

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA102/2018
[2019] NZCA 365**

BETWEEN

RIKI SCOTT STEEN WALLS
Appellant

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

Hearing: 4 July 2019

Court: Stevens, Venning and Dunningham JJ

Counsel: A Shaw and P V Cornege for Appellant
N H Malarao and B J Hamilton for Respondents

Judgment: 15 August 2019 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondents one set of costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Venning J)

[1] Riki Walls was the sole director of Ulsterman Holdings Ltd. Mr Walls and his partner each owned 50 per cent of the shares in the company. The company was placed into liquidation in August 2016 on the application of the Commissioner of Inland Revenue. The second respondents, Ms Madsen-Ries and Mr Levin, were appointed liquidators.

[2] Following their investigation into the affairs of the company the liquidators issued proceedings against Mr Walls. The liquidators alleged that Mr Walls had breached the duties imposed upon him as a director under the Companies Act 1993 and sought orders requiring him to pay compensation to the company for such breaches.

[3] The proceedings were served on Mr Walls. He took no steps. Following a formal proof hearing Peters J entered judgment against him in the sum of \$489,810.06, together with interest and costs.¹

[4] Mr Walls has not sought to have the judgment set aside under r 15.10 of the High Court Rules 2016 (the Rules) but has instead appealed the entry of judgment against him to this Court.

The appeal

[5] In the amended notice of appeal Mr Walls raised the following points:

- (a) At no time after the proceeding was listed for formal proof was he given notice that he could file a statement of defence with leave as provided by r 15.9(3).
- (b) In an on the papers minute² Associate Judge Christiansen listed the proceeding for formal proof in a manner that infringed his rights

¹ *Ulsterman Holdings Ltd (in liq) v Walls* [2017] NZHC 3040.

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

under r 15.9(3) (when read together with ss 3(a), 6, 27(1) and 28 of the New Zealand Bill of Rights Act 1990 (BORA)).

- (c) The Deputy Registrar allocated a hearing date for the formal proof of 7 March 2017. By failing to draw the attention of a judicial officer to the fact no notice had been given to the appellant of his rights under r 15.9(3) the Deputy Registrar acted in a manner that infringed the appellant's rights.
- (d) In deciding to hear and proceeding to determine the application for formal proof Peters J infringed the appellant's rights under r 15.9(3), (read together with the aforesaid sections of BORA), in that the Judge did not take any steps to give notice to Mr Walls of his rights under r 15.9(3).
- (e) The liquidators, being persons who had a duty to act in accordance with the principles of natural justice and fairness, did not take any step after the proceeding was listed for a formal proof hearing to give notice to Mr Walls of his rights under r 15.9(3).

The relevant procedural history

[6] The notice of proceeding and statement of claim, together with the plaintiff's bundle of initial disclosure, were served on Mr Walls by arrangement at 9.50 am on 30 November 2016. No issue is taken as to service.

[7] If Mr Walls intended to defend the proceeding, the time for him to file a statement of defence expired on 25 January 2017.³

[8] On 14 February 2017 counsel for the liquidators filed a memorandum with the Court requesting the allocation of a formal proof hearing in accordance with r 15.9(2).

³ High Court Rules 2016, r 5.47(2).

[9] The memorandum was referred to Associate Judge Christiansen on 14 February 2017. On the same day the Judge adjourned the proceeding to a formal proof hearing before a judge in March on a day and at a time to be scheduled by the Registry.

[10] The Deputy Registrar then listed the proceeding for a formal proof hearing in the High Court at Tauranga on 7 March 2017.

[11] The hearing proceeded before Peters J on 7 March 2017.

[12] After hearing from counsel for the liquidators and there being no appearance for or on behalf of Mr Walls, the Judge reserved her decision.

[13] On 7 December 2017 the Judge issued her reserved decision ordering Mr Walls to contribute \$489,810.06 to the assets of the company.

Presentation of the appeal

[14] Mr Shaw addressed the BORA context and Mr Cornege advanced the particular arguments in support of the appeal. Mr Shaw referred to *Noort v Ministry of Transport* and *R v Goodwin*.⁴ He submitted that s 6 of BORA applied and that natural justice required that an interpretation consistent with BORA be given to the Rules.

[15] Mr Cornege submitted that r 15.9(3) provided Mr Walls a right to seek to file a statement of defence with leave of a judge. He submitted that, properly interpreted, the reference in r 15.9(2) to notice was a reference to notice of listing the proceeding for formal proof, rather than a reference to notice of the date of the formal proof hearing.

[16] *Noort* and *Goodwin* are seminal cases. They confirm the importance of the right to a lawyer and clarify the concept of detention when considering the application of BORA. The general principles espoused are important and uncontroversial.

⁴ *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA); and *R v Goodwin* [1993] 2 NZLR 153 (CA).

With respect to Mr Shaw's reliance on them, they have little relevance to the application of r 15.9 in the present case.

Decision

[17] The appeal turns on the appellant's construction of r 15.9 of the Rules and in particular the right said to arise from r 15.9(3). The relevant rule provides:

15.9 Formal proof for other claims

- (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.
- (2) The proceeding must be listed for formal proof and no notice is required to be given to the defendant.
- (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.
- (4) The plaintiff must, before or at the formal proof hearing, file affidavit evidence establishing, to a Judge's satisfaction, each cause of action relied on and, if damages are sought, providing sufficient information to enable the Judge to calculate and fix the damages.
- (5) If the Judge before or at the formal proof hearing considers that any deponent of an affidavit filed under subclause (4) should attend to give additional evidence, the Judge may direct accordingly and adjourn the hearing for that purpose.

[18] The appellant's argument is that the wording in r 15.9(2) that "and no notice is required to be given to the defendant" simply means that no notice has to be given of the fact that the court is administratively listing the matter for a hearing. The appellant says that interpretation of r 15.9(2) is available and should be applied, consistent with s 6, BORA. That would lead to the conclusion that notice should be given that a formal proof hearing has been allocated. Defendants must be told of that so they can exercise their right under r 15.9(3) to seek leave to file a statement of defence.

[19] We consider that the appellant's construct that r 15.9(3) creates a right to apply to the court for leave to file a defence out of time is misconceived. Rule 15.9(3) does not create an additional right, rather it constrains an existing right. When served with

the proceeding a defendant has the right to file a defence. The notice of proceeding, which is a form prescribed by the Rules,⁵ gives express notice of the consequence of failure to file a defence within time:

This document notifies you that you must file in this registry of the court a statement of defence to the plaintiffs' claim (a copy of which is served with this notice). You must do this within 25 working days after the date on which you are served with this notice. If you do not, the plaintiffs may at once proceed to judgment on the plaintiffs' claim, and judgment may be given in your absence.

[20] The memorandum accompanying the notice of proceeding gives further general advice, including about filing a statement of defence.⁶

[21] Section 6 of BORA is simply not engaged in the present case. The distinction Mr Walls seeks to argue for in the present case is entirely artificial.

[22] The defendant was able to file a statement of defence as of right at any time after being served with the proceeding up until the time it was listed for formal proof. A party is taken to be aware of the law and their rights.⁷ Once the matter was listed for formal proof the defendant's ability to file a statement of defence as of right was constrained. From that time on an application for leave to file a statement of defence was required. Properly construed, r 15.9(3) does not create an additional right, but rather restricts the existing right to file a statement of defence without leave of the judge. On that basis alone the appeal cannot succeed.

[23] There are other difficulties with the appellant's argument and a number of additional reasons why the appeal must fail. The meaning of r 15.9(2) is plain. Listing of a proceeding for formal proof is an administrative matter undertaken by the Registry. It would be pointless and otiose for the rule to be interpreted in the way argued for by the appellant. The Registry need not give notice of various steps taken in the course of the administration of files within the court. The Registry does give notice of hearing dates and court events. But r 15.9(2) confirms that in the case of a formal proof hearing, notice of the date is not required.

⁵ High Court Rules, sch 1 form G 2.

⁶ Form G 3.

⁷ *Alatupe v Police* HC Auckland AP90/03, 26 August 2003 at [25].

[24] Further, there are other processes prescribed by the rules which on the appellant's argument would create rights yet no notice is given of them. For example, no notice is given of the ability to issue a third party notice pursuant to r 4.4, the right to file and serve a notice of opposition pursuant to r 7.24 or the right to make a defendant's application for summary judgment pursuant to r 12.2(2).

[25] Next, it is said the right engaged is under s 27(1) of BORA:⁸

27 Right to justice

- (1) Every person has the right to the observance of the principles of natural justice by any tribunal or other public authority which has the power to make a determination in respect of that person's rights, obligations, or interests protected or recognised by law.

[26] Section 27(1) recognises and expresses the existing common law that natural justice must be applied by a tribunal or other public authority when determining a person's rights. The use of the word "determination" is particularly relevant in the present context. None of the administrative steps taken by the parties referred to by the appellant in this case, namely the liquidators, the Associate Judge or the Registrar, determined Mr Wall's rights in the matter.

[27] The liquidators' memorandum was clearly no more than a request to the Court that the Court apply r 15.9(2) and list the case for formal proof.

[28] The Registrar could have acted on the basis of that request and, pursuant to r 15.9(2), allocated a formal proof hearing without involving a judicial officer. Although the request was referred to an Associate Judge, he simply adjourned the matter for a formal proof hearing, leaving it to the Registry to list the date and time. None of those steps involved a determination of the appellant's rights.

[29] The Registry then listed the proceeding for a formal proof hearing exactly as r 15.9(2) contemplates.

⁸ During the hearing reference was made to s 27(3) but that has no application as it relates to proceedings brought against or by the Crown.

[30] While Peters J (in conducting a formal proof hearing and issuing a judgment) did determine Mr Wall's substantive rights, she was not involved in listing the case for the formal proof hearing, which is the step Mr Walls says engaged the right.

[31] There are also practical issues which count against the appellant's argument. In a number of cases the Registry will not be able to serve notice on the defendant as it will have no address for the defendant. In the absence of a statement of defence, the Registry will not have an address for service.

[32] Next r 6.20 confirms that a party who has not given an address for service is not entitled to be served with notice of any step in the proceeding. While Mr Cornege submitted the rule appeared under a sub-part heading "Corporations, partners, attorneys, and agents", it appears at the end of those rules and in the context of other rules which have general application, such as service on a representative: r 6.17; service on a solicitor: r 6.18; and service on certain days being void: r 6.19. Those rules are clearly not limited and plainly have general application, as does r 6.20.

[33] When considering r 15.9 and the consequences of the application of BORA, it is relevant to consider r 15.10 and the remedies available to a defendant who has had a default judgment entered against them on that basis.

[34] While it is a matter for the appellant rather than this Court, the obvious remedy for Mr Walls was to file an application to set aside the formal proof judgment under r 15.10. The Court could then take into account the relevant considerations under that rule, including the merits of any proposed defence. We note there is no evidence from Mr Walls in relation to any of those factors.

[35] It may be correct, as Mr Cornege submitted, that it will be more difficult for a defendant to set aside a formal proof judgment than it will be to obtain leave to file a defence out of time. However that does not support his conclusion that failure to advise a defendant of the right means the defendant's rights are "wholly undermined".⁹

⁹ See Andrew Beck and others *McGechan on Procedure* (online ed, Thomson Reuters) at [HR15.10.05]; cf *Neumayer v Kapiti Coast District Council* [2014] NZHC 417, [2015] NZAR 1185.

[36] Next, the object of the High Court Rules is also relevant. It is to secure the just, speedy and inexpensive determination of proceedings before the Court.¹⁰ The application of the rule challenged in this appeal, r 15.9, was clarified on 3 June 2014 to provide expressly that no notice was required. The reason for the insertion of those words given by the Explanatory Note to the High Court Amendment Rules 2014 was:

These rules also align the drafting of rules 15.9 and 26.27 with the language to be used in the new District Court Rules 2014, in order to ensure better consistency between the 2 sets of rules and to resolve 2 legal questions that are not currently addressed expressly in the High Court Rules. ...

[37] The other provisions of BORA referred to by the appellant do not assist. While s 3(a) applies the Act to the judicial branches of Government, for the reasons given above, the only determination in the present case was the substantive decision of Peters J. Section 3(b) of BORA extends the application to acts done by any non-government body, but only in respect of their public functions. While liquidators are officers of the court and are appointed under the Companies Act, the powers and duties conferred and the exercise of them are essentially private functions.

[38] For completeness, we record the appellant did not refer to s 28 of BORA in his written submissions. It adds nothing to the argument.

Result

[39] The appeal is dismissed.

[40] The appellant must pay the respondents one set of costs for a standard appeal on a band A basis and usual disbursements.

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

¹⁰ Rule 1.2.