he was notified by the Queensland Land Registry that his consent to the transfer was required. In any case, the Settlement Agreement signed on 4 August 2008 is clear that the sale was to proceed.
>
> The original statement of claim was not filed until 30 July 2014. It did not include a claim for breach of duty as a partner. That was included in the amended statement of claim on 30 January 2015, so 30 January 2015 is the relevant date regarding this claim. Unless Mr Skelton can show that he was prevented from claiming through fraud or mistake, he is precluded from claiming. Section 28 of the Limitation Act 1950 defines the fraud and mistake exceptions:
>
> > **28 Postponement of limitation period in case of fraud or mistake**
> >
> > Where, in the case of any action for which a period of limitation is prescribed by this Act, either—
> >
> > (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
> >
> > (b) the right of action is concealed by the fraud of any such person as aforesaid; or
> >
> > (c) the action is for relief from the consequences of a mistake,—
> >
> > the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case

[14] *Skelton v Howcroft*, above n 4, at [18] – [22] (footnotes omitted).

> may be, or could with reasonable diligence have discovered it

> Materially, Mr Skelton has not pleaded such exceptions. Nor could he. He submits that the price was not notified in the Settlement Agreement, and it is true that the receiver Mr Nair initially signed the agreement for sale and purchase in his stead. But not only was he well and truly on inquiry by the time the Settlement Agreement was concluded (because it makes clear that the sale was to proceed), it is clear that he knew the property was being sold to the Howcrofts well in advance of the Settlement Agreement. In his affidavit of 25 March 2008, Mr Skelton himself said:
>
> > It is now clear that on 18 May 2007 [the receiver] had already signed an agreement for sale and purchase of the property to the Howcrofts for $780,000.
>
> I consider that this statement places beyond doubt the fact that Mr Skelton knew on 25 March 2008, if not before, about the facts on which he purports to found his claim, and that after that point there can be no argument that he was prevented through fraud or mistake from bringing a claim. 25 March 2008 was more than six years before the current claim was filed.
>
> The limitation defence therefore applies and I consider that the claim fails on this ground.

[31] On the basis of the Associate Judge's decision and having regard to the matters referred to by the Associate Judge, the applicants submit that Mr Skelton's proposed claim relating to the second cause of action similarly has little realistic prospects of success.

[32] The applicants also refer to the heads of agreement dated 4 August 2008 which evidenced full and final satisfaction of any claims between the intending plaintiff either in his personal capacity and as a trustee of the BHSCT. The heads of agreement was entered into by Mr Nair as receiver of the Urban and Country Partnership and the heads of agreement provides in cl 14 as follows:[15]

> This agreement and completion of settlement in its terms are accepted by all parties in full satisfaction of all claims and obligations now or in the future inter parties or by either Bevin [Skelton] or Marie [Skelton] against any family trust of which the other is or has been [a] beneficiary, as between the trusts referred to herein and as between the Receiver, the Trusts and parties herein.

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[15] Although nothing turns on it as the scope and finality of settlement remains the same, the handwritten heads of agreement provides for the interpolation of certain words and I have set this out in full again notwithstanding its inclusion in the Judgment of Asher J, as I consider this to be the intended wording.

[33] Clause 19 of the heads of agreement provides:

> The parties to this deed acknowledge that all claims they may have whether present or future, arising out of the receivership and the receiver's entry into this deed of settlement are fully and finally settled upon execution of this deed.

[34] Mr Skelton's fourth cause of action alleges that the net purchase price of AUD300,025 for the half interest in the Gold Coast apartment was not paid into the trust account of the receiver's solicitors. Mr Skelton alleges that instead, the net purchase price was paid directly to Mr Nair who banked it into his own account. In answer to that allegation, Mr Cunningham refers to an affidavit by Mr Howcroft filed in support of his application for security for costs, in which Mr Howcroft explains that on 11 August 2008 he paid NZD423,216.19 directly to Patel Nand Legal. Mr Howcroft exhibited to his affidavit the settlement statement/tax invoice issued to him and his wife by Patel Nand Legal setting out the calculation of the amount required to settle the purchase, namely NZD423,216.19. Mr Cunningham says this evidence is a complete answer to the allegation that there was any misapplication of the purchase money.

[35] Finally, counsel for the intended defendants submits that Mr Skelton has not pointed to any evidence of fraud or mistake that would operate to postpone the limitation period provided for in the Limitation Act 1950.

Mr Skelton's submissions

[36] Mr Skelton submits that his intended proceedings seek to recover damages for losses caused by Mr Nair as receiver and Mr Howcroft as his former solicitor and trustee. He says his failure to pay the legal costs ordered against him and the financial position of the BHSCT are the result of actions by Mr Bird and Mr Howcroft and the failure of Mr Nair to act as a receiver in accordance with his duties.

[37] Mr Skelton says that if any of the claims he proposes to bring are successful he will be able to pay the costs order in relation to any in which he does not succeed.

[38] He submits that should the Court make an order for security for costs, it will effectively prevent the BHSCT claims from being pursued as the trust does not have assets or funds with which to meet legal costs, and it would require the beneficiaries, being his adult children, to fund the litigation and the payment of security for costs.

[39] Mr Skelton submits that the $70,000 sum loaned by Mr Bird was not paid or applied for the benefit of the BHSCT and he says only pre-commencement discovery will enable determination of the application of the loan money.

[40] He submits that the prospects of success of his claims are high by reason of the different allegations now pleaded, specifically allegations of fraud. He says that fraud by the intended defendants was not previously provable, but that what was previously placed before the courts by the intended defendants was incorrect information and that once the correct information is available a different outcome can be expected. He submits that Asher J was misled by incorrect information placed before him.

[41] Similarly, he says Associate Judge Sargisson adopted the same approach as had Asher J in applying the provisions of the heads of agreement dated 4 August 2008.

[42] In his submissions Mr Skelton reviewed the actions of the intended defendants, and submitted that having regard to their respective experience, their failure to inform him of their actions is itself an indication of a lack of probity. He submitted that the registration of the transfer of the Gold Coast apartment was achieved as a result of fraud, by Mr Nair telling him that he had previously signed an agreement for sale and purchase of the apartment. Acting on that information he says he signed a transfer. He says that he was misled and that Mr Nair acted fraudulently. He says that Mr Howcroft was also involved in getting him to sign the transfer, the effect of which was to transfer the half interest in the apartment to Mr Howcroft and his wife. He says that the relationship between him and his wife and Mr Howcroft and his wife in relation to the Gold Coast apartment was in the nature of a partnership and accordingly Mr Howcroft owed duties of good faith. He says he was effectively tricked by being told that he had already signed an agreement to sell the

BHSCT's interest in the apartment, and believing that he had, he signed the transfer. He says that the litigation conducted between Mr Nair as receiver and Mr Howcroft as trustee of the BHSCT occurred without his knowledge when he was residing in China, and that it exhausted the financial resources of the BHSCT which he would never have allowed to happen.

[43] It is fair to say that Mr Skelton's submissions were rather unfocussed and discursive. However they can be summarised as amounting to a submission that notwithstanding the previous decisions striking out his claims against Mr Nair and Mr Howcroft, Mr Skelton maintains that they are responsible for acting in their own interests at the expense of the BHSCT and himself. He submits that discovery of the relevant financial records that he is seeking by means of the pre-commencement discovery orders, will assist to confirm his claims.

The relevant rules and principles relating to security for costs

[44] Rule 5.45 of the High Court Rules confers power on the Court to order security for costs where a Judge is satisfied that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff's claim is unsuccessful and where the Judge considers it just in all the circumstances to make an order requiring security for costs to be given. Rule 5.45 provides:

> (1) Subclause (2) applies if a Judge is satisfied, on the application of a defendant,—
>
> ...
>
> (b) that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding.
>
> (2) A Judge may, if the Judge thinks it is just in all the circumstances, order the giving of security for costs.
>
> (3) An order under subclause (2)—
>
> (a) requires the plaintiff or plaintiffs against whom the order is made to give security for costs as directed for a sum that the Judge considers sufficient—
>
> (i) by paying that sum into court; or

(ii) by giving, to the satisfaction of the Judge or the Registrar, security for that sum; and

(b) may stay the proceeding until the sum is paid or the security given.

[45] In *Rafiq v Mediaworks TV Ltd* Faire J described the application of the rule as follows:[16]

> The rule involves a two-stage process. The first stage has been referred to in the cases as the threshold test. That stage requires a finding that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding.

[46] The plaintiff in *Rafiq* was an undischarged bankrupt. The same situation applies here and I am satisfied that the threshold test is met by the intended defendants having shown that there is reason to believe that Mr Skelton will be unable to pay the costs if his claim against them is unsuccessful. It has also been shown that the BHSCT does not have assets which could be used to meet an order for costs. I turn to consider whether it is just in all the circumstances to order Mr Skelton to give security for costs.

[47] In *McLachlan v MEL Network Ltd* the Court of Appeal, with reference to what was then High Court Rule 60(1)(b), similarly provided that the Court could order the giving of security for costs "if it thinks fit in all the circumstances".[17]

> [15] The rule itself contemplates an order for security where the plaintiff will be unable to meet an adverse award of costs. That must be taken as contemplating also that an order for substantial security may, in effect, prevent the plaintiff from pursuing the claim. An order having that effect should be made only after careful consideration and in a case in which the claim has little chance of success. Access to the Courts for a genuine plaintiff is not likely to be denied.
>
> [16] Of course, the interests of defendants must also be weighed. They must be protected against being drawn into unjustified litigation, particularly where it is over complicated and unnecessarily protracted.

Conclusion

[48] Having regard to that history and the findings of this Court and the appellate

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16 *Rafiq v Mediaworks TV Ltd* [2014] NZHC 1699 at [7].
17 *McLachlan v MEL Network Ltd* (2002) 16 PRNZ 747 (CA).

courts as regards Mr Skelton's claims, essentially on substantially the same factual basis as he proposes to rely on in the present proceedings, it is clear that Mr Skelton's proposed claims against the intended defendants face significant and probably insurmountable obstacles. I consider that it is appropriate to categorise them as realistically having little prospect of success.

[49] Mr Skelton says fraud, if established, will override the Limitation Act provisions that would otherwise prevent the claims proceeding.[18] As regards this approach it is appropriate to note that a plaintiff must be able to show a proper prima facie case to support an allegation of fraud at the time the pleading is filed. A plaintiff cannot proceed in the hope that proof of a suspected fraud will appear from discovery or during cross-examination.[19] Mr Skelton is seeking pre-commencement discovery in order to undertake an analysis of the movement of funds in order to obtain evidence to support his allegations of fraud. However he is yet to provide any cogent support for the making of what are undoubtedly very serious accusations.

[50] The earlier observations of Asher J in his judgment of 24 April 2015, regarding the proceedings then brought against Mr Nair having hallmarks indicating they were frivolous and vexatious sound even louder now. The draft statement of claim filed by Mr Skelton is similarly prolix and unfocussed. The unfocussed allegations in the proposed pleading informs an assessment of the nature of the litigation that the intended defendants will be drawn into if the matter proceeds, and as such also informs the Court's assessment of an appropriate order for security for costs.

[51] Having regard to the history of litigation between the parties initiated by Mr Skelton and the prior disposition of his claims by prior judgments of this Court, I am satisfied that his presently intended proceeding, including his application for pre-commencement discovery orders, is a proceeding with little or no realistic prospect of success and that having regard to what I consider to be his dogged persistence in pursuing unmeritorious claims, it is just in all the circumstances to order that he give security for costs. Whilst it may be that as an undischarged

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18 Refer above at [23].

19 *Ng v Harkness Law Ltd* [2014] NZHC 850 at [44], this decision was overturned on appeal but not on this point.

bankrupt he has little or no ability to personally satisfy an order requiring him to give security for costs, by bringing the proceeding as trustee for the BHSCT, there is that separate capacity which must be also considered. However it appears from Mr Skelton's previous submissions to the Court, the BHSCT's only assets are its prospects of recovery of money from the intended defendants.

[52] Where it is shown that a plaintiff's inability to meet an award of costs can be causally linked to the actions of the defendants and in respect of which remedies are sought, such a causal link will be relevant to the Court's decision as to whether it is just to make an order for security for costs, and if so whether the amount ordered should be tailored accordingly. However, notwithstanding the allegations made by Mr Skelton against the intended defendants in the draft statement of claim, I consider that when those allegations are considered against the broader background of the extensive history of litigation between the parties, this is not a case where it would be appropriate to conclude that such a causal link exists.

[53] Having regard to the preliminary assessment of the merit of Mr Skelton's intended claim by reference to the earlier decisions of this Court and the documentation filed, I consider that notwithstanding the financial position of the intending plaintiff as a bankrupt and that of the BHSCT of which he is a trustee, that it is just in all the circumstances to make an order against the intending plaintiff requiring the giving of security for costs. I find that such an order is necessary as a means of protecting the intended defendants against incurring legal costs in connection with this proposed litigation. Even at this preliminary stage in which pre-commencement discovery orders are to be sought, the wide ranging nature of the allegations made by Mr Skelton indicates the potential scope of discovery and the incurring of significant legal costs in opposing the application and complying with any discovery order made.

[54] The prior litigation conducted by Mr Skelton against these same parties has involved misconceived assertions and allegations, which have nevertheless been pursued with a dogged determination warranting the description of having the hallmarks of being frivolous and vexatious. If the intending plaintiff wishes to proceed with claims against the intended defendants based on essentially the same

allegations as have already been addressed in earlier proceedings, it is just and proper that the intended defendants who are being drawn into yet another round of litigation, are protected so far as their legal costs are concerned by means of an order requiring the intending plaintiff to give security for their costs.

The quantum of security for costs

[55] The first and second intended defendants note that at present Mr Skelton personally has failed to pay a total of $42,562.62, being the total of previous costs ordered by the courts.

[56] Counsel for the intended defendants submit that on a scale 2B basis, allowing for a two day trial and applying Schedule 3 of the High Court Rules, a costs calculation of $35,680 would result. There being two intended defendants, the first and second intended defendants say that security should be ordered in respect to both of them, being a total of $71,360, and they submit that the security ordered should be not less than $75,000.

[57] In my view it would be wrong to ignore and overlook the unpaid costs as previously ordered by the Court. The fact that Mr Skelton is an undischarged bankrupt and that there is a substantial amount of costs outstanding is a clear indication of the intending plaintiff's inability to meet a future order for costs.

[58] Having regard to the circumstances as set out in the summary above, I consider that it is just in all the circumstances to order Mr Skelton to give security for costs based on a scale 2B calculation as quantified for a two day trial, but staged by reference to the sequence by which the preliminary issue of pre-commencement discovery will necessarily be addressed before any proceedings are filed, and thereafter disposition of any applications to strike out the claim having regard to the previous applications made by the intended defendants.

[59] Of course at this early stage it is not possible to foresee what interlocutory applications may arise, although as I have said an application to strike out the claims can be anticipated having regard to the previous and successful applications made by

the intended defendants. If such applications succeed then obviously there will be no trial, but the hearing of such applications will itself be a reasonably substantial interlocutory hearing involving legal costs that have not been factored into the costs assessment made by the intended defendants.

[60] For those reasons I will reserve leave to the first and second intended defendants to apply for further security for costs in order to address particular aspects of the proceedings as may actually ensue.

[61] Accordingly I order that:

(a) The intending plaintiff is to give security for costs in the sum of $15,000 in respect of each of the first and second intended defendants (i.e. a total sum of $30,000), such sum to cover the first stage of this proceeding including the intending plaintiff's application for pre-commencement discovery and any interlocutory applications relating to the striking out of the proceeding.

(b) If such security for costs is not paid by 4:00pm on Friday 16 June 2017 to the Registrar of this Court, the proceeding shall thereupon be stayed until such security is paid.

(c) Leave is reserved to the first and second intended defendants to apply by memorandum to have the issue of further security for costs determined in respect of the further stages of the proceeding beyond pre-commencement discovery and any interlocutory applications to strike out the proceedings, should the proceedings continue thereafter.

(d) The intended first and second defendants have been successful in relation to their application for security for costs, and I order the intending plaintiff to pay costs of $1,000 to each of the first and second intended defendant, together with disbursements to be fixed by the Registrar.

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Paul Davison J