IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 88/2019
[2019] NZSC 126

BETWEEN	RIKI SCOTT STEEN WALLS Applicant
AND	ULSTERMAN HOLDINGS LIMITED (IN LIQUIDATION) First Respondent
	VIVIEN MADSEN-RIES AND HENRY DAVID LEVIN AS LIQUIDATORS OF ULSTERMAN HOLDINGS LIMITED (IN LIQUIDATION) Second Respondents

Court:	Winkelmann CJ, Glazebrook and O'Regan JJ
Counsel:	A Shaw for Applicant N H Malarao and B J Hamilton for Respondents
Judgment:	15 November 2019

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay costs of $2,500 to the second respondents.

REASONS

[1] The applicant was a 50 per cent shareholder and sole director of the first respondent (the Company). The Company was put into liquidation in August 2016 on the application of the Commissioner of Inland Revenue. The second respondents (the liquidators) were appointed as its liquidators.

[2] The liquidators investigated the affairs of the Company and issued proceedings against the applicant, alleging breaches of duties imposed on him as a director under the Companies Act 1993. The liquidators sought orders requiring him to pay compensation.

[3] The proceedings were served on the applicant but he took no steps. After the time for the filing of a statement of defence had expired, counsel for the liquidators filed a memorandum with the High Court, requesting the allocation of a formal proof hearing in accordance with r 15.9(2) of the High Court Rules 2016 (the Rules).[1] On 14 February 2017, Associate Judge Christiansen adjourned the proceeding to a formal proof hearing before a Judge.[2] That hearing proceeded before Peters J and she issued a reserved decision entering judgment against the applicant in the sum of $489,810.06 together with interest and costs.[3]

[4] Rule 15.9 relevantly provides:

> **15.9 Formal proof for other claims**
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> (1) This rule applies if, or to the extent that, the defendant does not file a statement of defence within the number of working days required by the notice of proceeding, and the plaintiff seeks judgment by default for other than a liquidated demand.
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> (2) The proceeding must be listed for formal proof and no notice is required to be given to the defendant.
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> (3) After a proceeding is listed for a formal proof hearing, no statement of defence may be filed without the leave of a Judge granted on the ground that there will or may be a miscarriage of justice if judgment by default is entered, and on such terms as to time or otherwise as the Judge thinks just.
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> …

[5] Rule 15.10 provides that a person against whom judgment is entered by default after a formal proof hearing can apply to have the judgment set aside. For reasons which are not apparent to us, the applicant has not made an application under r 15.10.

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1 The High Court Rules 2016 are deemed to form part of the Senior Courts Act 2016: see s 147 of that Act.

2 *Ulsterman Holdings Ltd (in liq) v Walls* HC Tauranga CIV-2016-470-184, 14 February 2017.

3 *Ulsterman Holdings Ltd (in liq) v Walls* [2017] NZHC 3040.

Instead he appealed against the entry of judgment to the Court of Appeal. That Court dismissed his appeal.[4]

[6] The applicant now seeks leave to appeal to this Court against the judgment of the Court of Appeal.

[7] The essence of the applicant's complaint is that he received no notice of the formal proof hearing. He says this meant he did not have the chance to apply for leave to file a statement of defence out of time.

[8] He argues that leave should be granted because a matter of general or public importance (or a matter of general commercial significance) arises or because, if leave is not given, a substantial miscarriage of justice may occur.

[9] The applicant argues that the statement in r 15.9(2), that no notice of a formal proof hearing need be given to a defendant, should be given an interpretation that is consistent with the New Zealand Bill of Rights Act 1990.[5] The interpretation he sought to impress upon the Court of Appeal was that the statement in 15.9(2), that no notice of a formal proof hearing needs to be given, dealt only with the decision to schedule a formal proof hearing and that notice of the hearing itself should have been given. He pointed to s 27 of the New Zealand Bill of Rights Act, which gives him the right to the observance of the rules of natural justice.

[10] We do not consider that there is sufficient prospect of that argument succeeding to justify a further appeal. The words of r 15.9(2) are clear and unambiguous and we do not see any prospect of success in an argument that they should be interpreted in the manner suggested by the applicant.

[11] The applicant argued in the Court of Appeal that r 15.9(3) gives a right to file a statement of defence, with the leave of a Judge and this right cannot be exercised if notice of the formal proof hearing is not given. The Court of Appeal rejected this argument. It considered that the right to file a statement of defence arises when

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4 *Walls v Ulsterman Holdings Ltd (in liq)* [2019] NZCA 365 (Stevens, Venning and Dunningham JJ).

5 New Zealand Bill of Rights Act 1990, s 6.

proceedings are filed. The applicant had been advised of this right, as well as being advised to consult a lawyer. Once the time for filing a statement of defence lapsed, r 15.9(3) placed a limit on the pre-existing right to file a statement of defence: it could be done only if a Judge gave leave.

[12] On that basis, the Court rejected the applicant's argument that he had suffered a breach of natural justice.

[13] We do not consider the applicant's arguments in relation to r 15.9 have sufficient prospect of success to justify a further appeal. The applicant's complaint that he has been the victim of a breach of the rules of natural justice fails to confront the fact that the proceeding has been conducted in accordance with the rules of the Court (contained in primary legislation) which are clear and unambiguous. Those rules have their own safeguard to deal with the possibility that a miscarriage of justice may result from the default process culminating in a formal proof hearing: the right to seek an order setting aside the default judgment under r 15.10.

[14] In this case, the notice of proceeding was served on the applicant. It contained a notice telling him of the need to file a statement of defence within a specified time. He chose to do nothing. He did not even provide an address for service. When confronted with the default judgment issued after the formal proof hearing, he chose not to seek to have it set aside under r 15.10. In these circumstances we do not consider there is any real prospect that a Court would find a breach of natural justice occurred.

[15] The applicant also sought to argue that the liquidators were bound by the New Zealand Bill of Rights Act because they had been appointed by the Court. We do not see this argument as having any influence on the outcome of the case.

[16] We do not have any concern that a substantial miscarriage of justice will occur if leave is not given.[6] Rule 15.10 provides an obvious process for the applicant to pursue if he considers that the default judgment has occasioned a miscarriage of justice.

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[6] Senior Courts Act 2016, s 74(2)(b); and *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369 at [4]–[5].

[17] The application for leave to appeal is dismissed.

[18] The applicant must pay costs of $2,500 to the liquidators.

Solicitors:
Bytalus Legal, Auckland for Applicant
Meredith Connell, Auckland for Respondents