

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

**CIV-2018-404-1833
[2018] NZHC 2621**

UNDER Sections 322(2) and 323 of the Companies
Act 1993 Part 19 of the High Court Rules

IN THE MATTER of CDZNT01 LIMITED (IN
LIQUIDATION) (3480231)

BETWEEN SOUTH BRITISH NOMINEES LIMITED
Applicant

AND REGISTRAR OF COMPANIES
First Respondent

AND DANIEL AUSTIN WALLEY AND AS
SOLE LIQUIDATOR OF CDZNT01
LIMITED (IN LIQUIDATION)
Second Respondent

AND MARICA HOLDINGS LIMITED
Fourth Respondent

Hearing: 4 October 2018

Appearances: D C Beissel for Applicant

Judgment: 8 October 2018

JUDGMENT OF PAUL DAVISON J

*This judgment was delivered by me on 8 October 2018 at 4:00 pm
pursuant to r 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Solicitors:
Duncan Cotterill, Auckland

[1] South British Nominees Limited (South British) applies for an order pursuant to ss 322 and 323(2) of the Companies Act 1993 (the Act) that CDZNT01 Limited (in liquidation) (3480231) not be removed from the Companies Register. The order is sought so as to enable the applicant to fund the liquidator to pursue claims in respect of certain insolvent transactions discovered by the liquidators during their investigations of the affairs of the company.

[2] When the matter was called before Wylie J in the Duty Judge list on 13 September, his Honour noted that counsel for South British advised that service had not yet been effected on the fourth respondent. The matter was therefore adjourned to enable service to be effected and proof of service filed.

[3] Ms Beissel for the applicant confirms that service on the fourth respondent was effected on 13 September 2018 and an affidavit of service has been filed.¹ None of the respondents have taken any formal steps in the proceeding.

[4] Ms Beissel explains however that the applicant has been in contact with Mr Sebastjan Marinkovich, who is a shareholder and director of the fourth respondent Marica Holdings Limited (Marica). Marica held 30 per cent of the shares of the company (CDZNT01 Ltd). The remaining 70 per cent was held by BFA Holdings Limited (BFA), which was owned by the third respondent Stephen Owsley and his wife Janine Owsley. Ms Beissel advises that Mr Marinkovich is not opposing the application, and is offering his support to any application that may be brought by the applicant or liquidator in respect of any insolvent transactions.

[5] Ms Beissel advises that the evidence in support of the application is contained in the affidavit of Mr John Khouri.² In his affidavit Mr Khouri sets out the background to the application and summarises the history of the company prior to and since liquidation.

¹ Affidavit of Jerome Swan (sworn 3 October 2018).

² Affidavit of John Khouri (sworn 24 August 2018).

The relationship between the applicant and the company

[6] Mr Khouri explains that in 2014, the directors of the applicant were approached by Mr Marco Marinkovich and Mr Stephen Owsley regarding a business they were developing to manufacture and sell pharmaceutical grade infant formula. The vehicle by which they were conducting their venture was the company CDZNT01 Ltd, then named the New Zealand Dairy Company Limited. Mr Marco Marinkovich and Mr Owsley proposed that the applicant provide the funding necessary to build a plant to blend and package their infant formula. They sought finance to undertake the construction totalling between \$7M - \$8M, and proposed that the applicant advance \$4M during the construction of the plant with the balance of approximately \$4M to be raised through a conventional bank funding package. The applicant agreed to lend the company the funds for the construction of the plant.

[7] By July 2015, despite the applicant by then having advanced the company around \$2.45M to fund the construction of the plant, little progress had been made. The applicant then engaged and appointed a general manager to the company to assess the state of the project, and to prepare forward cash flow forecasts for the completion of the plant. The new general manager quickly discovered the company owed \$400,000 to outstanding creditors and had insufficient funds to cover staff wages. The general manager also discovered that approximately \$1,600,000 had been paid to a company called ASW Dairy Limited, which was wholly owned and directed by Mr Owsley and his wife.

[8] By 20 November 2015 the outstanding aged creditors of the company were owed nearly \$600,000 and the total funds available to meet those payments were only \$5,000. The applicant itself then provided the further funds necessary to pay the company's creditors, and also to pay staff wages.

[9] The company also owed approximately \$50,000 to the IRD for unpaid PAYE, Kiwisaver and student loan deductions. On 15 November 2015 the company received a statutory demand from its landlord for the payment of unpaid rent and interest totalling over \$300,000, together with a notice of intention to cancel the lease of its premises.

[10] As a result of the solvency issues that had been discovered, the applicant applied to the High Court for an order putting the company into liquidation. On 4 December 2015, Mr David Webb and Mr John Lerner of PPB Advisory were appointed as interim liquidators by the Court. On 15 December the interim liquidators were appointed joint and several liquidators by the Court pursuant to s 241(2)(c) of the Act.

[11] As of 7 December 2015, having paid outstanding urgent creditors and staff wages owed by the company, the applicant itself was a creditor in the sum of \$3,296,397.07. Following the appointment of the liquidators, the applicant continued to advance funds to the company so that it could pay its ongoing creditors and staff.

[12] In January 2016, the applicant purchased the assets of the company (then named the New Zealand Dairy Company) for \$75,000 plus GST, and agreed to pay off the company's creditors.

[13] In February 2016, the applicant took steps to pay all the creditors of the company 100 per cent of their outstanding invoices in exchange for an assignment of their debt. As a result, the company subsequently paid the creditors and obtained an assignment of debt, with the result that the total debt owed by the company to the applicant as at 17 May 2016 was \$4,158,767.53.

[14] On 18 January 2016, the liquidators issued their first report in which they advised that they had successfully negotiated the sale of the business of the company to a third party. In their report the liquidators said that they had sold the business and assets of the company to a third party, which would yield benefits to creditors in excess of \$1M. Although the purchaser was not named at the time, it was in fact the applicant, South British.

[15] On 20 January 2016 the liquidators made application to the Companies Office to change the company's name from the New Zealand Dairy Company Limited to CDZNT01 Limited. On 22 July 2016 the liquidators presented a six monthly report to all creditors and shareholders of the company. In this report they said:

The Liquidators have run a sale process to sell the business and assets of the Company. As a result of this process, we have been successful in achieving a sale to a third party. The sale involved a cash payment of \$75,000, plus an agreement from the purchaser to write off \$1m of debt and satisfy a significant number of unsecured creditor claims as determined by the purchaser.

Whilst the specific details of the sale remain confidential, we can report the value achieved was well in excess of estimates for individual asset sales in a break-up scenario.

[16] The liquidators also reported that as a result of their investigations to date, it was their view that a number of transactions made by the company prior to their appointment may constitute insolvent transactions. The liquidators expressed their view that there might be further avenues of recovery available to the liquidators, but as they were without sufficient funding to progress any such claims, they were unable to take any further action in respect of the transactions at that time. The liquidators reported that as of 22 July 2018 they had received creditor claims totalling \$1,188,143.20, of which a total of \$1,075,076 related to unsecured creditors.

[17] On 27 September 2016, Mr Webb and Mr Lerner retired as liquidators and the second respondent, Daniel Walley, was appointed as the sole liquidator. On 10 February 2017 Mr Walley issued his six monthly liquidator's report in which he noted:

Investigations identified a number of potential transactions which may constitute insolvent transactions. There may be further avenues of recovery available for the Liquidator, however insufficient funding has meant that these claims will not be progressed.

[18] Mr Walley issued further six monthly reports on 10 July 2017, 16 January 2018, 29 June 2018 and 4 July 2018 and a final report on 4 July 2018. In his final report of 4 July 2018, Mr Walley stated that as liquidator he was obliged to give public notice of his intention to have the company removed from the Register of Companies. He referred to s 321 of the Act and advised that where public notice is given of an intention to remove a company from the Register, any person may send or deliver to the Registrar not later than the date specified in the notice an objection to the removal on any one or more of the grounds set out in s 321.

[19] On 4 July 2018, Mr Walley gave written notice pursuant to s 318(1)(e) of the Act stating that, having filed the liquidator's final report with the Registrar, it was intended that the company be removed from the Register. The notice of intention

stated that any objection to the removal pursuant to s 321 of the Companies Act had to be delivered to the Registrar no later than 1 August 2018.

[20] On 1 August 2018 Mr Khouri, on behalf of the applicant, lodged an objection to the removal of the company from the Companies Register pursuant to s 321(1)(d) of the Act on the basis that the applicant is a creditor of the company and has an undischarged claim against the company.

[21] In the notice of objection Mr Khouri said:

I am the Accountant for South British Nominees Ltd which is the sole creditor of CDZNT01 Limited and am authorised to act on behalf of South British Nominees Ltd. The affairs of CCZNT01 Limited and distribution of funds from its Bank Account by its Manager in 2014 are currently subject to an investigation by the New Zealand Police. Until that investigation is completed it is necessary that CDZNT01 Limited continue to be a Registered Company and not removed from the Register. This objection is lodged under Section 321(d) and on the basis that South British Nominees Ltd is a Creditor of the Company and has an undischarged claim against the Company.

[22] Mr Khouri's notice dated 1 August 2018 was received and acknowledged by the Registrar of Companies also on 1 August 2018. In acknowledging receipt of the notice, the Registrar noted that s 322(2) of the Act required an application to be made to the High Court for an order that the company not be removed from the Register and that notice of the application be served on the Registrar no later than 20 working days following the date of the notice.

[23] Mr Khouri explains that it has always been the applicant's intention to fund the liquidators to investigate the insolvent transactions that they uncovered during the course of their initial investigation of the company's accounts.

[24] Having regard to that background and its position as the sole creditor of the company, the applicant now seeks an order from this Court that the company not be removed from the Companies Register.

Conclusion

[25] I am satisfied on the basis of the evidence set out in Mr Khouri's affidavit, and the exhibits annexed thereto, that it is appropriate to make an order that the company

should not be removed from the Register. I am satisfied that the applicant has made out the requisite grounds of its objection pursuant to s 321(1)(d) as a creditor of the company. Furthermore, I am satisfied that the applicant justifiably believes that there exists a right of action on behalf of the company in relation to what may be insolvent transactions entered into by the company prior to liquidation. It is clear that the applicant intends to pursue these claims and has demonstrated its commitment by its funding of the company prior to liquidation and its subsequent obtaining of an assignment of the debts of other unsecured creditors on the basis of them being paid 100 per cent of their outstanding invoices.

[26] For those reasons I also consider that it would not be just and equitable to remove the company from the New Zealand Register.

[27] Having reached that conclusion, I also make an order cancelling the final liquidation report prepared by Mr Walley and dated 4 July 2018. The liquidator's final report of 4 July 2018 was required to be sent to every creditor and shareholder and included a statement that the company was ready to be removed from the New Zealand Register. However, in light of the order made herein that the company not be removed from the Companies Register to enable insolvent transactions to be investigated and steps taken for the recovery of money from the recipients of any such transactions, the 4 July 2018 report by Mr Walley cannot stand as a final report, and accordingly its status as a *final report* is cancelled. As the company is not to be removed from the Companies Register and as further steps are to be undertaken by the liquidator seeking to recover insolvent transaction money, further liquidator's reports will be required before a final report can be prepared. A final liquidator's report will therefore not be prepared until all the proposed recovery action has been taken and any insolvent transaction funds have been recovered and distributed to the company's creditors.

Result

[28] I make an order that:

- (a) CDZNT01 Limited (in liquidation) not be removed from the Companies Register; and

- (b) Mr Walley's liquidator's report dated 4 July 2018 expressed as being the liquidator's "final report" be cancelled as being a final report under s 257(1)(a)(i).

Paul Davison J