

**IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY**

**CIV-2014-454-000412
[2015] NZHC 843**

UNDER	the Companies Act 1993
IN THE MATTER	of an Application seeking an order that Aladdin's Motor Inn Limited (In Liquidation) not be removed from the Register, Section 321(1)(e) and (f) Companies Act 1993
BETWEEN	ALADDIN'S MOTOR INN LIMITED (IN LIQUIDATION) Applicant
AND	BOWCORP HOLDINGS LIMITED Respondent

Judgment: 28 April 2015

JUDGMENT (ON THE PAPERS) OF COLLINS J

Introduction

[1] I am granting one of three applications brought by Mr and Mrs Waugh, but dismissing two of their applications.

[2] Mr and Mrs Waugh are directors and shareholders of Aladdin's Motor Inn Ltd (in liquidation) (Aladdin's). They believe they have suffered a number of grievances resulting from the actions of Bowcorp Holdings Ltd (Bowcorp), Aladdin's former lessor. They wish to bring claims against Bowcorp for:

- (1) breaching the lease agreement;
- (2) illegally terminating the lease;

- (3) retaining Aladdin's business assets for a price lower than their true value; and
- (4) misleading the Court about Aladdin's debt to Bowcorp.

[3] Aladdin's was placed into liquidation by order of the High Court on 3 October 2013 following steps taken by Bowcorp to recover rent owed by Aladdin's. Those steps included issuing statutory demands on 13 June 2011 and 22 November 2011.

[4] Mr and Mrs Waugh provided the Official Assignee with an extensive background to the liquidation of Aladdin's, including their grievances with Bowcorp. They urged the Official Assignee to investigate their complaints and take all necessary steps to ensure a reversal of what they considered was the unjust and unfair situation in which Aladdin's had ended up.

[5] The Official Assignee decided not to pursue legal action or continue with the arbitration that Mr and Mrs Waugh had initiated against Bowcorp. In reaching this conclusion the Official Assignee took into account the fact she had no funds with which to advance legal proceedings. The Official Assignee was also mindful that the complaints made by Mr and Mrs Waugh were becoming increasingly antiquated as they related to events prior to the termination of the lease in 2011. The Official Assignee was also concerned that it would be difficult to substantiate and quantify the complaints.

[6] In addition, the Official Assignee took into account the fact that proceedings would be against Bowcorp who, as a creditor in the liquidation, would not be prepared to advance funds for that purpose. Furthermore, Mr and Mrs Waugh had advised the Official Assignee that they had already depleted all available personal funds to assist in the company's legal battle.

[7] The Official Assignee gave consideration to s 254(b) of the Companies Act 1993 (the Act) which provides that where a company in liquidation has no assets for distribution to creditors, the Official Assignee is not required to act, carry out any

duty or exercise any power in connection with the liquidation if to do so would, or would be likely to, involve the incurring of expense.

First application

[8] The Official Assignee completed the liquidation of Aladdin's on 7 March 2014 and found there were no assets for her to distribute to creditors. Mr and Mrs Waugh object to having Aladdin's removed from the Register of Companies. They have filed an application pursuant to ss 321 and 323 of the Act for an order that Aladdin's not be removed from the Register of Companies.

Second application

[9] Mr and Mrs Waugh seek an order reversing the Official Assignee's final report as liquidator of Aladdin's pursuant to s 284(1)(b) of the Act. That section allows the Court to reverse the actions of the Official Assignee.

Third application

[10] The third application seeks an order that the Official Assignee provide Mr and Mrs Waugh with a list of creditors admitted in the liquidation of Aladdin's pursuant to s 256(1)(a)(ii) of the Act.

[11] The parties are content for me to deal with all applications on the papers.

Objection to removal from register

[12] Section 321 of the Act provides a mechanism for any person to object to the removal of a company from the register. That section provides:

321 Objection to removal from register

- (1) Where a notice is given of an intention to remove a company from the New Zealand register, any person may 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 following grounds:
 - (a) That the company is carrying on business or there is other reason for it to continue in existence; or
 - (b) That the company is a party to legal proceedings; or

- (c) That the company is in receivership, or liquidation, or both; or
- (d) That the person is a creditor, or a shareholder, or a person who has an undischarged claim against the company; or
- (e) *That the person believes that there exists, and intends to pursue, a right of action on behalf of the company under Part 9 of this Act; or*
- (f) *That, for any other reason, it would not be just and equitable to remove the company from the New Zealand register.*

...

(emphasis added)

[13] Mr and Mrs Waugh's application is based upon s 321(1)(e) and (f) of the Act.

Right of action on behalf of the company under Part 9

[14] Mr and Mrs Waugh wish to bring a derivative action in the name of Aladdin's against Bowcorp, either through litigation or arbitration, pursuant to s 165 of the Act.

[15] Where, however, a company is in liquidation, the Court may not have jurisdiction to authorise a derivative action. As Wild J observed in *Hedley v Albany Power Centre Ltd (In Liquidation)*,¹ after review of overseas cases, the jurisdiction under s 165 ought not to be exercised once a company has been put into liquidation. This conclusion was reached after considering the following factors:

- (1) allowing shareholders to bring a derivative action would potentially undermine the liquidator's principal duty of gathering and distributing the company's assets as efficiently as is reasonably possible; and
- (2) section 284 of the Act provides the most appropriate remedy, which allows the Court to direct the actions of the liquidator.

[16] In this case it is significant the Official Assignee has already decided not to pursue an action against Bowcorp. That decision was made by the Official Assignee

¹ *Hedley v Albany Power Centre Ltd (In Liquidation)* [2005] 2 NZLR 196 (HC).

after considering the merits of Mr and Mrs Waugh's claim and the other relevant considerations I have summarised in paragraphs [4] to [7] of this judgment.

[17] In my assessment, the fact the Official Assignee has already determined that there is no merit in the claim which Mr and Mrs Waugh wish to bring against Bowcorp is a powerful factor that weighs against their first application.

Just and equitable

[18] Mr and Mrs Waugh have also identified s 321(1)(f) of the Act as a ground for objecting to Aladdin's being removed from the register. They say they do not want Aladdin's to be removed from the register on just and equitable grounds so as to enable them to pursue against Bowcorp.

[19] Having determined however that the Official Assignee's decision not to pursue action against Bowcorp weighs against the Waugh's claims, the just and equitable limb of s 321(1)(f) of the Act ceases to have the significance that it might otherwise have had.

Reversing the liquidator's final report

[20] Mr and Mrs Waugh apply under s 284 of the Act for an order reversing the liquidator's final report. They have however not sought leave from the Court to bring such an application. Before such an application would be granted Mr and Mrs Waugh would need to establish an arguable case for leave to be granted.

[21] Section 284 of the Act provides:

284 Court supervision of liquidation

(1) On the application of the liquidator, a liquidation committee, or, with the leave of the Court, a creditor, shareholder, other entitled person, or director of a company in liquidation, the Court may—

...

(b) Confirm, reverse, or modify an act or decision of the liquidator:

...

[22] Mr and Mrs Waugh seek an order that I cancel by reversal the liquidator's final report. This aspect of Mr and Mrs Waugh's claim is based upon their concern that the liquidator has decided not to pursue claims against Bowcorp.

[23] While the Court undoubtedly has the ability to intervene to reverse or modify the acts of a liquidator, Courts should be cautious before doing so. Toogood J explained this in *Levin v Lawrence*:²

... Without abrogating its supervisory obligations, the Court should be slow to intervene where matters of judgment and assessment on commercial matters are concerned. That includes assessing how far to investigate possible avenues of recovery of funds for distribution. Weighing the likely cost of pursuing such avenues against the prospects of success and the amount which may be recovered are matters for judgment which are squarely within a liquidator's domain.

(Footnotes omitted)

[24] Courts will only intervene to reverse or modify a liquidator's decision in special circumstances.³ This requires Mr and Mrs Waugh to demonstrate the liquidator was not acting genuinely or that she was acting in a way that no reasonable liquidator could act.⁴

[25] Before Mr and Mrs Waugh could satisfy the Court of the minimum threshold for reversing the liquidator's decision not to pursue an action against Bowcorp, they would need to demonstrate reasonable prospects that Aladdin's will recover in a claim against Bowcorp and that the litigation can be adequately funded and indemnified.

[26] There are four reasons why I have decided the liquidator's decision not to pursue the claims against Bowcorp was reasonable and bona fide:

- (1) it has been established through litigation that Bowcorp was entitled to cancel the lease and that Aladdin's is in debt to Bowcorp;

² *Levin v Lawrence* [2012] NZHC 1452 at [54].

³ See *Brookers Company Law* (online looseleaf ed, Thomson Reuters) at [CA284.05(1)].

⁴ *Commissioner of Inland Revenue v Hulst* (2000) 8 NZCLC 262,266 (HC) at [24]; citing *Leon v York-O-Matic Ltd* [1966] 1 WLR 1450 and *Re Peters, ex p Lloyd* (1882) 47 LT 64 at 65.

- (2) the other claims against Bowcorp have not been quantified;
- (3) in the course of pursuing arbitration against Bowcorp, Aladdin's has been required to pay security for costs and has already had an adverse costs award against it; and
- (4) there are no company assets or other funding available to fund the litigation.

[27] In these circumstances there is nothing that can be identified by Mr and Mrs Waugh to properly suggest the liquidator's decision to refrain from proceeding against Bowcorp was not reasonable or bona fide.

[28] For this reason, Mr and Mrs Waugh have not established an arguable case that the decision of the liquidator ought to be reversed. This means Mr and Mrs Waugh's application under s 284 of the Act must also be dismissed. This conclusion is also consistent with allowing Aladdin's removal from the register under s 323 of the Act because Mr and Mrs Waugh are very unlikely to be successful in pursuing a claim on behalf of Aladdin's, either by derivative action or by an application under s 284 of the Act.

Order to provide Mr and Mrs Waugh with a list of creditors admitted in liquidation

[29] The Official Assignee has indicated that only two creditors filed a claim in the liquidation of Aladdin's, namely Bowcorp and Technology Holdings Ltd. Neither claim was formally admitted.

[30] Nonetheless, the Official Assignee has no objection to an order being made to provide a list of the creditors admitted under s 256(1)(a)(ii) of the Act. In view of this approach, I grant the third application sought by Mr and Mrs Waugh.

Conclusion

[31] This proceeding has had a very unfortunate and protracted history. Whilst I appreciate Mr and Mrs Waugh genuinely believe they have been the victims of injustice, their options for seeking redress have now been exhausted.

[32] In the unusual circumstances of this case I will not order any costs in the hope that Mr and Mrs Waugh accept this matter is now at an end.

D B Collins J

Solicitors:
Official Assignee, Insolvency & Trustee Service, Napier