NOTE: EXTANT HIGH COURT ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF APPELLANT

IN THE SUPREME COURT OF NEW ZEALAND

SC 87/2012
[2013] NZSC 152

BETWEEN	P (SC 87/2012) Appellant
AND	BRIDGECORP LIMITED (IN RECEIVERSHIP AND IN LIQUIDATION) Respondent

Hearing: 25 July 2013

Court: Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ

Counsel: C R Pidgeon QC and R S Pidgeon for Appellant
No appearance by or for the Respondent

Judgment: 19 December 2013

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no order for costs.

REASONS

ELIAS CJ

[1] Bridgecorp Limited claimed judgment against the appellant for a debt due under a deed of settlement of 21 September 2010.[1] Filed in the High Court at the

[1] The exact date on which the deed of settlement was executed is unclear. I have adopted the date recorded in *Bridgecorp Ltd v P* HC Auckland CIV-2011-404-1573, 14 October 2011 at [11], but the precise date is not material.

same time as the notice of proceeding and statement of claim on 18 March 2011 were an affidavit by the receiver of Bridgecorp (certifying the unpaid debt), an undated admission of claim signed by the appellant at the time the settlement of 21 September 2010 had been entered into, and a draft judgment by admission.

[2] By paragraph 1 of the terms of the undated admission of claim the appellant admitted the claim by Bridgecorp for the sum of $58,173.99, "together with":

> 1.1 interest at the rate of 10% per annum from 8 July 2010 to the date of judgment and from the date of judgment to the date of payment by the defendant;
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> 1.2 real estate agents' charges incurred in relation to the plaintiff's sale of XYZ Street, Auckland; and
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> 1.3 the plaintiff's legal expenses, on a solicitor and own client basis,
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> as certified by the plaintiff's receivers (or either of them).

Paragraph 2 of the admission of claim also provided that the appellant:

> … consents to judgment being entered and enforced for the amounts set out at paragraph 1 above, and authorises the plaintiff to file this admission on his behalf pursuant to Rule 15.16 of the High Court Rules.

[3] Clause 11 of the settlement deed provided:

> In the event that [the appellant] fails to make any payment strictly in accordance with clause 3 above, time being of the essence, Bridgecorp may (without any further notice) file the admission of claim together with a statement of claim in the form annexed to this deed, and immediately enter and enforce judgment, and may seal judgment under the High Court Rules, against [the appellant] for the amount of the Debt then outstanding, plus interest in accordance with clause 6.2 above, less all payments made by [the appellant] pursuant to clause 3 above.

[4] Bridgecorp sought to seal judgment for the amount of the claim in the form of the draft judgment supplied, in reliance on r 15.16(3) of the High Court Rules, which permits a plaintiff on whom an admission of some or all of the causes of action is served by the defendant to seal judgment on the cause or causes of action admitted. Rule 15.16 provides:

15.16 Admission of cause of action

(1) At any time after a party has been served with a notice of proceeding, that party may file and serve (separately from the party's pleadings) an admission of all, some, or part of the alleged causes of action on all other parties to the proceeding.

(2) An admission can be withdrawn only with the leave of the court.

(3) When an admission is filed and served under subclause (1), a party on whom the admission is served may seal judgment on the cause of action admitted, without prejudice to that party's right (if any) to proceed on any other cause of action.

(4) An admission under subclause (1) relating to any cause of action in which a sum of money is claimed must state the exact amount admitted.

(5) Any judgment entered on an admission filed and served under subclause (1) may, upon application, be set aside by the court if—

(a) the plaintiff, being under a duty or obligation to the defendant not to enter judgment on the admission, acted contrary to that duty or obligation in entering judgment; or

(b) the plaintiff, in entering judgment, acted fraudulently, unconscionably, or in wilful or reckless disregard of the defendant's rights.

(6) Upon an application under subclause (5), the court may direct that a proceeding be brought to determine whether judgment was wrongfully entered.

…

[5] There are four issues on the appeal: were the Courts below correct to hold that an admission of claim prepared in advance of proceedings and filed by the plaintiff (instead of the person making the admission) complied with r 15.16? Did the admission of claim for a sum to be determined comply with r 15.16(4)? Were the Courts below right to treat the basis for withdrawal of an admission as the same as the basis on which judgment under r 15.16 can be set aside under r 15.16(5)? And were the Courts below able to conclude on summary assessment that the defences raised by the appellant could not succeed, so that leave to withdraw the admission was properly withheld and judgment on it was rightly sealed?

[6] For the reasons given in what follows and in disagreement with the other members of the Court, I have concluded that the procedure adopted by Bridgecorp

and the terms of the admission did not comply with the rule. I would treat that non-compliance as fatal to the application to seal judgment. In any event, I consider that the Court of Appeal was in error in treating the approach to leave to withdraw an admission as equivalent to the approach on an application to set aside judgment under r 15.16(5) (and on this point am in agreement with the other members of this Court). In further disagreement, however, I consider that the substantive issues raised by the defences were not suitable for determination on summary process as they were treated in the Courts below and by the other members of this Court. I do not find it possible to conclude that the defences raised were unarguable, justifying peremptory disposal and clearing the way for judgment on summary process.

Background

[7] None of the documents filed with the Court were initially served on the appellant. Associate Judge Bell, to whom the Registrar referred the application to seal judgment, directed that the proceedings and the supporting documents be served on him, referring to the interests of natural justice.[2] Judge Bell considered that r 5.70, which requires a statement of claim and notice of proceeding to be served on every defendant, had not been complied with and held there was no authority for dispensing with service under that rule.[3] Recourse could be had to r 15.16 "only after a party has been served with a notice of proceeding".[4]

[8] The proceedings and the request for judgment to be sealed on the basis of the admission of claim were then served on the appellant. No additional application for summary judgment was made by Bridgecorp.

[9] Upon the service of the documents upon him, the appellant, who acted for himself until the proceedings reached the Court of Appeal, filed a statement of defence. In it, he claimed that the deed on which the claim was based was invalid because of duress, unconscionability, and undue influence. He claimed that at the time he entered into the settlement deed and gave the admission he was suffering

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2 *Bridgecorp Ltd (in rec and in liq) v P* HC Auckland CIV-2011-404-1573, 24 March 2011 at [6].
3 At [8].
4 At [9].

from post-traumatic stress disorder and severe depression. He claimed Bridgecorp was aware of his medical condition.

[10] The appellant also gave notice of interlocutory application for leave to withdraw the admission of claim (leave being required by r 15.16(2) before an admission of a cause of action under that rule can be withdrawn). In support of his application he filed medical reports relating to his long-standing psychiatric illness and its treatment in 2008 and 2009. This application was opposed by Bridgecorp, which filed evidence in opposition indicating that it believed the appellant to have been independently advised at the time and an affidavit by a consultant psychiatrist who offered the opinion that the medical reports provided by the appellant did not support the contention that his judgment was impaired at the time he entered into the deed of settlement.

[11] The psychiatric opinion supplied by Bridgecorp was responded to by the appellant with a further report from a fourth psychiatrist who expressed the opinion that it was "probable" that the appellant was impaired at the time he entered into the settlement agreement in 2010.

[12] Associate Judge Christiansen dismissed the application for leave to withdraw the admission on 14 October 2011.[5] In doing so, he held first that the procedure followed by Bridgecorp in obtaining an admission before proceedings was one permitted under the High Court Rules.[6] The Judge treated the application to withdraw the admission as raising the same considerations as an application to set aside a judgment under r 15.16(5). He expressed doubt as to whether the circumstances relied upon by the appellant in support of his application to withdraw the admission (his mental state and claims of oppressive and unconscionable conduct by Bridgecorp) were within the scope of r 15.16(5).[7] On the basis that it was "arguable" they came within the rule,[8] he concluded that, in any event, despite the fact that the psychiatric reports identified "significant mental health issues",[9] there

5 *Bridgecorp Ltd v P*, above n 1.
6 At [71].
7 At [74].
8 At [75].
9 At [99].

was no suggestion that "the [appellant] did not know what he was doing"[10] and there was "no sufficient evidence that the [appellant's] decision making ability was affected".[11]

[13] Judgment was then sealed in favour of Bridgecorp in the sum of $65,030.24. The appellant was also ordered to pay interest on the judgment debt to the date of payment at the rate of 10 per cent per annum and to pay costs totalling $4,700, together with disbursements of $2,894.55.

[14] Because direct appeal to the Court of Appeal from the decision of the Associate Judge was precluded by s 26P(2) of the Judicature Act 1908,[12] application for review of the orders was made to the High Court. The application for review was then removed by consent into the Court of Appeal.[13]

[15] The Court of Appeal upheld the decision of Judge Christiansen.[14] It acknowledged that the introductory words of r 15.16 contemplate that an admission will be filed after proceedings have been served but held that "the rule does not prevent a party obtaining an admission of claim in advance of proceedings being filed".[15] The filing by the plaintiff (instead of the defendant) of an admission by the defendant already prepared as part of a settlement before proceedings were instituted would, it thought, be "consistent with … the just, speedy and inexpensive determination of litigation".[16] It considered that the safeguards provided by leave to withdraw under r 15.16(2) or, "perhaps more relevantly", by the ability to set aside a judgment under r 15.16(5) were sufficient protection against abuse.[17] And it took the view that the admission was not defective in not referring to the exact amount

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10 At [99].
11 At [102].
12 *P v Bridgecorp Ltd (in rec and in liq)* CA756/2011, 17 October 2012 (Stevens, French and Venning JJ).
13 *P v Bridgecorp Ltd (in rec and in liq)* [2012] NZCA 530 (Stevens, French and Venning JJ) [*P v Bridgecorp Ltd* (CA)] at [3].
14 *P v Bridgecorp Ltd* (CA), above n 13. (The Court of Appeal did however allow an appeal against the award of costs in the High Court on the basis that the scale used should have been the District Court scale.)
15 At [20].
16 At [21].
17 At [22].

claimed (as r 15.16(4) requires) because it considered it "impracticable" to restrict admissions of claim to cases where the amount is predetermined and fixed.[18]

Scope of Rule 15.16

The structure and language of r 15.16

[16] The use of r 15.16 to enable judgment to be entered directly on filing of an admission of claim earlier obtained by a creditor before default and before proceedings have been issued seems to be a practice that has arisen without any clear authority. Before judgment in the present case (now cited as authority for the practice), the commentary to the rule in *McGechan on Procedure* described it as a "common practice" which had been sanctioned by the courts despite the fact that it was "not strictly in accordance with the words" of the rule.[19]

[17] In this Court, the appellant argues that the procedure under r 15.16 was not available to Bridgecorp on the basis of the admission signed in advance. It is acknowledged however that Bridgecorp could have applied for judgment under r 15.15 on the basis of the acknowledgement of liability made in the admission.

[18] Rule 15.16 is contained in the Part of the Rules concerned with disposal of actions "other than by trial". It is found in Subpart 3, which is concerned with "[j]udgment on admission". Such admissions may be of facts under r 15.15. Admissions may also be of causes of action, under r 15.16. If admission of a cause of action is made in accordance with r 15.16, the other party may, without more, seal judgment for the cause of action admitted. Admission of the whole or part of a defence is covered by r 15.17 and, like r 15.16, it permits the party on whom the admission is served to seal judgment on the cause of action to which the admission relates.

[19] Under r 15.15, where a fact is admitted (by "pleadings or otherwise") application may be made to the court "for any judgment or order upon those admissions the other party may be entitled to". The court "may give any judgment

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18 At [24].

19 Andrew Beck and others *McGechan on Procedure* (looseleaf ed, Brookers) at [HC15.16.01A].

or order on the application as it thinks just". An admission may be made before or after the proceedings are commenced[20] and may be made in a written agreement or even by oral acknowledgement, if properly proved.[21]

[20] By contrast with r 15.15, r 15.16 does not require application for entry of judgment or assessment by a judge of what judgment on the admissions the other party is entitled to. Nor does it apply to admissions of defence which permit judgment to be entered by the defendant. It is confined to admissions of claim by a defendant and enables the plaintiff to seal judgment on the cause of action admitted, without application and without judicial determination of whether judgment should be entered. That is because where a party has admitted liability to a pleaded cause of action in formal response to the pleading filed in court, there is no need for the court to determine liability or to require proof of the admission or further assessment of its effect. Even so, by r 15.16(4), an admission relating to any cause of action in which a sum of money is claimed "must state the exact amount admitted".

[21] Rule 15.16 provides safeguards in the ability of the court to grant leave to withdraw an admission under r 15.16(2) and by application to have the judgment set aside in the circumstances identified in r 15.16(5) if the plaintiff has acted contrary to "a duty or obligation to the defendant not to enter judgment on the admission" or if "the plaintiff, in entering judgment, has acted fraudulently, unconscionably, or in wilful or reckless disregard of the defendant's rights". (Where such a claim is made by the defendant, the court may under r 15.16(6) "direct that a proceeding be brought to determine whether judgment was wrongly entered", indicating that peremptory determination of such matters may not always be appropriate.)

[22] But the safeguards in r 15.16 are not confined to correction after the event by leave to withdraw the admission or where the narrow grounds which justify setting aside the judgment are made out. There are also important safeguards in the way in which the process is structured.

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[20] *Ellis v Allan* [1914] 1 Ch 904 (Ch) at 908–909.
[21] *Re Beeny, Ffrench v Sproston* [1894] 1 Ch 499 (Ch) at 501.

[23] An admission for the purposes of r 15.16 to enable judgment to be sealed without more, unlike the admissions of fact which may be proved for the purposes of enabling the court to enter judgment under r 15.15, is itself a formal step in court proceedings which have been served on the defendant. It is an admission to the court in response to the pleading served by the plaintiff. That is made clear by the wording of r 15.16 which provides that an admission of a cause of action may be filed and served by "that party" – that is to say, the party who has been served with the notice of proceeding. If the claim is for a sum of money, the admission "must state the exact amount admitted".

[24] Proceeding under r 15.16 is tailored for cases of unmistakeable formal acknowledgement of the pleaded and served claim which is certain, admitting no argument and requiring no assessment by the court. If those conditions are not met, an acknowledgement of liability is simply evidence on which judgment may be entered if a judge considers it just on application under r 15.15.

[25] The sequence envisaged by r 15.16 does not suggest that an admission of claim may be executed before the claim has been filed and served. Nor is the formality of a step in court process (indicated by the requirement of filing and service of admissions of "all, some, or part of the alleged causes of action") maintained if a creditor can hold an acknowledgement of liability obtained before default and can file it itself in proceedings subsequently issued. The requirement of service on the other parties by the admitting party in such circumstances would be pointless. It is "a party on whom the admission is served" that may seal judgment.

[26] The acknowledgement signed by the appellant and referred to at [2] above purported to authorise the creditor to file the admission on behalf of the appellant. In the High Court[22] and Court of Appeal[23] that course was approved as conforming with r 15.16.

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22 See above at [12].
23 See above at [15].

[27] The Court of Appeal cited the High Court decision of *Mather v O'Keeffe*[24] as authority.[25] In *Mather v O'Keeffe*, however, Heath J had declined to allow judgment to be sealed in circumstances where the admission was obtained before proceedings had been instituted and the admission had been filed by the plaintiff.[26] Instead, he treated the admission as evidence of facts entitling the plaintiff to judgment under r 15.15. Heath J entered judgment on the basis of the formal proof tendered[27] (the defendants, upon whom service was proved, having made no formal appearance and having indicated informally through their solicitor that they did not oppose the application for judgment[28]). The Judge acknowledged that the commentary to the rule in *McGechan on Procedure* suggested that judgment could be sealed simply on the filing and service of an admission filed by the plaintiff obtained before the proceedings were issued despite the course being "not strictly in accordance with the words of HCR 15.16",[29] but expressed concern about the correctness of the procedure.[30] He allowed that "[o]ne basis on which that might be sustained" was treating the admission as "effectively held in escrow" and then being filed by the plaintiff "in an agency role".[31] But he considered he did not need to decide the point, since judgment could be entered by treating the admission as one of fact under r 15.15.[32] As he pointed out, by reference to authority,[33] the court has a discretion as to whether judgment is entered pursuant to r 15.15 (whereas entry of judgment under r 15.16 follows without the exercise of discretion by a judge).[34]

[28] I am therefore unable to agree with the Court of Appeal that in *Mather v O'Keeffe* Heath J "accepted the creditor could hold and file the admission in an agency capacity" under r 15.16.[35] That was a point the Judge expressly did not decide. It was unnecessary since the admission was treated as an admission of fact under r 15.15, upon which the Judge entered judgment.

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24 *Mather v O'Keeffe* [2012] NZHC 2240.
25 *P v Bridgecorp Ltd* (CA), above n 13, at [23].
26 *Mather v O'Keeffe*, above n 24, at [11].
27 At [17].
28 At [2]–[3].
29 *Mather v O'Keeffe*, above n 24, at [13].
30 At [13].
31 At [14].
32 At [14]–[15].
33 *Sealord Charters Ltd v "Efim Gorbenko"* HC Wellington AD369/96, 9 December 1996 at 9.
34 At [16].
35 *P v Bridgecorp Ltd* (CA), above n 13, at [23].

[29] As Heath J's concerns suggest (and as is acknowledged in *McGechan on Procedure* itself) the words of r 15.16 are difficult to reconcile with the view that an admission can be entered into before a claim is made and be filed by the plaintiff as the authorised agent for the defendant. Nor do I agree with the additional suggestion made by the Court of Appeal that "the rule is silent on the issue" and that recourse can therefore be had to r 1.6(2), which provides that where there is no form of procedure prescribed for a particular case, the case should be disposed of in the way that best promotes the "just, speedy, and inexpensive determination of any proceeding or interlocutory application" (the objective of the Rules under r 1.2).[36] For the reasons given, I consider that the language and the structure of r 15.16 provide a complete and careful scheme for the circumstances in which a plaintiff can proceed to seal judgment without determination by a judge on evidence. In my view the process followed here was not in accordance with the rule.

The natural sense of r 15.16 accords with its legislative history

[30] I consider that the meaning I prefer on the structure and language of r 15.16 is consistent with the legislative history of the rule. Both confession of judgment on a cause of action (also known as a "*cognovit actionem*") and a warrant of attorney to confess judgment (authorising an attorney to appear for a defendant in proceedings and confess judgment or let it go by default) have been the subject of legislative regulation since the early 19th century in the United Kingdom and in New Zealand since enactment of the Supreme Court Procedure Act 1856 (UK) 19 & 20 Vict c 15. Such regulation, which has been strictly enforced by the courts,[37] has responded to the risk of abuse through such devices, including in the exclusion of opportunity to defend a claim.

[31] So, from 1838, statutes in the United Kingdom laid down strict conditions for entering into valid warrants of attorney to confess judgment and *cognovits actionem*, which required that they be explained and countersigned by a solicitor.[38] The legislation provided that it was no answer to non-compliance with the statutory

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[36] At [21].

[37] See *Everard v Poppleton* (1843) 5 QB 181, 114 ER 1217; and *Pocock v Pickering* (1852) 18 QB 790, 118 ER 298.

[38] Judgments Act 1838 (UK) 1 & 2 Vict c 110, s 9; replaced by the Debtors Act 1869 (UK) 32 & 33 Vict c 62, s 24.

requirements that the person executing the warrant or *cognovit* understood or had been informed of its nature and effect.[39] From 1869, legislation in the United Kingdom required a warrant of attorney or *cognovit* to be filed within 21 days after execution, failing which it was deemed fraudulent and void.[40]

[32] In New Zealand, the Regulae Generales, which were annexed to the Supreme Court Procedure Act 1856 (UK) 19 & 20 Vict No 15, contained a section on "Judgment by Confession" which regulated warrants of attorney to confess judgment and *cognovits actionem* by adopting the effect of the English statutory provisions in rr 422 to 436.[41] A *cognovit*, by r 424, could be given "at any time after the writ of summons is issued out". By contrast, under r 425, a judgment by confession could be entered before an action was started "upon a *warrant* in writing, signed by the party against whom judgment is to be entered up":[42]

> Such warrant shall be directed to one or more Solicitors of the Court, and shall authorize them to consent on his behalf that judgment be entered up against him.
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> 426. Every such warrant shall recite the facts out of which the liability has arisen, and shall show that the amount to be confessed is justly due or to become due.

[33] Under these Rules, neither warrant nor *cognovit* could be given without attestation by a solicitor that its nature and effect had been explained before execution to the person giving it.[43] And, if not so certified, it was not rendered valid by proof that the person executing it understood its nature and effect or was fully informed of it.[44] The warrant or *cognovit* so certified could then be relied on to obtain judgment without leave of the court only for a period of one year after the date of execution.[45]

[34] Under the 1882 Code of Civil Procedure the section on "Judgment by Confession" dealt with the circumstances in which judgment could be entered "in any action upon a written confession" given by the defendant to the plaintiff "with or

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39 Judgments Act, s 10; and the Debtors Act, s 25.
40 Debtors Act, s 26.
41 Regulae Generales, rr 427–431.
42 Emphasis in original.
43 Rule 427.
44 Rule 428.
45 Rule 432.

without condition annexed as to the time for satisfying the plaintiff's claim".[46] A confession could not be given before an action was commenced, as r 305 made clear:

> 305. A confession may be given at any time after the writ of summons is issued.

Rule 304 provided that "in causes of action where money is claimed the confession must state the exact amount confessed".

[35] The 1882 Code of Civil Procedure did not contain reference to warrants of attorney to confess judgment. It seems that may have been because the practice of filing warrants of attorney to confess judgment was obsolete. In the United Kingdom, it was observed in 1956 in relation to the Administration of Justice Bill (which repealed a number of provisions regulating warrants of attorney and *cognovits actionem*) that no warrant of attorney had been filed since 1886.[47] Certainly, in 1906 the 16th edition of *Williams on Personal Property* suggested that the method had "become almost obsolete".[48]

[36] Although the Code of Civil Procedure was altered significantly in 1909, the provisions dealing with judgment by confession were in substance unchanged. Rule 309 provided for judgment to be entered in any action upon a written confession, "with or without condition annexed as to the time for satisfying the plaintiff's claim". Such conditions were commonly imposed and their observance was necessary if a judgment was not to be set aside under r 312 as "contrary to good faith". Rule 310 provided that "in causes of action where money is claimed the confession shall state the exact amount confessed". Again, r 311 made it clear that a confession could be given "at any time after the writ of summons is issued".

[37] In the High Court Rules 1985 the former rr 309–312 of the 1882 Code were recast in r 471:

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46 Rule 303.

47 Speech of the Attorney-General (Sir Reginald Manningham-Buller) on the second reading of the Bill: (*13 February 1956) 548 GBPD HC 2095*.

48 T Cyprian Williams *Principles of the Law of Personal Property, Intended for the Use of Students in Conveyancing* (16th ed, Sweet and Maxwell, London, 1906) at 211 and see generally at 210, n (z).

471 Admission of claim or cause of action

(1) A party who admits any claim or cause of action alleged in any proceeding served upon him may at any time thereafter file an admission thereof and serve a copy thereof on the other party.

(2) Where an admission is filed and served under subclause (1), the party on whom the admission is served may thereupon seal judgment on the claim or cause of action so admitted, without prejudice to his right (if any) to proceed on any other claim or cause of action.

(3) An admission under subclause (1) with regard to any cause of action in which a sum of money is claimed shall state the exact amount admitted.

(4) Any judgment entered on an admission filed and served under subclause (1) may, upon application, be set aside by the Court if—

(a) the plaintiff, being under a duty or obligation to the defendant not to enter judgment on the admission, acted contrary to that duty or obligation in entering judgment; or

(b) the plaintiff, in entering judgment, acted fraudulently, unconscionably, or in wilful or reckless disregard of the defendant's rights.

(5) Upon any application under subclause (4), the Court may direct that a proceeding be brought in order to determine whether judgment was wrongfully entered.

[38] *McGechan on Procedure* states in relation to sub-cls (4) and (5) of the 1985 Rules (which seem to have been drafted to give effect to suggestions made by the Court of Appeal in *Rhodes v Reid Development Co Ltd*,[49] decided under r 312 of the former Code) that they apply most commonly when, in settlement of proceedings, the defendant delivers an admission upon terms that judgment not be entered for a certain period to allow the judgment debtor time to pay.[50]

[39] The new r 15.16 was introduced in the High Court Rules 2008. There is nothing to suggest that r 15.16 was intended to depart from the approach taken in all the New Zealand rules since 1856, under which a confession of judgment could be given only after a claim had been filed and served on the party making the confession.

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49 *Rhodes v Reid Development Co Ltd* [1981] 2 NZLR 721 (CA) at 726.

50 Andrew Beck and others *McGechan on Procedure* (looseleaf ed, Brookers, updated to 12 November 2004) at [HR471.03(1)].

The procedure followed did not conform with r 15.16

[40] The language used in r 15.16 continues to require admission of a cause of action to be a formal step taken after service of a claim filed in court on the party making the admission. That is both the natural sense of r 15.16 and is consistent with its antecedents. It is based on sound policy, long recognised by legislation, rules, and case law, that these devices may be used oppressively. The modern form of the rule in r 15.16 refers to the filing and service of the admission taking place "after a party has been served with a notice of proceeding", rather than referring to the time at which an admission of claim may be "given", as the rules before the 1985 changes had provided. That, however, is because the modern rules do not envisage the admission being given by the defendant to the plaintiff but instead require the party who admits to file the admission in court. It is a formal step in court proceedings already constituted.

[41] The clear sequence provided for in r 15.16(1) is only avoided on the argument for Bridgecorp by effectively reinstating a form of warrant of attorney to confess judgment, without the safeguards the law built around that device before it fell into disuse (provision to a solicitor – not the creditor – with certification by a solicitor that its effect had been explained). I do not think the courts can properly resurrect such a procedure, even if it had been reasonably available on the meaning of the rule (as I think it is not). In my view, the plaintiff in such a case should proceed with its action to judgment by proof, perhaps by summary judgment, in which the admission could be tendered as evidence of indebtedness under r 15.15 (subject to any challenge as to its admissibility).

[42] The Court should not countenance corner-cutting out of a premature impression of the merits of a claim. Nor do I think we should be giving an imprimatur to practices such as those used here. It is to be expected that they will be applied to the poor and ignorant. I do not accept there is adequate safeguard in the ability of the judgment debtor to seek to set aside the judgment under r 15.16, as the Court of Appeal suggested.[51] Rule 15.16(5)(a) is directed at the situation where there is a condition imposed at the time of admitting the cause of action, which is not

[51] See above at [15].

observed (as where the plaintiff must not enter judgment if payment arrangements are fulfilled). Similarly, r 15.16(5)(b) is concerned with fraud or disregard of rights in the entry of judgment itself. Neither sub-rule is directed to defences or challenges to the validity of the admission of the cause of action, as is in issue here.

The admission did not conform with r 15.16(4)

[43] Quite apart from the sequence in which the admission was obtained and the manner in which it was filed on behalf of the defendant by the plaintiff, I consider that the admission in its own terms did not comply with r 15.16(4) because it did not "state the exact amount admitted". Instead, it provided for the principal sum to have added to it interest at 10 per cent per annum, real estate agents' charges, and the plaintiff's legal expenses on a solicitor and client basis, less any payments made against the liability. Neither the real estate agents' charges nor the legal expenses were quantified.

[44] This indeterminacy meant that the liability acknowledged was not able to be known in advance by the appellant and required calculation and determination. Since the obligation in relation to the charges by the real estate agents and the solicitors was necessarily subject to a requirement of reasonableness, it was an assessment that was contestable. Such indeterminacy and contestability is inconsistent with the inexorability of judgment under r 15.16 and the absence of any identification of a decision-maker or opportunity for decision in the process.

[45] Even if the admission had been confined to a sum requiring calculation, rather than evaluation, I do not consider that it would fall within the language of r 15.16(4). It would have been easy enough for the Rules to provide that stating the "exact amount admitted" included acknowledgement of the debt and the manner of calculation of the exact sum. So, for example, in the case of judgment by default under r 15.7 (where no statement of defence is filed), it is specifically provided in r 15.7(1) that judgment on a liquidated demand may include interest (if specifically claimed in the statement of claim and available as of right) and costs and disbursements as fixed by the Registrar.

[46] In the absence of similar explicit extension, and against the plain language of r 15.16(4), I do not think it is possible to fashion a similar regime by creative interpretation. As the history of the procedure provided for by r 15.16 already referred to indicates, rule-making in this area has been undertaken conscious of the risk of abuse in the procedure for admitting causes of action. The courts should leave policy development here to the legislative processes.

[47] I would therefore allow the appeal on this point and set aside the judgment. The Bridgecorp claim would then proceed on a defended basis.

Leave to withdraw

The basis on which leave to withdraw under 15.16(2) may be granted

[48] Because I take the view that Bridgecorp was not entitled to file the admission and was not entitled to seal judgment, it is strictly unnecessary for me to consider whether the Court of Appeal was right in its approach to the application for withdrawal of leave. As mine is, however, a minority view, it is necessary to indicate that I do not accept that the approach to withdrawal of admissions is the same as in an application to set aside a sealed judgment, as was suggested in the Courts below.[52]

[49] The grounds on which judgment so sealed may be set aside under r 15.16(5) are based on the wrongfulness of the actions of the plaintiff in sealing judgment. The inquiry into whether leave should be given to withdraw an admission is not so confined and is likely to be principally concerned with the circumstances in which an admission was given by the defendant. It is undertaken against the background that the outcome of withdrawal is not to find against the plaintiff, but to require the plaintiff to prove its case to obtain judgment. For the defendant, the outcome of not permitting withdrawal pre-empts the defences that would otherwise be available to him. It will usually be in the interests of justice that leave to withdraw in those circumstances should be available when defences are raised which cannot safely be determined peremptorily. I would adopt, in this connection, the approach taken to

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[52] See above at [12] and [15].

rejection of defences raised in response to an application for summary judgment, another summary procedure.[53]

Peremptory rejection of the application to withdraw the admission

[50] I do not accept that the defences raised here warranted peremptory dismissal. If the admission had otherwise been regularly filed by the appellant following the issue of proceedings, I do not think leave to withdraw it could properly have been withheld in the circumstances of this case. Before explaining this view, it is necessary to give some further background relating to the settlement agreement and more detail of the evidence filed for the purposes of the application for leave to withdraw the admission.

The background to the settlement agreement

[51] In September 2006 the appellant purchased for $50,000 Bridgecorp's interest in a judgment debt owed by his cousin. As a result, Bridgecorp abandoned its bankruptcy proceedings against the cousin. Under the deed of assignment and acknowledgement of debt entered into between the appellant and Bridgecorp in September 2006, this money was to be paid on or before 8 May 2007 and the payment was secured against a property part-owned by the appellant and occupied by his family as their home.

[52] In 2004 the appellant had forged his uncle's signature to an enduring power of attorney in his favour. The uncle was the co-owner of the house used as security and the appellant used the forged power of attorney in granting a third mortgage over the property to secure the debt. Some payments were made against the debt but, following default, Bridgecorp moved to realise its security over the house when the debt became due in May 2007. At that point the uncle was informed of the position and brought proceedings seeking injunctive relief in the High Court. The High Court discharged the mortgage in relation to the uncle's share of the property but indicated it would make an order for sale so that the security could be realised over the appellant's share.[54] Before formal orders were made, the appellant and Bridgecorp

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53 See *Pemberton v Chappell* [1987] 1 NZLR 1 (CA) at 3.

54 *G v Bridgecorp Ltd* HC Auckland CIV-2008-404-8217, 15 February 2010.

entered into the settlement deed executed on 21 September 2010 which gives rise to the present claim. The settlement provided for staged repayments of the debt, then identified with interest to amount to $58,173.99.

The affidavit evidence before the Court

[53] As has been indicated, the appellant represented himself in the High Court application for leave to withdraw the admission of claim. He filed affidavit evidence, including reports from two psychiatrists who had examined him in 2008 and 2009. The psychiatric evidence was used to support the appellant's contention that he was suffering from a long-standing depressive illness. The appellant suggested that his infirmity had been taken advantage of by Bridgecorp at the time the deed was given and the admission of claim provided. He was not independently advised at the time he entered into the settlement deed.

[54] The appellant himself deposed that he had suffered from severe depression and chronic post-traumatic stress disorder over a long period beginning in about 2004. That was substantiated by the psychiatric reports he provided from two consultant psychiatrists. The first psychiatrist had reported in January 2008. The second had provided reports in September 2009 and in January 2010. The reports referred to the appellant's long-standing condition apparently referable in part to childhood abuse, for which he had made earnings-related compensation claims to the Accident Compensation Corporation. The psychiatric reports were prepared at the request of the Corporation. The report in 2008 referred to the plan to treat the appellant's condition with anti-depressants. The second psychiatrist reported no improvement with the treatment. In his report of January 2010 he recorded the appellant's report that he did not trust his own judgment and in consequence left management of his financial matters to his wife. The appellant says he made one of the psychiatric reports (presumably the first) available to Bridgecorp in 2008 when it was pressing him for payment.

[55] The appellant states in his affidavit that he cannot explain why he took on the debt owed by his cousin in 2006, which he says was of no benefit to him. He describes how he became the subject of a number of complaints to the Auckland

District Law Society in 2007. He was eventually struck off as a solicitor for misleading his clients about the progress of their cases, apparently because of the pressure he felt to meet their expectations. This led to financial difficulties which resulted in the bankruptcy of the appellant's wife, for which he felt guilt.

[56] The appellant describes how at the time the deed was entered into in August or September 2010 he was very anxious about the sale of the family home and feeling guilty about the trouble he had brought on his wife and his uncle. He discusses the pressure he felt at the time he entered into the deed of settlement because of his wife's bankruptcy, the collapse of his legal practice at the end of 2007, the stress of having to disclose to his uncle and to his wife what he had done in forging the power of attorney and using it to raise the money to pay of his cousin's debt against the security of the home he only part-owned, and the "threats" by Bridgecorp to sell the family home after he defaulted on the first deed in 2007.

[57] Bridgecorp itself obtained a report from a psychiatrist for use in respect of the appellant's application to withdraw the admission of claim. The psychiatrist provided an opinion on the appellant's condition based on his reading of the psychiatric reports obtained in 2008 and in 2009–2010. The psychiatrist referred to the fact that the appellant had received "assertive treatment, including sessions with a very experienced and able clinical psychologist, … as well as a different antidepressant medication" in the year after the second psychiatrist gave his second report to the Accident Compensation Corporation in September 2009. While the psychiatrist allowed that the appellant may have continued to be impaired despite this treatment, he expressed the view that "[w]hile [the reports] could support the contention that [the appellant] was unable to make the decisions involved in agreeing to the [settlement deed], and admission of claim, there are some inconsistencies". He pointed out that the two psychiatrists who had seen the appellant had considered him to be capable of functioning appropriately at the time they saw him (although he acknowledged that was "in a different context" than in financial management and related to concentration). The Bridgecorp expert acknowledged that the appellant's self-report in January 2010 to the consultant he saw "could support" his contention that he was "unable to make the decisions involved in agreeing to the Settlement Deed, and admission of claim". He suggested, however, "some inconsistencies":

"Not the least, is that having made that assessment of his ability, and then making such accommodations in the management of his financial affairs he then attempted to deal with this on his own". He referred to the fact that both consultants had commented that the appellant presented more positively than his self-assessment would suggest. Despite the view taken by the second consultant in September 2009 and January 2010 that the appellant was not fit to work because of his depression, the psychiatrist concluded that the earlier reports "do not support [the appellant's] contention that his judgment was seriously impaired in August 2010".

[58] A few days before the hearing before Judge Christiansen, a further psychiatric opinion from a fourth psychiatrist was obtained by the appellant in response to the psychiatric opinion evidence filed by Bridgecorp. This psychiatrist was asked to comment on whether, from the medical reports and from the account the appellant had given in his evidence, the appellant may have been suffering from post-traumatic stress disorder and a major depressive episode in August 2010 which could have affected his ability to make decisions and exercise judgment in the circumstances he faced. On the basis of the information the appellant supplied, the consistency between the findings of the two psychiatrists who had earlier reported on the appellant's condition, and by reason of his own observations of the appellant (an opportunity the psychiatrist engaged by Bridgecorp had not had), this psychiatrist expressed the view that the probability was that the appellant's function at the time he entered into the settlement was impaired.

Assessment

[59] The appellant was not independently advised until the present case reached the Court of Appeal. There was an evidentiary basis for the claim that he may have been under a disability at the time he entered into the settlement, and indeed for some time before that. The evidence included not only the psychiatric opinions but information about his own apparently erratic behaviour in the assumption of responsibility for his cousin's debt in 2006 (which he said was of no benefit to him), the circumstances which led to his being struck off as a solicitor in 2007 (which were for failing to keep clients informed about the progress of their cases in order not to disappoint them), and the circumstances of the mortgage of the home. It is possible

that the background includes a cultural dimension which has not emerged on the limited information available.

[60] I do not think it is an answer, as it was treated in the Courts below, that the 2010 agreement provided "a benefit"[55] to the appellant because it capped his liability under the 2006 agreement, extended him time to repay the debt, and staved off the loss of his home. The appellant was not represented in the High Court. His acknowledgement, in response to the Judge's question while he was making his submissions, that he did not challenge the 2006 agreement is not one on which it is safe to place too much weight.[56] The 2006 agreement was not directly in issue in the narrow proceedings concerned with use of the admission to seal judgment on the 2010 settlement. It cannot be assumed that the 2006 settlement would not itself have become an issue if the Bridgecorp claim had proceeded as an ordinary action, and counsel for the appellant in this Court quite properly reserved his position on that matter.

[61] Nor do I consider that the question of Bridgecorp's knowledge of the appellant's circumstances could be resolved in the procedure before Judge Christiansen. It could not be assumed that the entire evidence available would have been in the correspondence viewed by the Associate Judge. The context of all dealings between the parties at the time was relevant, including the dealings in 2006 as well as 2010.

[62] As a result, I am of the view that the substantive defences could not properly be resolved on a summary basis in the interlocutory application. They were not suitable for peremptory rejection. On that basis they should have gone to trial for determination on the evidence.

[63] I would therefore allow the appeal on this basis also and set aside the entry of judgment, leaving the proceedings to continue in the High Court.

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55 *Bridgecorp Ltd v P*, above n 1, at [94]; see also *P v Bridgecorp Ltd* (CA), above n 13, at [45].
56 *Bridgecorp Ltd v P*, above n 1, at [95].

McGRATH, WILLIAM YOUNG, GLAZEBROOK AND ARNOLD JJ

(Given by Arnold J)

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Introduction

[64] The appellant was in debt to the respondent, Bridgecorp Ltd (in receivership and in liquidation) (Bridgecorp). In the context of settling mortgagee sale proceedings for the recovery of the debt, the parties entered into an arrangement under which the appellant agreed to pay the debt by instalments and Bridgecorp agreed that it would not seek to recover the debt by court action if the appellant met his obligations. Bridgecorp did however, as part of the arrangement, provide the appellant with a draft statement of claim (alleging breach of the terms of settlement) and required him to execute an admission of liability and give Bridgecorp irrevocable authority to file it on his behalf should proceedings be issued. When the appellant failed to meet his payment obligations under the settlement arrangement, Bridgecorp issued proceedings (on the basis of the draft statement of claim),[57] filed the admission and applied for the entry of judgment under r 15.16 of the High Court Rules. Bridgecorp's application was granted. The principal question on this appeal

[57] Unlike the draft statement of claim, the statement of claim ultimately filed did not claim costs on a solicitor/client basis: see [70] below.

is whether an admission executed prior to the issue of proceedings in this way complies with the requirements of r 15.16.

Factual background

[65] The appellant is from a South Pacific island community in Auckland and was admitted as a barrister and solicitor in the mid-1990s, although he has now been struck off. He and his uncle own a residential property as tenants in common, the appellant as to a one-quarter share and his uncle as to a three-quarter share. The appellant held what appeared to be an enduring power of attorney in relation to the property from his uncle. However, it was a forgery: late in 2004 the appellant had forged his uncle's signature on the document.

[66] Earlier, in 2003, Bridgecorp had made a loan to the appellant's cousin. When the cousin was unable to repay it in its entirety, Bridgecorp issued proceedings against him for the outstanding amount, which was a little over $68,000, plus interest and costs. Bridgecorp obtained summary judgment. The consequence was that the cousin owed Bridgecorp over $91,000, which he was unable to pay. Bridgecorp commenced bankruptcy proceedings against him on the judgment debt.

[67] The appellant decided to take on the responsibility for his cousin's debt. In December 2006, on behalf of himself, and as the purported attorney for his uncle, the appellant executed a deed of assignment and acknowledgement of debt (the 2006 deed) under which he agreed to pay Bridgecorp a discounted amount ($50,000) by 8 May 2007 in full and final satisfaction of his cousin's debt. To secure the arrangement, the appellant gave Bridgecorp a mortgage over the residential property, utilising the forged power of attorney. The appellant's uncle was living overseas when this arrangement was entered into, and had been since 2001 or 2002.

[68] Although he paid Bridgecorp $16,770 under the 2006 deed, the appellant was not able to pay the full amount. Bridgecorp took steps to recover under its mortgage by initiating the mortgagee sale process. At that point, the appellant's uncle, who had by now returned to New Zealand, issued proceedings against Bridgecorp, seeking to prevent it from exercising its powers, on the basis that the power of

attorney held by the appellant was a forgery. Joseph Williams J upheld the uncle's claim.[58] The Judge held that the uncle was entitled to a discharge of the mortgage in respect of his three-quarter share of the property but accepted that Bridgecorp held a valid security over the appellant's one-quarter share.[59] Williams J indicated that he may direct a sale of the property if necessary, with the proceeds being distributed to the uncle as to three-quarters and to Bridgecorp as to one-quarter.[60] However, before taking that step he invited the parties to see whether they could reach a practical arrangement of some sort.[61]

[69] Following discussions, the parties executed a deed of settlement in September 2010 (the settlement deed). It provided that the appellant would pay Bridgecorp the amount outstanding and some additional costs by way of instalments. As part of the arrangement, Bridgecorp prepared a draft statement of claim alleging a debt owing under the settlement deed, and required the appellant to sign an admission of claim and give the executed original to Bridgecorp. Bridgecorp undertook not to file the statement of claim or the admission so long as the appellant met his obligations under the settlement deed. However, if the appellant defaulted, Bridgecorp was entitled to file the draft statement of claim and the admission, and to enter judgment on the basis of the admission under r 15.16 of the High Court Rules.

[70] Although he made some payments under the settlement deed, the appellant went into default. Bridgecorp then filed the statement of claim, the admission and an affidavit from the receiver annexing the settlement deed and certifying the amount left to be paid under it. The statement of claim was in the same form as the draft, except that it contained a calculation of the amount owing and did not seek (as the draft had) solicitor/client costs under cl 7 of the settlement deed. Bridgecorp then sought to enter judgment against the appellant on the basis of the admission. The file was referred to Associate Judge Bell, who in a minute dated 24 March 2011 noted that there was no evidence of service on the appellant and accordingly refused to enter judgment at that point.

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58 *G v Bridgecorp Ltd* HC Auckland CIV-2008-404-8217, 15 February 2010.
59 At [39].
60 At [39].
61 At [40].

[71] Bridgecorp then arranged for the appellant to be served. Having been served, the appellant filed a statement of defence and applied under r 15.16(2) of the High Court Rules for leave to withdraw the admission. This application was on the basis that:

(a) when he entered into the deed of settlement (which included signing the admission and giving authority to file it), the appellant was suffering from depression and post-traumatic stress disorder which, together with his medication and pressure from Bridgecorp, significantly impaired his judgment;

(b) Bridgecorp was aware of the appellant's illness;

(c) the appellant did not seek legal advice before he signed the admission; and

(d) the admission was an unfair bargain and was otherwise unreasonable and unjust.

[72] Importantly, one thing that the appellant did not challenge in his statement of defence (or in his application to withdraw) was the enforceability of the underlying debt to Bridgecorp. He did not attempt to argue that he was incapacitated when he took on responsibility for his cousin's debt in the 2006 deed, and accepted that it could be enforced by way of Bridgecorp's mortgage. According to his affidavit in support of his application to withdraw the admission, the first occasion on which he brought his mental state to Bridgecorp's attention was in 2008, when he gave a recent psychiatric report to a Bridgecorp senior manager.

[73] The matter came before Associate Judge Christiansen.[62] In addition to the arguments based on his mental state at the time he signed the admission, the appellant submitted that the admission was not one on which judgment could be properly entered under r 15.16 of the High Court Rules. This was because he signed the admission before the proceedings were issued. Rule 15.16 could, he argued,

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[62] *Bridgecorp Ltd v P* HC Auckland CIV-2011-404-1573, 14 October 2011 [*P* (HC)].

apply only where an admission has been executed, filed and served *after* the relevant statement of claim and notice of proceeding have been filed and served.[63]

[74] Associate Judge Christiansen rejected this argument, and the appellant's arguments based on his mental health issues and allegations of duress.[64] The Associate Judge dismissed the appellant's application to withdraw his admission and entered judgment in favour of Bridgecorp on the basis of the admission.[65]

[75] The appellant then appealed to the Court of Appeal.[66] Up to this point, the appellant had been acting for himself. However, in the Court of Appeal his present counsel, Messrs Colin R Pidgeon QC and Richard S Pidgeon, appeared. They advanced, unsuccessfully, similar arguments to those which had been advanced before the Associate Judge. The appellant then sought leave to appeal to this Court.

[76] Leave was granted on the question: "Was r 15.16 of the High Court Rules correctly applied?"[67] In addition, when giving leave the Court issued a minute dated 15 March 2013 in the following terms:

> [1] We intend the approved ground of appeal to cover all the procedural matters Mr Pidgeon QC has raised in his leave submissions. In addition, we would be grateful if counsel would consider and make submissions on whether the Associate Judge had jurisdiction to deal with the application to set aside the admission, given that the dismissal of the application to set aside led to the entry of judgment. Associate Judges generally have jurisdiction to enter substantive judgments only in the circumstances set out in s 26I of the Judicature Act 1908. There may be nothing in this point, but we would appreciate counsel's help on it.

[77] Before we turn to the principal issue raised by the appeal, we will address the jurisdiction argument. We note that Bridgecorp was not represented at the hearing of this appeal. Its counsel, Messrs Brian J Burt and Janko Marcetic, filed a memorandum in which they advised that Bridgecorp did not wish to take any further steps in the appeal as it decided to pursue an alternative remedy against the appellant, namely a mortgagee sale of the property, a remedy which the appellant acknowledged was open to Bridgecorp. Counsel for Bridgecorp did, however,

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63 At [60].
64 At [108]–[109].
65 At [110]–[111].
66 *P v Bridgecorp Ltd (in rec and in liq)* [2012] NZCA 530 [*P* (CA)].
67 *P v Bridgecorp Ltd (in rec and in liq)* [2013] NZSC 20.

provide brief submissions on the jurisdiction point raised by the Court and also provided a copy of Bridgecorp's submissions in the Court of Appeal.

The jurisdiction argument

[78] To address the jurisdiction argument we need to set out r 15.16 of the High Court Rules. It is one of a group of three rules dealing with admissions, the others being rr 15.15 and 15.17.[68] Rule 15.15 provides that a party to a proceeding may apply for judgment or an order on admissions of fact made by the other party and r 15.17 provides for the admission of defences and for the sealing of judgment on such admissions. Rule 15.16 provides:

> **Admission of cause of action**
>
> (1) At any time after a party has been served with a notice of proceeding, that party may file and serve (separately from the party's pleadings) an admission of all, some, or part of the alleged causes of action on all other parties to the proceeding.
>
> (2) An admission can be withdrawn only with the leave of the court.
>
> (3) When an admission is filed and served under subclause (1), a party on whom the admission is served may seal judgment on the cause of action admitted, without prejudice to that party's right (if any) to proceed on any other cause of action.
>
> (4) An admission under subclause (1) relating to any cause of action in which a sum of money is claimed must state the exact amount admitted.
>
> (5) Any judgment entered on an admission filed and served under subclause (1) may, upon application, be set aside by the court if—
>
> (a) the plaintiff, being under a duty or obligation to the defendant not to enter judgment on the admission, acted contrary to that duty or obligation in entering judgment; or
>
> (b) the plaintiff, in entering judgment, acted fraudulently, unconscionably, or in wilful or reckless disregard of the defendant's rights.
>
> (6) Upon an application under subclause (5), the court may direct that a proceeding be brought to determine whether judgment was wrongfully entered.
>
> (7) This rule does not affect rule 8.48.

[68] Rule 8.48 also deals with admissions and provides: "A judgment or order may be made on an admission of facts under rule 15.15".

[79] Mr Pidgeon submitted that the Associate Judge lacked jurisdiction to hear applications under r 15.16(2) as they could result in the entry of judgment and did not fall within s 26I of the Judicature Act 1908 or r 2.1 of the High Court Rules. By contrast, counsel for Bridgecorp submitted in their memorandum that the application for leave to withdraw an admission under r 15.16(2) is an interlocutory application: if the application is granted, the proceeding goes forward as a contested proceeding in the normal way; if the application is refused, the entry of judgment, once requested, is automatic by virtue of r 15.16(3) – the Registrar may seal a judgment without the input of a Judge or Associate Judge. In the result, counsel for Bridgecorp submitted, the application was one in respect of which the Associate Judge had jurisdiction under s 26J of the Judicature Act and r 2.1 of the High Court Rules.

[80] We accept Bridgecorp's argument on this point. Under r 15.16(1) an admission may go to "all, some, or part of the alleged causes of action". Because liability is admitted to the extent of the admission, no judicial determination as to liability is necessary. The court's role under r 15.16(2) is simply to determine whether leave will be granted to withdraw the admission. An application to withdraw an admission is an interlocutory application and accordingly will be heard in chambers unless the court orders otherwise.[69] If no such order is made, an associate judge has jurisdiction to determine the application.[70] If the application is declined, the admission will stand and the plaintiff will be entitled to seal judgment on it under r 15.16(3). That is a step that will be completed by the Registrar.[71] If a defendant wishes to challenge the entry of judgment, he or she must do so under r 15.16(5).

[81] We turn now to the principal issue on the appeal, namely, whether judgment could properly be given against the appellant on his admission. We begin with the terms of the settlement deed.

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69 High Court Rules, r 7.34.
70 Judicature Act 1908, s 26J and High Court Rules, r 2.1(1).
71 High Court Rules, r 11.11.

The settlement deed

[82] Relevantly, the settlement deed provided:

> **Acknowledgement of Debt**
>
> 2 [The appellant] acknowledges that he is indebted to Bridgecorp in the sum of $58,173.99, together with interest at the rate of 10% per annum from 8 July 2010, real estate agents' charges incurred in relation to Bridgecorp's sale of the Property[72] and legal fees incurred by Bridgecorp in relation to enforcement of the [2006 deed] and the Proceeding (*Debt*).
>
> **Payment of Debt**
>
> 3 In consideration for Bridgecorp signing this agreement, [the appellant] shall pay $68,173.99 to Bridgecorp, in the following instalments (inclusive of GST, if any):
>
> 3.1 $1,000 on or before 31 August 2010;
>
> 3.2 $5,000 on or before 29 October 2010;
>
> 3.3 $5,000 on or before 31 December 2010;
>
> 3.4 $5,000 on or before 31 March 2011;
>
> 3.5 $5,000 on or before 31 May 2011;
>
> 3.6 $5,000 on or before 31 July 2011; and
>
> 3.7 $300 per week, commencing on 5 August 2011 and continuing until the amount of $68,173.99 is paid in full.
>
> …
>
> **Compliance with obligations**
>
> 5 Provided that [the appellant] makes the payments strictly in accordance with clause 3 above, time being of the essence, Bridgecorp shall not charge [the appellant] interest on the Debt or impose any other penalty.
>
> 6 If [the appellant] fails to make any payment on or before the date prescribed by clause 3 above:
>
> 6.1 the entire amount of the Debt shall immediately become due and payable by [the appellant] to Bridgecorp; and
>
> 6.2 without prejudice to any of Bridgecorp's other rights or remedies, [the appellant] shall pay interest, calculated on the

[72] A reference to the property owned by the appellant and his uncle, over which the appellant had given Bridgecorp a mortgage as security when the 2006 deed was entered into: see [67] above.

amount of the Debt outstanding from time to time from 8 July 2010 until the date the entire amount of the Debt is paid by [the appellant] (both before and after any judgment), at the rate of 10% per annum.

7 [The appellant] shall pay or reimburse Bridgecorp, on demand, for any costs and/or expenses which Bridgecorp incurs or which Bridgecorp is liable to pay in connection with the exercise or attempted exercise of Bridgecorp's rights, powers or remedies under or in relation to this deed including, without limitation, all legal expenses charged on a solicitor and own client basis.

8 A certificate signed by Bridgecorp's receivers (or either of them) shall be conclusive evidence of any amount payable by [the appellant] pursuant to clauses 6 and/or 7 above.

Admission of claim

9 Upon execution of this deed, [the appellant] shall execute an admission of claim in the form annexed to this deed and deliver the original, executed admission of claim to Bridgecorp.

10 The admission of claim shall be held by Bridgecorp, and shall not be filed in Court unless [the appellant] fails to make a payment in accordance with clause 3 above. Bridgecorp undertakes that it will not use the admission of claim other than in accordance with this clause and clause 11 below.

11 In the event that [the appellant] fails to make any payment strictly in accordance with clause 3 above, time being of the essence, Bridgecorp may (without any further notice) file the admission of claim together with a statement of claim in the form annexed to this deed, and immediately enter and enforce judgment, and may seal judgment under the High Court Rules, against [the appellant] for the amount of the Debt then outstanding, plus interest in accordance with clause 6.2 above, less all payments made by [the appellant] pursuant to clause 3 above.

12 [The appellant] irrevocably authorises Bridgecorp to file the admission of claim under Rule 15.16 of the High Court Rules, on behalf of [the appellant].

[83] The draft statement of claim referred to in cl 11 of the settlement deed contained a single cause of action against the appellant, on the basis of a default under the settlement deed. The draft pleaded the terms of the settlement deed, alleged a default by the appellant (with details of the date and amount to be inserted) and alleged the overall indebtedness of the appellant to Bridgecorp (again with the details to be completed). It sought judgment in an amount to be specified, interest on that amount from a date and at a rate to be specified and solicitor/client costs in accordance with cl 7 of the settlement deed.

[84] The admission which the appellant was required to execute was in the following terms:

> 1 The [appellant] admits the claim by [Bridgecorp] in the sum of $58,173.99, together with:
>
> 1.1 interest at the rate of 10% per annum from 8 July 2010 to the date of judgment and from the date of judgment to the date of payment by the [appellant];
>
> 1.2 real estate agents' charges incurred in relation to [Bridgecorp's] sale of [the residential property]; and
>
> 1.3 [Bridgecorp's] legal expenses, on a solicitor and own client basis,
>
> as certified by [Bridgecorp's] receivers (or either of them).
>
> 2 The [appellant] consents to judgment being entered and enforced for the amounts set out at paragraph 1 above, and authorises [Bridgecorp] to file this admission on his behalf pursuant to Rule 15.16 of the High Court Rules.

[85] Finally, we set out the paragraphs from the statement of claim in fact filed dealing with the appellant's default and the amount allegedly owed:

> 4 On 31 December 2010 the [appellant] defaulted on his obligations under clause 3 of the [settlement deed] by failing to pay $5,000 as required by clause 3.3 of the [settlement deed] on or before 31 December 2010.
>
> 5 On 18 March 2011, one of the receivers of [Bridgecorp] certified that the [appellant] owed $62,721.67 to [Bridgecorp] pursuant to clauses 6, 7 and 8 of the [settlement deed], made up of the following amounts:
>
> 5.1 principal of $58,173.99;
>
> 5.2 $10,000.00 in respect of real estate agents' charges and legal fees;
>
> 5.3 interest of $4,197.68;
>
> 5.4 less payments by the [appellant] totalling $9,650.00.
>
> 6 The [appellant] is indebted to [Bridgecorp] in the amount of $62,721.67.

[86] When compared to the statement of claim, the admission is notable in stating only one specific figure, the principal owed. The real estate charges, the legal fees and interest are left to be completed at the time of default, by reference to a

receiver's certificate. Further, the admission does not specifically address the issue of any payments made before default. That also was to be accommodated through the receiver's certificate mechanism.

Basis of appeal

[87] In his written submissions, Mr Pidgeon identified two essential respects in which he argued that the Court of Appeal had erred. First, Mr Pidgeon submitted that the admission did not meet the requirements of r 15.16 of the High Court Rules. He argued that the plain meaning of r 15.16 was that Bridgecorp had to file and serve the relevant proceeding on the appellant before the latter executed the admission of liability, which he could then file. Only after that had occurred could the admission form the basis for the entry of judgment. Second, Mr Pidgeon argued that the Associate Judge and the Court of Appeal wrongly refused to permit the appellant to withdraw the admission, given his mental capacity at the time he executed it.

[88] We should reiterate a point we made earlier. The appellant did not seek to challenge the validity of the underlying debt to Bridgecorp and accepted in his written submissions that Bridgecorp was entitled to exercise its rights under its mortgage over the residential property. Rather, the appellant's challenge focussed on the particular enforcement mechanism which Bridgecorp had chosen to utilise, namely, judgment on an admission of liability.

The requirements of r 15.16

[89] Enforcement mechanisms such as giving pre-action admissions of liability as an incident of the debtor/creditor relationship are not new to the law. In his *Commentaries on the Laws of England* published in 1768 Sir William Blackstone discussed how a judgment might become final. He said:[73]

> And this happens, in the first place, where the defendant suffers judgment to go against him by default, or *nihil dicit*; as if he puts in no plea at all to the plaintiff's declaration: by confession or *cognovit actionem*, where he acknowledges the plaintiff's demand to be just: or by *non sum informatus*,

[73] William Blackstone *Commentaries on the Laws of England: a Reprint of the First Edition with Supplement* (a reprint of the first edition (1768), Dawsons of Pall Mall, London, 1966) vol 3 at 397.

> when the defendant's attorney declares he has no instructions to say anything in answer to the plaintiff, or in defence of his client; which is a species of judgment by default. If these, or any of them, happen in actions where the specific thing sued for is recovered, as in actions of detinue or debt for a sum or thing certain, the judgment is absolutely complete. And therefore it is very usual, in order to strengthen a bond-creditor's security, for a debtor to execute a warrant of attorney to any one, empowering him to confess a judgment by either of the ways just now mentioned (by *nihil dicit*, *cognovit actionem*, or *non sum informatus*) in an action of debt to be brought by the creditor for the specific sum due: which judgment, when confessed, is absolutely complete and binding.

What occurred in the present case falls within this pattern – having executed the admission, the appellant gave Bridgecorp irrevocable authority to file it if Bridgecorp issued proceedings as a consequence of his default.

[90] In the early part of the 19th century, warrants of attorney and *cognovits* were in common use in England.[74] Legislation was passed providing that, if they were registered, they would be valid against assignees in bankruptcy.[75] Consistently with Blackstone's description, a debtor would be required to give security for a loan by executing a warrant of attorney, in which the debtor authorised the creditor to confess an action for debt on the debtor's behalf and consented to judgment being entered. Not only were warrants of attorney commonly taken by creditors, they were commonly enforced, a particular concern in an era where debtors could be imprisoned for debt (a practice that was not abolished until the passage of the Debtors Act in 1869).[76]

[91] In New Zealand, rules of court made under the Supreme Court Procedure Act 1856 provided for the entry of judgment on the basis of *cognovits* and warrants of attorney.[77] The rules provided that a *cognovit* could be given any time after the writ of summons was issued out.[78] There was no similar restriction in relation to warrants of attorney. In the case of a warrant, judgment could be entered without

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74 For a helpful overview, see Sir John Baker (ed) *The Oxford History of the Laws of England: Volume XII – 1820–1914: Private Law* (Oxford University Press, Oxford, 2010) at 523–524.

75 See the Warrants of Attorney Act 1822 (UK), the Warrants of Attorney Act 1843 (UK) and the Debtors Act 1869 (UK), ss 24–28. These enactments were repealed by s 16 of the Administration of Justice Act 1956 (UK).

76 Debtors Act 1869, s 4.

77 General Rules of Practice and Procedure 1856, rr 422–436.

78 Rule 424.

action in relation to money due or about to become due.[79] Such warrants were directed to a solicitor, who was authorised to consent to judgment on behalf of the maker of the warrant.[80] Neither a *cognovit* nor a warrant of attorney was valid unless it was executed before a solicitor, who was required to explain the nature and effect of the particular document.[81] By contrast, the Code of Civil Procedure 1882 did not refer to *cognovits* or warrants of attorney but simply provided for confession of judgment by way of a standard form, which could be given at any time after a writ was issued.[82]

[92] Concerns about *cognovits*, warrants of authority and other enforcement mechanisms, and money-lending more generally, grew to the point that in 1897, a select committee of the Imperial Parliament was appointed "to inquire into the alleged evils attendant upon the system of Money-Lending by Professional Money-Lenders, at high rates of Interest, or under oppressive conditions as to Repayment".[83] One of the matters which the select committee considered was the use of warrants of attorney and *cognovits* by money lenders.[84] Evidence before the select committee described the common form warrant of attorney as permitting the money lender, at any time, on the happening of one of a number of events (including, but not limited to, default under the loan) to enter judgment and issue execution without notice to the debtor. The select committee concluded that warrants of attorney and *cognovits* "have been and still may be instruments of oppression" and recommended that their use by money lenders be prohibited.[85]

[93] The select committee's report was laid before the House of Representatives in New Zealand in 1899 and a summary quoting extracts from the report was published in the Appendix to the Journals of the House of Representatives.[86] The report led to the enactment of the Moneylenders Act 1900 in the United Kingdom and the

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79 Rule 425.
80 Rule 425.
81 Rule 427.
82 Code of Civil Procedure 1882, rr 303–306.
83 Imperial Parliament Select Committee on Money-Lending *Report* (1898) at iii. The Select Committee was appointed in June 1897 and delivered its report in 1898.
84 At viii.
85 At viii.
86 Imperial Parliament Select Committee "Money Lending: Report from the Select Committee, Imperial Parliament, 29th June 1898" [1899] III AJHR H–38.

Moneylenders Act 1901 in New Zealand. While both Acts regulated moneylenders, neither specifically addressed warrants to act or *cognovits*.

[94] Concerns have also been raised in the United States, where warrants of attorney and similar mechanisms have been widely used.[87] Warrants of attorney were often incorporated into credit documentation at the time credit was extended.[88] They empowered the attorney (usually a lawyer selected by the creditor) to appear before any court and confess judgment on the debtor's behalf. In some cases this could be done before there was any default under the credit arrangement and without any substantive process. The result was that the creditor had only to execute the judgment if the debtor defaulted.[89] The attraction for lenders will be obvious: they could obtain judgment without the time and expense associated with usual litigation processes.

[95] However, there were obvious dangers with judgments obtained in this way, particularly where unsophisticated consumers were involved. By accepting credit on the basis of giving warrants of attorney, consumers waived important rights, such as the rights to notice, to a hearing and to mount a defence, generally without the opportunity for legal advice and with no real appreciation of the implications of what they were agreeing. In a 1972 case, *D H Overmeyer Co Inc of Ohio v Frick*,[90] where a contract between commercial parties contained a confession of judgment clause, the United States Supreme Court held that the clause did not of itself violate the due process protections contained in the Fourteenth Amendment to the United States

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87 Although warrants to act and similar processes have a long history in the United States, it is difficult to provide a general overview as different states took different approaches. What follows should be read against that background. For an overview of the position in the United States see *Corpus Juris Secundum* (2013) vol 49 Confession Under Warrant or Power of Attorney: Overview at § 192.

88 A debt instrument containing a warrant of attorney is referred to, rather confusingly, as a "*cognovit* note": see Gerald S Sampson "Confession of Judgement in California" (1977) 8 Pac L J 99 at 101–102.

89 At 101.

90 *D H Overmeyer Co Inc of Ohio v Frick* 405 US 174 (1972).

Constitution. Rather, the matter had to be considered in the context of particular factual situations.[91] On the facts before it, the Court held that the debtor "voluntarily, intelligently, and knowingly waived the rights it otherwise possessed to prejudgment notice and hearing, and … it did so with full awareness of the legal consequences".[92] However, the Court noted that in other factual situations, different considerations might produce different outcomes.[93]

[96] In a subsequent case in 1978, *Isbell v County of Sonoma*, the California Supreme Court, by a majority, struck down the confession of judgment provisions in California's Code of Civil Procedure on the ground that they violated the due process protections of the Fourteenth Amendment, essentially because they did not permit a case by case assessment of whether a debtor's waiver of his or her due process rights was "voluntary, knowing and intelligent".[94] The majority said that the possibility of a debtor obtaining post-judgment relief by seeking to have the judgment set aside did not meet the constitutional concern because a post-judgment determination of the validity of the debtor's waiver came too late: by that point, the debtor was the subject of an immediately enforceable obligation imposed in violation of his or her due process rights.[95] By contrast, the minority considered that the majority's approach was too blunt because it did not permit a case by case assessment of whether debtors had in fact waived their rights knowingly and voluntarily: many warrants of attorney were given by willing and knowledgeable debtors for good reason but these would be invalidated on the majority's approach.[96]

[97] Rule 15.16 of the High Court Rules does not contemplate the waiver of rights by a defendant to the extent permitted in the legislation of some American states and

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91 The clause provided "The undersigned hereby authorize any attorney designated by the Holder hereof to appear in any court of record in the State of Ohio, and waive this issuance and service of process, and confess a judgment …": see *D H Overmeyer Co Inc of Ohio v Frick*, above n 90, at 180–181. The Court delivered judgment in a companion case at the same time: see *Swarb v Lennox* 405 US 191 (1972).

92 *D H Overmeyer Co Inc of Ohio v Frick*, above n 90, at 187.

93 At 187–188.

94 *Isbell v County of Somoma* 577 P 2d 188 (Cal Sup Ct 1978) at 193 per Bird CJ, Tobriner, Mosk and Thompson JJ.

95 At 194. In support of these arguments, see "Recent Developments: Due Process – Confession of Judgment Procedures Are Not Unconstitutional Per Se" (1972) 25 Vand L Rev 613 at 619–620.

96 At 197–198 per Richardson, Clark and Manuel JJ.

equally avoids many of the evils associated with English practices in the 19th century. In particular:

(a) Rule 15.16(1) requires that the plaintiff issue proceedings, and that the defendant be given notice of those proceedings, before an admission of liability may be filed.

(b) Once an admission is filed, the defendant is entitled to seek leave to withdraw it under r 15.16(2). No grounds are specified in the rule.

(c) A judgment issued on an admission may be set aside, albeit only on one of the grounds specified in r 15.16(5).

[98] Although no grounds are specified in r 15.16(2), both Associate Judge Christiansen[97] and the Court of Appeal[98] approached the question of whether leave to withdraw the admission should be granted by reference to the factors identified in r 15.16(5) in relation to an application to set aside judgment. This reflected the way the parties had argued the case in both Courts. We consider, however, that the discretion conferred by r 15.16(2) does not limit the court to consideration of the factors identified in r 15.16(5). There is nothing in the language of r 15.16(2) to indicate such an intention, and we can see no reason of policy to support such an interpretation. Rather, we consider that r 15.16(2) confers a general discretion on the court, to be exercised in the interests of justice. That is not to say that an application to withdraw an admission will be granted simply because the maker of the admission has changed his or her mind. A reasoned case for withdrawal must be made out. It may be that that will most easily be done in circumstances of the type referred to in r 15.16(5). But if the court is satisfied that it is in the interests of justice to do so, it is entitled to grant leave to withdraw an admission even though a ground similar to those in r 15.16(5) has not been made out.

[99] In *Gale v Superdrug Stores Plc*, a decision of the English Court of Appeal, Millett LJ succinctly expressed the principles relevant to an application to withdraw

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97 *P* (HC), above n 62, at [74]–[76].
98 *P* (CA), above n 66, at [26].

a pre-action admission of liability under the United Kingdom Rules of the Supreme Court (RSC) Order 27, r 3 (now repealed and replaced by the Civil Procedure Rules (UK), in particular pt 14).[99] That case concerned a personal injury claim. The defendant (through its insurer) had made an admission of liability in correspondence with the plaintiff's solicitors before proceedings were issued. However, when quantum could not be agreed and proceedings were issued, the defendant filed a defence denying liability. The plaintiff applied to have the pleading struck out as an abuse of process. Counsel agreed that the principles applicable to an application to withdraw an admission under RSC Order 27, r 3 should be applied. By analogy with the principles applicable to granting leave to amend a pleading, Millett LJ summarised the proper approach as follows:[100]

> In my judgment leave should be normally be granted if the application is made in good faith, raises a triable issue with a reasonable prospect of success, and will not prejudice the plaintiff in a manner which cannot be adequately compensated.

[100] The Practice Directions which supplement pt 14 of the Civil Procedure Rules provide that an admission made under pt 14 may be withdrawn and provide a list of factors to which the court must have regard in considering whether to grant leave to withdraw. The circumstances to which the court must have regard are:[101]

> (a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;
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> (b) the conduct of the parties, including any conduct which led the party making the admission to do so;
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> (c) the prejudice that may be caused to any person if the admission is withdrawn;
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> (d) the prejudice that may be caused to any person if the application is refused;
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> (e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;

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99 *Gale v Superdrug Stores Plc* [1996] 1 WLR 1089 (CA) at 1100. Waite LJ gave the principal judgment, Millett LJ gave a concurring judgment and Thorpe LJ dissented.

100 At 1100 per Millett LJ.

101 See *The White Book Service Civil Procedure* (2013) vol 1 at 14PD7.2. This list appears to be based substantially on a list of relevant factors identified by Sumner J in *Braybrook v Basildon & Thurrock University NHS Trust* [2004] EWHC 3352, [2005] All ER (D) 320 (QB) at [45], which Brooke LJ approved in *Sowerby v Charlton* [2005] EWCA Civ 1610, [2006] 1 WLR 568 at [35].

(f) the prospects for success (if the admission is withdrawn) of the claim or part of the claim in relation to which the offer was made; and

(g) the interests of the administration of justice.

Although the scheme of the Civil Procedure Rules in relation to admissions differs from that in the High Court Rules, we consider that this list of factors provides useful assistance in the context of the exercise of the court's discretion under r 15.16(2). We emphasise, however, that r 15.16(2) confers a general discretion, to be exercised in the interests of justice as the circumstances of the particular case require, so that the factors just identified are indicative, not exhaustive.

Our evaluation

[101] Mr Pidgeon argued that the language of r 15.16(1) was plain – it requires first, that a proceeding be issued and served on the party making the admission before an admission can be filed and acted upon and second, that the admission be filed and served by the person making it, not by the plaintiff. He also emphasised that r 15.16(4) provides that an admission in a case such as the present "must state the exact amount admitted". Here the admission of liability did not state the exact amount, but identified the categories involved (principal, interest, real estate fees and legal costs) and a process by which the amount would be ascertained, that is, certification by Bridgecorp's receivers or either of them. There is a further argument that we should address, namely that to interpret r 15.16 to allow the use of the procedure adopted in this case will be to create opportunities for oppressive conduct by creditors towards debtors.

[102] We will address the arguments just noted under four headings:

(a) Is a plaintiff entitled to file an admission on behalf of a defendant under r 15.16(1)?

(b) Does r 15.16 permit the filing of an admission that has been signed in advance of the issue of proceedings?

(c) What is the effect of r 15.16(4)?

(d) Is there scope for oppression under the rule that cannot be addressed adequately through r 15.16(2) and (5)?

Is a plaintiff entitled to file an admission on behalf of a defendant under r 15.16(1)?

[103] In the judgment under appeal,[102] the Court of Appeal referred to *Mather v O'Keeffe*, where Heath J considered whether a creditor could hold an admission and file it as the agent for the debtor under r 15.16.[103] The Judge quoted the following passage from *McGechan on Procedure*:[104]

> It is common practice for an admission to be signed by the party served and held by the party serving for the party serving to file in the event that the party served defaults on the terms of a settlement. Even though that is not strictly in accordance with the words of [High Court Rule] 15.16 such filing is nevertheless permitted by the rule.

The Judge said that in such a situation the creditor might be said to file the admission as agent for the debtor. However, the Judge concluded he did not need to decide the point.[105]

[104] We consider that a debtor may give his or her creditor authority to act on his or her behalf in filing an admission of liability under r 15.16. First, there seems to be no reason of principle to preclude normal agency principles from applying in respect of the giving of admissions.

[105] Second, given that there are safeguards against oppressive behaviour by creditors in r 15.16(2) and (5), it is difficult to see why a creditor should not be an agent for a debtor in this context. Where proceedings are issued to recover a debt, it may well be in the debtor's interests to negotiate a settlement with the creditor that allows further time for payment, with the proceedings not being pursued in the meantime. Avoiding the entry of judgment in this way may have significant benefits, for example, in relation to credit worthiness. As part of such a settlement the

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102 *P* (CA), above n 66, at [23].

103 *Mather v O'Keeffe* [2012] NZHC 2240.

104 At [13] quoting *McGechan on Procedure* (LexisNexis, looseleaf) at [HR15.16.01A]. This passage was revised following the Court of Appeal's decision in the present case: see now [HR15.16.04].

105 At [14]. The Court of Appeal was in error when it said at [23] that Heath J accepted that a creditor could hold and file an admission in an agency capacity: *P* (CA), above n 66, at [23].

creditor may require a formal admission of liability from the debtor and authority to file it if there is a default. Prohibiting the creditor from obtaining the admission and the filing authority may well operate as a disincentive to a settlement that would be in the debtor's interests. The ability to enter such conditional settlements is consistent with the purpose of the High Court Rules to secure the "just, speedy, and inexpensive determination" of proceedings.[106]

[106] Third, earlier rules dealing with judgments on confessions contemplated that a defendant would provide a confession to the plaintiff, either conditionally or unconditionally. So r 309 of the Code of Civil Procedure 1908 provided:[107]

> Judgment may be entered in any action upon a written confession … given by the defendant to the plaintiff, with or without condition annexed as to the time for satisfying the plaintiff's claim.

As the Court of Appeal observed in *Rhodes v Reid Development Co Ltd*:[108]

> The main object of the Rules which provide for judgment by confession is to avoid a plaintiff having to set an admitted claim down for trial in the type of case where formal proof will be required in default of appearance. It is to be observed in this respect that a written confession under R 309 must confess liability under the cause of action contained in the statement of claim, and that document must state the exact amount for which judgment is confessed. But apart from the practical utility of judgment by confession where formal proof would otherwise be required, the procedure is often resorted to in practice where judgment by default would be available without trial, but where the defendant agrees to admit liability for the amount claimed or part thereof on terms that he is given time to pay or is given the right to pay by instalments. That is a situation which R 312[109] clearly contemplates, in addition to possible breach of the special condition referred to in R 309. *The transaction at present under review represents a common example of a confession of judgment being signed and delivered conditionally, with the plaintiffs holding the signed confession by way of security for the due performance by the defendant of his promise to pay.* It is against this background that the true scope and intent of R 312 requires to be considered.

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106 High Court Rules, r 1.2.

107 The Code of Civil Procedure was initially part of the Supreme Court Act 1882. The Supreme Court Act 1882 was repealed by the Judicature Act 1908. The Judicature Act contained a revised Code of Civil Procedure. What were rules 303–306 in the Code of Civil Procedure 1882 became rules 309–312 under the Code of Civil Procedure 1908.

108 *Rhodes v Reid Development Co Ltd* [1981] 2 NZLR 721 (CA) at 725 (emphasis added). *Rhodes* involved a settlement arrangement agreed after an action to recover a debt was filed. The settlement provided for the debtors to pay a sum by instalments, with the creditor's solicitors holding an executed confession of judgment, to be acted upon in the event of default.

109 Rule 312 provided: "Any judgment signed on the confession of the defendant contrary to good faith may be set aside by the Court or a Judge". As a result of the Court of Appeal's judgment concerning "good faith" (at 726), r 312 was amended to wording similar to that in r 15.16(5); see rr 471(4) and (5) of the High Court Rules 1985.

[107] The current version of the rule was introduced in the High Court Rules 1985.[110] We do not consider that its wording was intended to prevent debtors from giving creditors admissions of liability, together with authority to file them if a settlement arrangement broke down, at least in the context of existing proceedings. As we have said, such arrangements will generally benefit debtors because they allow more time to pay and stave off the entry of judgment. Rule 15.16(5)(a), which provides that a court may set aside a judgment entered on an admission where the plaintiff entered judgment contrary to a duty or obligation not to do so, recognises that parties may reach settlement arrangements involving the giving of admissions on which judgment cannot be entered immediately but only in specified circumstances.

Does r 15.16 permit the filing of an admission that has been signed in advance of the issue of proceedings?

[108] It will be apparent from what we have said at [97](a) above that we agree with Mr Pidgeon that r 15.16(1) requires that proceedings be filed and served before an admission of liability can be filed. Associate Judge Bell was accordingly right to refuse to allow judgment to be entered against the appellant until there was proof that he had been properly served with the proceedings.[111] But that does not answer what is at issue in this case, namely whether r 15.16(1) requires that the admission of liability be executed after the issue of proceedings or whether a creditor can require that an admission be executed on the basis of a draft statement of claim in advance of filing, against the possibility that the debtor will default and it will become necessary to institute the proceedings. As we see it, there is nothing in the language of r 15.16 which specifically addresses that point.

[109] However, r 15.16(1) must be seen against its historical background and in its context. As we have said, the Code of Civil Procedure 1882 omitted the previous rules about *cognovits* and warrants of attorney and replaced them with rules dealing with the entry of judgment on confessions, namely rr 303–306 (which later became

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110 High Court Rules 1985, r 471.

111 See [70] above.

rr 309–312[112]). The text of r 303 (later r 309) is set out at [106] above. In addition, r 305 (later r 311) provided that a confession "may be given at any time after the writ of summons is issued". The rules remained in this form until the High Court Rules 1985 came into effect, when r 471, which is in substantially the same terms as r 15.16, replaced rr 309–312.

[110] In her judgment the Chief Justice concludes that the High Court Rules were not intended to change the point in time at which a confession of judgment (or, in current terminology, an admission of liability) could be given. Rather, the language of what is now r 15.16 is consistent with the timing provided for in r 305/311. Accordingly, it is not open to a defendant to give an admission of liability to a creditor on the basis of a draft statement of claim or to authorise the creditor to file it if proceedings become necessary.[113]

[111] We do not agree with that analysis. It is now accepted that a pre-action admission of fact may provide a proper basis for the entry of judgment under r 15.15. That rule provides:[114]

> **Judgment on admission of facts**
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> (1) If a party admits facts (*in the party's pleadings or otherwise*), any other party to the proceeding may apply to the court for any judgment or order upon those admissions the other party may be entitled to, without waiting for the determination of any other question between the parties, and the court may give any judgment or order on the application as it thinks just.
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> (2) This rule is not affected by rules 15.16 and 15.17.

[112] That language is almost identical to the language of RSC Order 27, r 3 (which, as we have said, has been replaced by pt 14 of the Civil Procedure Rules). In England, the words "or otherwise" in the italicised phrase have been interpreted as permitting a pre-action admission to be the basis for an application under r 15.15.[115] Under RSC Order 27, r 3, the English courts did not distinguish between admissions

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112 As explained above n 107.

113 See above at [25]–[29] and [39] in the Chief Justice's reasons.

114 Emphasis added.

115 See, for example, *Standerwick v Royal Ordnance PC* QBENI 95/0933/E, 6 March 1995 (CA) at 12–13; and *Gale v Superdrug Stores Plc*, above n 99, where it was accepted without argument that a pre-action admission could be the basis for the entry of judgment, the issue being whether the defendant should be granted leave to withdraw the admission.

of fact and admissions of liability (there being no equivalent to r 15.16) – both could result in the entry of judgment, even if made pre-action. In interpreting the words "or otherwise" to include pre-action admissions, the English courts were influenced by policy considerations. As the Court of Appeal in *Standerwick v Royal Ordnance PC* said:[116]

> The wider reading is consistent with policy. It enables the court in an appropriate case to make orders which dispose of cases more cheaply and expeditiously. The court does not have to make an order, the power is discretionary. The wider reading means that when the admission is made before proceedings are started and the start of proceedings is delayed in the hope of saving costs in reliance on the admission, the situation in which the likelihood of prejudice to the party to whom the admission has been made will be greater and will come within the ambit of Order 27, rule 3 and allow the court, in its discretion, to protect the person to whom the admission has been made.

It appears, then, that the words "or otherwise" did not compel the extended meaning but were sufficiently broad to encompass it given the policy considerations identified.

[113] There are significant differences between the relevant English rules, both existing and past, and the New Zealand rules. For example, as we have said, there was (and still is) no direct equivalent to r 15.16.[117] And our focus must, of course, be on the language of the High Court Rules. But in principle, provided that r 15.16 is otherwise complied with, and given r 15.16(2) and (5), we see no reason why the rule should be interpreted as preventing a debtor from giving a pre-action admission of liability on the basis of a draft statement of claim, with authority to file the admission if proceedings are ultimately issued, as part of the settlement of other proceedings (here, Bridgecorp's mortgagee sale proceedings). Provided that oppressive conduct by creditors can be addressed, giving effect to arrangements of the sort reached in this case facilitates the just and efficient resolution of disputes.

[114] One potentially significant difference between rr 15.15 and 15.16, highlighted by the Chief Justice,[118] is that r 15.15 (like Order 27, r 3) requires a judicial

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116 *Standerwick v Royal Ordnance PC*, above n 115, at 13.

117 Pt 14 of the Civil Procedure Rules (UK) contains a number of rules dealing with admissions in particular contexts.

118 See above at [19]–[20] in the Chief Justice's reasons.

determination concerning any judgment or order made, whereas under r 15.16 the decision to enter judgment is that of a Registrar:[119] the court will become involved only if there is an application for the withdrawal of the admission or to have judgment set aside. This may suggest that r 15.16 is intended to be more limited in its scope than r 15.15, and so should be more rigorously interpreted.

[115] Presumably r 15.15 provides for judicial evaluation because there may be scope for argument as to how far an admission of fact goes and what order or judgment it entitles the other party to obtain. By contrast, an admission of liability under r 15.16 will relate to a particular cause of action, so the question of what the other party is entitled to on the basis of the admission should be rather more straightforward. Judicial involvement will come at a later stage, if there is an application for leave to withdraw the admission or to have a resulting judgment set aside.

[116] Accordingly, we do not see the fact that a Registrar is entitled to enter judgment on an admission of liability under r 15.16 as a reason for interpreting the rule to require that any such admission be executed by the defendant only after the proceedings are issued. What is important is that the defendant, and later the Registrar, know the precise effect of the admission of liability.

[117] Mr Pidgeon accepted that Bridgecorp could legitimately have applied for the entry of judgment under r 15.15 on the basis of the appellant's admission. He sought to draw support for his argument that r 15.16 was more restrictive in this respect from several English authorities under pt 14 of the Civil Procedure Rules, including in particular *Sowerby v Charlton*[120] and *Walley v Stoke-on-Trent City Council*.[121] In *Sowerby*, the English Court of Appeal determined that the words "A party may admit the truth of the whole or any part of another party's case" in r 14.1(1) of the Civil Procedure Rules did not encompass an admission made before the issue of proceedings. While a pre-action admission could be relied upon as evidence in

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119 See [80] above.
120 *Sowerby v Charlton*, above n 101.
121 *Walley v Stoke-on-Trent City Council* [2006] EWCA Civ 1137, [2007] 1 WLR 352.

interlocutory matters or at trial, it could not, on its own, provide a basis for the entry of judgment.[122]

[118] We consider *Sowerby* to be of limited assistance. The Court's decision was based on a close analysis of the new Civil Procedure Rules. The Court considered that the "carefully crafted" scheme of the new rules precluded reliance on pre-action admissions for the purpose of entering judgment.[123] The Court of Appeal in *Walley* felt bound to follow its earlier decision in *Sowerby*, but members of the Court indicated that they thought it desirable that pre-action admissions be given greater effect.[124] Part 14 of the Civil Procedure Rules was subsequently amended to provide for the entry of judgment on pre-action admissions in certain circumstances.[125]

[119] The admission made by the appellant was on the basis of a draft statement of claim alleging a breach of the settlement deed, which was ultimately filed with updated figures. This is not like the situations that caused concern in the past, where the recipient of a warrant of attorney could act on it even though no proceedings had been instituted or, indeed, before there was any default. Here the draft statement of claim, the draft admission and the authority to file it were part of the settlement of mortgagee sale proceedings in which the appellant's quarter interest in his family home would have been realised to meet his debt to Bridgecorp had the settlement not been reached. We see nothing in the language of r 15.16 to prevent an admission of liability executed prior to the issue of proceedings from being filed in such circumstances, provided that the other requirements of the rule are met.

What is the effect of r 15.16(4)?

[120] Rule 15.16(4) provides that an admission in relation to a cause of action claiming a sum of money must state the exact amount admitted. This is significant for two reasons. First, it may support the argument that an admission must be executed after the filing and service of the statement of claim as it is only at that

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122 *Sowerby v Charlton*, above n 101, at [18], as interpreted by *Walley v Stoke-on-Trent City Council*, above n 121, at [1].

123 At [18].

124 *Walley v Stoke-on-Trent City Council*, above n 121, at [45] per Brooke LJ, with whom Smith LJ expressed agreement at [37].

125 See Civil Procedure Rules, rr 14.1A and 14.1B.

point that the defendant will be able to identify the precise sum at issue and determine the amount in respect of which he or she is prepared to admit liability. Second, the admission of liability in this case stated only one specific sum (the principal amount owed), provided for the payment of interest at a specified rate for identified time periods and permitted the recovery of any real estate charges and legal fees incurred. The final amount owed was to be certified by either or both of Bridgecorp's receivers. This was how payments made under the settlement agreement prior to default would be accommodated. The result was that the admission did not itself identify the exact sum owed – to determine that, reference had to be made to an affidavit from one of the receivers.

[121] The Court of Appeal dealt with this point in the following way:[126]

> In the present case, the admission was for $58,173.99, together with amounts which were readily and exactly calculable based on the terms of the admission. In our view, this more than adequately complies with r 15.16(4). The purpose of r 15.16(4) is to ensure that the admitted amount can be ascertained with precision, so that the plaintiff can determine whether or not to accept the admission, and, if accepted, to enable judgment to be sealed for a specific amount. Given the time that may pass between the provision of an admission of claim, even in extant proceedings, and when it may be filed under r 15.16 and judgment sealed, it would be impracticable to restrict admissions of claim to fixed, predetermined amounts.

[122] We agree with this analysis. To require an admission to state the precise sum owing at the time it is filed, so that the inclusion in the admission of a mechanism by which that exact sum could be determined would not be sufficient, would unduly undermine the utility of the admission process. As we have already said, it may well be in a debtor's interests to enter into some form of post-action settlement agreement with the creditor[127] and give an admission of liability and authority to file it as part of the arrangement. As the Court of Appeal indicates, such an admission will not contain the exact sum owing at the time of default where payments have been made in the interim but rather will (or should) contain a mechanism by which that sum can be precisely determined. If it does contain such a mechanism, it is difficult to see why the admission should be treated as ineffective, particularly given the protections

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126 *P* (CA), above n 66, at [24].

127 Such an agreement might, for example, give further time for payment or provide for payment by instalments.

for the debtor in r 15.16(2) and (5) and the purpose of the High Court Rules.[128] This is consistent with r 15.16(5), which recognises that an admission may be given or filed on the basis that judgment will not be entered on it immediately. Where recovery of a debt is concerned, a conditional admission necessarily requires some mechanism to determine the amount outstanding if judgment must ultimately be entered.

[123] As we have said, what is important is that the defendant knows what he or she is admitting liability for and the Registrar who is asked to seal judgment can identify the amount for which liability is being admitted. Rule 15.7 is instructive. It provides that where a plaintiff is seeking the payment of a "liquidated demand in money" and the defendant does not file a defence, the plaintiff may seal judgment for a sum not exceeding that claimed in the statement of claim plus: (1) any interest payable as of right (if specifically claimed), and (2) costs and disbursements as fixed by the Registrar. "Liquidated demand" is defined in r 15.7(5) to mean (among other things) a sum that "has been quantified in, or can be precisely calculated on the basis of, a contract relied on by the plaintiff". Rule 15.7(2) requires that a plaintiff claiming costs and disbursements file a memorandum setting out the amount claimed and how it is calculated. Rule 15.7(3) provides that either a judge or a Registrar may authorise the sealing of judgment in these circumstances. The task of a Registrar under r 15.7 is similar to the task that we see Registrars as having under r 15.16 in cases such as the present.

[124] Finally, we note that the Court of Appeal in *Rhodes* upheld a judgment obtained on a confession even though the judgment was for a lesser sum than the confession (payments having been made after the confession was given) despite the requirement in r 310 of the Code of Civil Procedure 1908 that a confession state the exact amount confessed.[129] So the interpretation which we favour is not new.

[125] We see no reason why the approach which we have outlined above should not apply in respect of admissions of liability executed before the issue of proceedings as

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128 High Court Rules, r 1.2.

129 *Rhodes v Reid Development Co Ltd*, above n 108.

well as those executed after proceedings are issued, provided that they otherwise meet the requirements of r 15.16.

Is there scope for oppression under the rule that cannot be addressed adequately through r 15.16(2) and (5)?

[126] Finally, we must consider the policy implications of the interpretation of r 15.16 which we favour. Does it create a real risk of oppressive conduct towards debtors that cannot be addressed through the discretions conferred by r 15.16(2) and (5)? We do not think so. We do not see how warrants of attorney could, for example, be included in standard credit documentation, as has occurred in parts of the United States, resulting in oppression of consumers. We emphasise that the admission and the authority to file it in the present case were given on the basis of a draft statement of claim alleging a breach of the settlement agreement. The discretions which the court has under r 15.16(2) and (5) are sufficient to protect against oppressive behaviour by creditors in such instances.[130]

Conclusion

[127] Much of Mr Pidgeon's argument was directed at the question whether the Associate Judge and the Court of Appeal were right in concluding that the appellant should not be given leave to withdraw his admission of liability. We have already said that we consider that both Courts approached the discretion under r 15.16(2) too narrowly. We do not propose to address the arguments raised, however, as the appellant faces an insurmountable hurdle for r 15.16(2) purposes, namely that he has never challenged his liability to Bridgecorp under the 2006 deed. The settlement agreement was entered into when the appellant defaulted on his obligations under the 2006 deed and was a favourable one from the appellant's perspective in that it allowed him further time to pay and avoided the immediate sale of the residential property in which he had a quarter interest. Undoing the effect of the settlement agreement may well leave the appellant exposed to an even greater liability.

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[130] We have said that r 15.16(1) does not permit the filing of an admission of liability until after the relevant proceedings have been filed and served: see [108] above. If a creditor had judgment entered immediately following the filing of an admission, without allowing the debtor any opportunity to apply for leave to withdraw it, the judgment may be vulnerable under r 15.16(5) depending on the circumstances.

[128] To summarise, then, where debt recovery proceedings are settled on the basis that the debtor will have more time to pay but must provide, as security, an admission of liability to a draft statement of claim alleging breach of the settlement agreement and authority to file the admission if necessary, the admission will be sufficient for the purposes of r 15.16 provided that it is filed after the proceedings are issued and properly served and states, or sets out a mechanism for the identification of, the exact amount in respect of which liability is admitted.

Decision

[129] The appeal is dismissed. There is no order for costs.

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