

19/7

1305

IN THE MATTER OF The Companies Act 1955

AND

IN THE MATTER OF An application by GREGORY CHARLES CROTT,  
District Registrar of Companies at  
Napier for an Order restoring HALDANE  
PARK LIMITED; AQUA DIVE LIMITED;  
JAMES W. WARK LIMITED; KEITH FOOTE  
INSURANCE BROKERS; RIDEAU INVESTMENTS  
LIMITED; HAMES TRADING COMPANY LIMITED;  
B. & E. KELLY LIMITED; ASTRO MOTORS  
(1988) LIMITED; CANDELIGHT RESTAURANT  
LIMITED; EASTLANDS DRAINAGE LIMITED;  
ALLAN GOLDS LIMITED; GRANNY'S  
RESTAURANT (1982) LIMITED; TE OHO  
MAURI TRANSPORT LIMITED; TE OHO MAURI  
HOTELS LIMITED; and TAINUI CHAMBERS  
LIMITED all duly incorporated companies

Counsel: G.A. Rea for Applicant

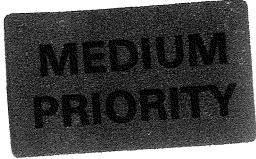
Judgment: 19 JULY, 1991

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JUDGMENT OF GALLEN J.

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S.306 of the Companies Act provides that in certain circumstances a District Registrar of Companies may strike companies off the Company Register. The section provides a procedure which the District Registrar of Companies is required to follow when exercising the powers conferred by the section. In this case the District Registrar of Companies believed that



the abovenamed defendants had ceased to carry on business or were no longer operative and in terms of the section, sent a letter to each company enquiring whether or not it was carrying on business or in operation. At the expiration of one month from the date of sending the letter already referred to, the District Registrar of Companies had not received a reply from any of the abovenamed companies and therefore in accordance with the provisions of s.336 (2) of the Act, a second letter was sent informing each of the defendants that if no reply was received in respect of the second letter within one month, a notice would be published in the Gazette with a view to striking the name of each such defendant off the Register. Again the applicant the District Registrar of Companies, did not receive any replies. That being so, he proceeded to strike the names of the defendants from the Register and on 23 January 1991 published notices in the Gazette advising that the abovenamed defendants had been struck off the Register.

In acting as he did, the applicant omitted the third step required by s.336 (3) of the Act which was to publish in the Gazette and to send to the defendants by post a notice that at the expiration of 3 months from the date of the notice, the name of the defendant would be struck off the Register and the company dissolved. Having realised that this step had been omitted, the applicant became concerned as to the validity of his action in striking off the names from the Register and seeks in these proceedings a declaratory order determining whether the purported striking off of the defendants was null

and void and further, whether a corrigendum to the Register is sufficient to restore the defendants to the Register.

Clearly a step which the section contemplates was omitted in this case and it is necessary to consider the effect of that omission. Both Maxwell on the Interpretation of Statutes and De Smith's Judicial Review of Administrative Action, express the traditional view that the effect of such omission depends on whether the step is to be described as mandatory or permissive and there is a considerable body of law indicating the way in which the Courts have approached that question in particular circumstances. The Court of Appeal in A.J. Burr Limited v. Blenheim Borough Council (1980) 2 N.Z.L.R. 1, per Cooke J. at p.5, indicated that traditional sharp delineation of the options into two choices did not recognise all the possibilities which could perhaps best be referred to as a spectrum of possibilities. The Court is required to consider all the circumstances and perhaps in the end the answer may depend upon the nature and purpose of the particular requirement considered in the light of all the relevant circumstances. It might perhaps be thought that both approaches are different ways of approaching the same question and that there may not be very much that is fundamentally different between them. Determining the nature of the step in traditional terms must after all involve a consideration of all the circumstances with a particular emphasis on the purpose of the omitted step.

In this case I think the starting point is that the striking off of the name of the company from the Register is from the point of view of the company, a matter of the greatest seriousness and from the point of view of those involved in the affairs of the company, may well have major consequences. It is not impossible to envisage circumstances where persons acting on behalf of the company may be incurring personal liability when they believed that it was the company which was at risk. Further, the rights of third parties may be involved. Persons dealing with the company will be placed in a position of considerable loss if the entity with which they thought they were dealing had ceased to exist. In that situation it is understandable that Parliament should have provided a detailed procedure designed to ensure that all those concerned received adequate notice. The step omitted in this case is particularly significant since it is a means whereby notice is given to the public at large by means of the Gazette, a notice which is designed to be given a considerable time lapse to enable action to be taken before the Registrar completes the striking off permitted by the section. It is therefore apparent that the step is of major significance and designed to provide rights of persons who may not have had the initial correspondence brought to their attention that such rights can be preserved. Accordingly using the old nomenclature I should have thought that the step is one which could properly be described as mandatory and could I think properly be described as sufficiently important that its omission must nullify any subsequent action. It has been held

that a failure to notify of a right of appeal has this effect and in my view the present situation is stronger.

Accordingly I am of the view that the purported striking off of the defendants by the applicant was null and void and a corrigendum to the Register is sufficient to restore the defendants to the Register.

There will therefore be a declaratory order in those terms. No order for costs is in the circumstances required.

RJatt

Solicitors for Applicants: Messrs Elvide and Partners,  
Napier

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