

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV-2016-404-002473  
[2016] NZHC 2407**

UNDER the Companies Act 1993

IN THE MATTER of an application for an order that a company, PRI Flight Catering Limited be restored to the Register

BETWEEN LSG SKY CHEFS NEW ZEALAND LIMITED  
Applicant

AND THE REGISTRAR OF COMPANIES  
First Respondent

THE SECRETARY TO THE TREASURY  
Second Respondent

Hearing: 5 October 2016

Appearances: C M Meechan QC for Plaintiff  
No appearance for Respondents

Judgment: 10 October 2016

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**JUDGMENT OF PALMER J**

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*This judgment is delivered by me on 10.10.16 at 3.30 pm  
pursuant to r 11.5 of the High Court Rules.*

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*Registrar / Deputy Registrar*

*Counsel/Solicitors:*  
C M Meechan QC, Auckland  
Douglas Erickson, Auckland  
Registrar of Companies, Wellington

## Summary

[1] PRI Flight Catering Ltd is alleged to have funded and controlled Employment Court proceedings against LSG Sky Chefs New Zealand Ltd, its successor as Singapore Airlines caterer. LSG seeks to pursue PRI for more than \$300,000 of costs related to those proceedings. But PRI had itself removed from the Register of Companies causing the pursuit of costs to be put on hold. LSG seeks restoration of PRI to the Register of Companies under s 329 of the Companies Act 1993.

[2] The text and purpose of s 329 makes clear that good reason to order restoration includes the pursuit of legitimate legal claims of or against, or enforcement of obligations of, the removed company. Restoring PRI to the Register of Companies will allow its legal obligations to be assessed and, if necessary, enforced. I consider restoration is consistent with the text and purpose of s 329. I order restoration under s 329(1)(a)(i) and (1)(b).

## Facts

### *LSG and PRI*

[3] Pacific Flight Catering and PRI Flight Catering Ltd (PRI) competed with LSG Sky Chefs New Zealand Ltd (LSG) in offering airline meals for passenger aircraft operating from Auckland Airport. Pacific and PRI supplied meals to Singapore Airlines until they lost a tender process to LSG in late 2010. As outlined by the Supreme Court in 2014, under the Employment Relations Act 2000, the employees of Pacific and PRI were entitled to transfer their employment to LSG on existing terms and conditions.<sup>1</sup> LSG was required to recognise accrued leave entitlements.

### *Employment claims*

[4] Two employees have taken claims against LSG:

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<sup>1</sup> *LSG Sky Chefs New Zealand Ltd v Pacific Flight Catering Ltd* [2014] NZSC 158, [2016] 1 NZLR 433.

- (a) Mr Matsuoka brought a claim for unjustified dismissal that was inherited by LSG. LSG sought, and on 29 August 2016 the Employment Court granted, non-party discovery from PRI of accurate wage/salary and leave records in relation to his employment. A fixture has not yet been allocated for a hearing. PRI is said to be funding Mr Matsuoka's claim.
- (b) In 2015, in *Nisha Alim v LSG Sky Chefs New Zealand Ltd*, Judge Corkill QC delivered a judgment in the Employment Court finding that PRI had falsely inflated one employee's leave balance and remuneration immediately prior to her transfer to LSG.<sup>2</sup> Although she claimed \$600,000, Ms Alim was awarded \$1,500. But she had failed to accept Calderbank offers of that amount and higher. LSG's costs claim is now over \$300,000. On 5 November 2015 LSG applied to join, as defendants for the purposes of costs, PRI and a director of PRI who it says are funders and controllers of the litigation.

[5] PRI and Ms Alim had described PRI as the funder of her claims.<sup>3</sup> On 10 August 2016, in the 21<sup>st</sup> judgment by the Employment Court in that proceeding, Judge Corkill recorded recent developments:<sup>4</sup>

- (a) On 5 August 2016 LSG applied for urgency for the application to join PRI.<sup>5</sup> LSG had learned PRI had applied to the Registrar of Companies to be removed from the Companies Register and the Registrar could make that decision by 11 August 2016.<sup>6</sup> That would have been before the Employment Court had determined costs. Apparently PRI's application was on the basis that it had ceased trading.
- (b) Judge Corkill invited Ms Meechan QC, counsel for LSG, to contact the Registrar of Companies urgently to seek deferral of the possible removal of PRI from the Register of Companies until the Court had

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<sup>2</sup> *Nisha Alim v LSG Sky Chefs New Zealand Ltd* [2015] NZEmpC 171.

<sup>3</sup> *Nisha Alim v LSG Sky Chefs New Zealand Ltd (No 21)* [2016] NZEmpC 98 at [24] and [26].

<sup>4</sup> *Nisha Alim v LSG Sky Chefs New Zealand Ltd (No 21)*, above n 3.

<sup>5</sup> At [4]-[5].

<sup>6</sup> At [6].

had the opportunity to hear counsel on the urgent joinder application.<sup>7</sup> LSG subsequently filed an objection to the removal of PRI from the register.<sup>8</sup>

- (c) PRI opposed the urgency application on the basis that LSG had a statutory right to object to PRI's removal from the Register and, under s 318(5) of the Act, removal cannot occur immediately if there is objection.<sup>9</sup> Under s 322, if LSG applied to the High Court for the company not to be removed, it would not be removed unless the High Court declined the application. In those circumstances PRI submitted there was no urgency since recourse to this procedure would address LSG's immediate concerns.<sup>10</sup>
- (d) LSG submitted to the Employment Court that it was critical PRI be "kept alive" long enough for the Court and the defendant to deal with the outstanding issues, given that Ms Alim continued to assert she was being funded by PRI which was otherwise said to be apparently "moribund".<sup>11</sup> It also applied to join another person as funder of the same claim.

[6] Judge Corkill understandably described the legal position with regard to the joinder of non-parties for costs purposes as "not straightforward".<sup>12</sup> He relied on an upcoming fixture to provide the parties with the opportunity to make submissions. He stated:

[31] LSG is naturally concerned that the possibility of joining PRI as a party for cost purposes should not be circumvented by removal from the register. However, I am satisfied that this is an issue which is capable of being dealt with via the mechanisms of the CA. LSG is exercising its right to object to removal; and the s 322 procedure means that removal will not occur during the period within which the application for joinder of PRI will be considered by the Court.

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<sup>7</sup> At [9].

<sup>8</sup> At [10].

<sup>9</sup> At [12]-[17].

<sup>10</sup> AAt [17].

<sup>11</sup> At [24].

<sup>12</sup> At [30].

[7] Accordingly, and because PRI has continued to be actively engaged in the matters before the Court, he declined the urgency application.

*Removal of PRI from the Register of Companies*

[8] LSG objected to PRI's removal from the Register of Companies on 10 August 2016. It applied to the High Court for orders that PRI not be removed on 6 September 2016 and served that application on the Registrar of Companies on 9 September 2016. There is some question about whether the application was validly filed which is being considered by Associate Judge Bell.

[9] However, on the same day, 9 September 2016, the Registrar of Companies removed PRI from the register on the basis that the application was not served in time.

*Current application*

[10] Now, LSG applies to have PRI restored to the Register under s 329 of the Companies Act. It also applies for leave pursuant to s 329(2)(c) of the Companies Act to bring the application and it applies for urgency.

[11] Judge Corkill has issued a minute stating he would continue to defer dealing with both of the applications for joinder of PRI until the outcome of the application for restoration of PRI to the register was known. Ms Meechan is to update the Employment Court by 25 October 2016.

**Law**

[12] Section 329 of the Companies Act provides:

**329 Court may restore company to New Zealand register**

- (1) The court may, on the application of a person referred to in subsection (2), order that a company that has been removed from the New Zealand register be restored to the register if it is satisfied that,—
  - (a) at the time the company was removed from the register,—
    - (i) the company was carrying on business or a proper reason existed for the company to continue in existence; or

- (ii) the company was a party to legal proceedings; or
  - (iii) the company was in receivership, or liquidation, or both; or
  - (iv) the applicant was a creditor, or a shareholder, or a person who had an undischarged claim against the company; or
  - (v) the applicant believed that a right of action existed, or intended to pursue a right of action, on behalf of the company under Part 9; or
- (b) for any other reason it is just and equitable to restore the company to the New Zealand register.
- (1A) In considering whether to restore a company to the register on the ground referred to in subsection (1)(a)(i) or (b), the court must have regard to the reasons for the company's removal and whether those grounds existed at the time of removal or exist at the time of the hearing of the application.
- (2) The following persons may make an application under subsection (1):
- (a) any person who, at the time the company was removed from the New Zealand register,—
    - (i) was a shareholder or director of the company; or
    - (ii) was a creditor of the company; or
    - (iii) was a party to any legal proceedings against the company; or
    - (iv) had an undischarged claim against the company; or
    - (v) was the liquidator, or a receiver of the property of, the company:
  - (b) the Registrar:
  - (c) with the leave of the court, any other person.
- (3) Before the court makes an order restoring a company to the New Zealand register under this section, it may require any provisions of this Act or any regulations made under this Act, being provisions with which the company had failed to comply before it was removed from the register, to be complied with.
- (4) The court may give such directions or make such orders as may be necessary or desirable for the purpose of placing the company and any other persons as nearly as possible in the same position as if the company had not been removed from the New Zealand register.

[13] This section enables applications for restoration to the Register of Companies to be made by a wider range of persons and on a wider range of grounds than did its

predecessor, s 336(7) of the Companies Act 1955. Associate Judge Abbott held, in *Downview Nominees Ltd v Registrar of Companies & Anor*, that the Court's discretion to grant leave to "any other person" to apply for restoration appears to be unfettered.<sup>13</sup> Of course it is unfettered apart from the Court having to make its decision for a purpose within the contemplation of the Act, in accordance with ordinary principles of administrative law.<sup>14</sup> I agree it is not necessary for an applicant to establish a legal nexus or interest in an application for restoration, though it is likely to be very unhelpful to the application's success if there is no nexus or interest in the application at all.<sup>15</sup>

[14] The purpose of the section is to allow the Court to order restoration of a company to the Register if there is good reason for doing so. The text and purpose of s 329 make clear that good reason includes the pursuit of legitimate legal claims of or against, or enforcement of obligations of, the company. Similarly, as *Sampson v Registrar of Companies* demonstrates, the Court will order restoration at the instigation of a third party to enable that party to obtain a benefit that requires the existence of that company.<sup>16</sup> Justice and equity offer residual categories of good reason.

### **Should PRI be restored to the Register?**

[15] I am concerned that the removal of PRI from the register is holding up live Employment Court processes. I am satisfied that the interests of justice, and of good judicial administration, favour expedition in dealing with this matter. I grant the LSG's application for leave to apply as "any other person" to have PRI restored to the Register and for the application to be accorded urgency.

### *Parties' positions*

[16] LSG relies on s 329(1)(a)(i) and (1)(b) for its restoration application. LSG says that PRI's application for removal from the Register, at a time it was before the

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<sup>13</sup> *Downsview Nominees Ltd v Registrar of Companies & Anor* HC Auckland, CIV 2005-404-401 9 June 2005 at [13].

<sup>14</sup> *Astrazenca Ltd v Commerce Commission* [2009] NZSC 92, [2010] 1 NZLR 297 at [29].

<sup>15</sup> *Downsview Nominees Ltd v Registrar of Companies & Anor*, above n 13, at [16].

<sup>16</sup> *Sampson v Registrar of Companies & Ors* [2016] NZHC 1051.

Employment Court in two sets of proceedings and faces the prospect of a six figure costs award, is a cynical ploy. It did not advise LSG, or apparently even its own counsel in the Alim proceedings, that it had done so.

[17] LSG had also applied for a direction that the Registrar of Companies and Secretary to the Treasury state their positions in relation to the restoration application within three days. However, on 4 October 2016, the Registrar of Companies confirmed that it does not object to the application for restoration and ancillary applications.

[18] The Secretary to the Treasury is a respondent because undistributed property in a company removed from the register vests in the Crown under s 324 and the Secretary has a role in relation to that. A solicitor for the Secretary has confirmed the Secretary does not object to restoration and will abide the decision of the Court.

[19] PRI is not a party, of course. Because it has been removed from the Register it is no longer a legal entity in its own right under s 15 of the Act. The Registrar of Companies does not oppose the applications.

### *Analysis*

[20] I agree it is extraordinary that PRI applied for removal from the Register at a time it was before the Employment Court in two sets of proceedings and facing the imminent prospect of legal argument over a substantial sum. It is not in the interests of justice that PRI be allowed to escape from its legal obligations by removing its corporate veil. That is particularly so when its own counsel relied on the ability of LSG to object to the removal as a reason why the Employment Court should not grant urgency to LSG's application for costs.

[21] I am told that the basis for PRI's removal from the Register was that it said it had ceased trading. However, there are serious arguments on foot in the Employment Court that it was continuing to fund two sets of proceedings. If so, that would call into question whether PRI was "not carrying on business" under s 318(1)(b) of the Act. The reasons for removal are a mandatory consideration in my decision as to whether to restore PRI to the register (s 329(1A)). . On the basis of

the evidence before me I am not satisfied those reasons were necessarily valid. Restoration will enable the Employment Court's inquiry into that to proceed.

[22] Restoring PRI to the Register of Companies will allow its legal obligations to be assessed and, if necessary, enforced. I consider restoration is consistent with the text and purpose of s 329. I order restoration under s 329(1)(a)(i) and (1)(b).

### **Result**

[23] I order that PRI be restored to the Register of Companies.

Palmer J