IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2015-404-1249
[2015] NZHC 2934

IN THE MATTER	of the liquidation of NZNet Services Limited (in Liquidation)
BETWEEN	STEPHEN ANDREWS First Applicant
	TRUSTEE ADVISORS LTD Second Applicant
AND	DAMIEN GRANT AND STEVEN KHOV Respondent

Hearing: 11 November 2015

Appearances: A R Nicholls for Applicants
B J Norling and A Cherkashina for Respondent

Judgment: 24 November 2015

JUDGMENT OF PALMER J

This judgment was delivered by me on 24 November 2015 at 2:30 pm pursuant to Rule 11.5 High Court Rules.

Registrar/Deputy Registrar

Solicitors: Edwards Clark Dickie, Auckland
Waterstone Insolvency, Auckland

Summary

[1] Mr Andrews and Trustee Advisors Limited (TAL) apply to set aside a judgment by default obtained against them by Mr Grant and Mr Khov. I find there are insufficient grounds to do so. In particular, I adopt a purposive interpretation of rr 15.8 and 15.9 of the High Court Rules (the Rules) that allows the plaintiff to seal judgment by default in relation to recovery of land or chattels rather than requiring a formal proof hearing. I do not consider there would be a miscarriage of justice if the default judgment remains. My reasons follow.

Facts

[2] Mr Andrews is the director of NZNet Internet Services Ltd (NZNet). NZNet went into liquidation on 17 November 2011.[1] TAL is the trustee of a trust settled by Mr Andrews. Mr Grant and Mr Khov were jointly appointed as liquidators of NZNet.[2]

[3] On 4 June 2015 the liquidators filed a Statement of Claim and Notice of Proceeding against Mr Andrews and TAL. They alleged that Mr Andrews transferred 25,082 shares in Engini Ltd to TAL with intent to prejudice Mr Andrews' creditors. They sought orders under s 348 of the Property Law Act 2007 vesting the shares in Mr Andrews and requiring TAL to restore the shares to him.

[4] The proceedings were served on 11 and 10 June 2015 respectively. The Notice of Proceeding was clear that if no Statement of Defence was filed within 25 working days of service "the Plaintiffs may at once proceed to judgment on the Plaintiff's claim, and judgment may be given in your absence."[3]

[5] The 25 days expired on 15 and 16 July 2015. No Statement of Defence was filed by then. The liquidators requested judgment by default on 17 July 2015. On 5 August 2015 the Registrar of the High Court granted judgment by default for recovery of a chattel – the shares (r 1.3(1)). Apparently the order was not served on Mr Andrews or TAL until 28 August 2015.

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1 *NZNet Internet Services Ltd (in liq) v Engini Ltd* [2015] NZHC 2713 at [3].
2 At [22].
3 The Notice of Proceeding was in form G2 as set out in sch 1 of the High Court Rules.

[6] In the meantime, on 7 August 2015, Mr Andrews and TAL each filed a Statement of Defence. Mr Andrews' two paragraph Statement of Defence consisted of a bald denial of the cause of action. TAL's two paragraph Statement of Defence neither admitted nor denied the cause of action but indicated it would abide the decision of the Court.

[7] Along the way there were various other proceedings between the parties including the imposition of freezing orders.

[8] On 22 September 2015 Mr Andrews and TAL applied to set aside the order for default judgment. That is the application for decision here.

Law

[9] Rules 15.7, 15.8 and 15.9 provide for the consequences of failing to file a statement of defence in time. A plaintiff may seal judgment by default in relation to a liquidated demand (r 15.7) or recovery of land or chattels (r 15.8). Where judgment by default is sought "for other than a liquidated demand", the proceeding is to be listed for a formal proof hearing (r 15.9).

[10] The parties are agreed that a default judgment may be set aside if:

(a) it was "irregularly obtained" which must include where there is no right to judgment[4] (or, put another way, where judgment was obtained unlawfully); or

(b) "it appears to the court that there has been, or may have been, a miscarriage of justice" (r 15.10).

[11] Both are argued here.

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[4] *Arnott v Artisan Holdings Ltd* (1998) 12 PRNZ 205 at 211; *Pulman v Orix New Zealand Ltd* (2008) 18 PRNZ 955 at [9] and [20]. The question of whether the Court should assess degrees of irregularity, discussed in those judgments, is not relevant to the argument here.

Irregularly Obtained

[12] Rule 15.9(1) states that it applies "where the plaintiff seeks judgment by default for other than a liquidated demand". When it applies, r 15.9 requires a formal proof hearing. As Mr Nicholls developed in argument, Mr Andrews and TAL submit that the default judgment was irregularly obtained because what was sought was not a liquidated demand as defined, for the purpose of r 15.9, by r 15.7(5). They say that, according to its terms, r 15.9 of the High Court Rules must apply.

[13] Mr Nicholls' argument is founded on the apparent direction by the words of r 15.9 that only liquidated demands may proceed by default judgment and all other types of demands must proceed by formal proof. However, this interpretation would obviate r 15.8 which explicitly enables a plaintiff to seal judgment by default for the recovery of land or chattels. Instead the generic terms of r 15.9 would override the specific terms of r 15.8 and require "formal proof" in relation to recovery of land or chattels. That would be inconsistent with both the text and the purpose of r 15.8.

[14] As Mr Norling submitted, there is no reason why a formal proof hearing would be required where recovery of land or chattels is at stake. As here, there is no unliquidated sum that needs to be determined. Instead, as the authors of *McGechan on Procedure* envisage, "all applications that do not fall within rr 15.7 or 15.8 proceed by way of formal proof".[5] In effect, r 15.9(1) should be read as if it says:[6]

> 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 *or recovery of land or chattels.*

[15] That reading is consistent with the text, scheme and purpose of the Rules. Rules 15.3, 15.5, 15.6 and 15.10 treat rr 15.7 and 15.8 as alternative avenues of obtaining default judgment to judgment by formal proof under r 15.9. Rule 15.9 is for "other claims", as its title indicates.

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5 Andrew Beck and others, *McGechan on Procedure* (online looseleaf ed Brookers) at HR 15.9.01. See also HR 15.7.02.

6 Italicised words added.

[16] I note that Mr Nicholls responsibly abandoned an alternative argument at the hearing that service by email (a means of service which had been accepted by Mr Andrews) meant the judgment had been irregularly obtained.

Miscarriage of Justice

[17] The jurisdiction to set aside a default judgment on the basis of a miscarriage of justice is discretionary and the parties are agreed that the relevant considerations are whether:[7]

(a) the defendant has a substantial ground of defence;

(b) the delay is reasonably explained;

(c) the plaintiff will not suffer irreparable injury if the judgment is set aside.

Substantial ground of defence

[18] The Statements of Defence filed on 7 August 2015 hardly disclose a defence. TAL's explicitly abides the decision of the court. Mr Andrews' is a bald denial. Neither was accompanied by initial disclosure.

[19] Mr Nicholls now says that:

(a) some of the debts are disputed;

(b) some of the shares were transferred, as relationship property, to the Mrs Andrews' GWF Trust as part of a relationship property agreement as well as other parties;

(c) share transfers from Mr Andrews were completed in 2011; and

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[7] *Mathieson v Jones* CA 198/92, 11 December 1992 at 6, affirming *Paterson v Wellington Free Kindergarten Association Inc* [1966] NZLR 975 (CA) at 983 and *Russell v Cox* [1983] NZLR 654 (CA) at 659.

(d) there is no opportunity to adduce evidence as to the true value of the shares.

[20] The first and second of these arguments are founded on bare assertion in a two page affidavit of Mr Andrews of 22 September 2015 unaccompanied by documentary support. Mr Andrews also filed an affidavit dated 5 November 2015 in response to a pending application by the liquidators for discovery and interrogation regarding the position of Engini, and a transfer of its shares in another company, as did Mr Mackie, a Director of Engini. These do not assist Mr Andrews. Indeed, the financial reports for Engini Ltd for the year ended 31 March 2012 list Mr Andrews as owning 25,082 shares, which rather contradicts the third of the arguments above. And, as Mr Norling points out for the liquidators, Mr Andrews' 5 November affidavit itself appears to contradict the arguments about the date of transfer of the shares.

[21] Mr Nicholls was unable to assist by providing evidence of transfer agreements and responsibly acknowledged that there was an absence of supporting documentation for his client's position before the Court.

[22] Mr Norling says the liquidators have discovered no information which supports these arguments. He points to evidence that the alleged transfers are not reflected in Companies Office records. The liquidators challenged the arguments in their evidence and no reply evidence was forthcoming. They also say the value of the shares is irrelevant to this application. Mr Norling points to three opportunities for Mr Andrews and TAL to provide evidence supporting their defence – in providing initial disclosure, accompanying this application, and in providing reply evidence. He submits that the court should take an adverse inference from the failure to do so.[8]

[23] I agree with the liquidators that the lack of substantiation of the arguments means that a substantial ground of defence to the default judgment has not been shown to exist here.

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8 *Pioneer Farms Ltd v Stoddart* [2012] NZHC 3114 at [24]; *Grant and Khov v Lotus Gardens Ltd* [2014] NZCA 127, [2014] 2 NZLR 726 at [53]-[55].

Reasonable Explanation for Delay

[24] Mr Andrews and TAL offer little by way of explanation for their delay in filing Statements of Defence. In his affidavit of 22 September 2015 Mr Andrews says the delays were "because a variety of different options were being explored at the time" and refers to discussions with his lawyer and accountant. This is not a reasonable explanation for the delay. Neither is Mr Nicholls' suggestion from the bar that Mr Andrews may have got overwhelmed at a stressful time and didn't attend to the Statement of Defence in time.

Irreparable Prejudice to the Plaintiff

[25] Mr Andrews and TAL submit that the liquidators would not suffer irreparable prejudice from the judgment being set aside but would have the opportunity to fully present their case. Unsurprisingly, the liquidators are less than enthusiastic at this prospect. They say that allowing the defence to the proceedings to revive would cause further delays and unnecessary costs and increase the liquidators' fees which would cause prejudice to NZNet and its creditors. I agree.

Overall No Miscarriage of Justice

[26] I do not consider that there would be a miscarriage of justice if the default judgment remains. Accordingly, I do not propose to exercise my discretion to set it aside.

[27] Costs of this application are awarded to the liquidators on a 2B basis as well as disbursements. (I was not asked to, and do not, certify for second counsel).

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Palmer J