IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

M 77/97

IN THE MATTER of Section 304 of the Companies Act 1955

A N D

IN THE MATTER of ECONOMY SERVICE LIMITED

A N D IAN OLIVER CADDIS

Applicant

A N D ARIE ROSKAM being a person directed to be served

Objector

Hearing: 4 July 1997

Counsel: G J Toebes for A Ruskam
P S J Withnall for Applicant

Judgment: 4 July 1997

ORAL JUDGMENT OF HERON J

Solicitors:
Buddle Findlay, Wellington for Mr Roskam
Russell McVeagh McKenzie Bartleet & Co, Wellington for Applicant

This is an application to restore a company to the register pursuant to S.304 of the Companies Act 1955. Commenced in the first instance as an ex parte application the company was incorporated on 18 October 1972. It has not been re-registered under the 1993 Companies Act. It has carried on business as a consultant debt collector and factor.

The company omitted to file an annual return in 1995 and was removed from the Register of Companies by the Registrar on 15 January 1996. On this coming to the notice of the company, the next day; Mr Caddis, a director of the company, made application pursuant to S.303 of the Act which allows the Registrar on application to restore a company where he is satisfied, amongst other things, the company was still carrying on business or other reason existed for the company to continue in existence. That section provides that before the Registrar restores a company, he must give public notice of his intention to do so if that is his view, and may not do so until that notice has expired.

The Registrar is charged with ensuring that any requirements which the company has failed to comply with before it was removed from the register, are in fact complied with. The public notice required to be given by the Registrar gives any person a right of objection to restoring the company to the register.

An objection having being received, the Registrar was bound to follow the procedure set out in S.304 which is as follows:

> "S.304: **Court may restore company to register** - (1) The Court may, on the application of a person referred to in subsection (2) of this section, order that a company that has been removed from the register be restored to the register if it is satisfied that, -
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> "(a) That the time the company was removed from the register, -
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> "(i) The company was still carrying on business or other reason existed for the company to continue in existence; or
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> "(ii) The company was a party to legal proceedings; or
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> "(iii) The company was in receivership or liquidation, or both; or
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> "(iv) The applicant was a creditor, or a member, or a person who had an undischarged claim against the company; or
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> "(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 Vd of this Act; or
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> "(b) For any other reason it is just and equitable to restore the company to the register.

"(2) The following persons may make an application under subsection (1) of this section:

"(a) Any person who, at the time the company was removed from the register, -

"(i) Was a member 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 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 register."

The ex parte application to this court contained no explanation or reasons for the objection referred to, nor was the relationship between the objector and the applicant explained. By order of 6 March 1997, Ellis J required such details. They ought to have been provided in the ex parte application and it is convenient I think to refer to them now.

The nature of the objection, received by the Registrar, was contained in a letter from Buddle Findlay, solicitors of Wellington, acting for one Arie Roskam. In that letter which is below, four points were made.

"23 February 1997

The Registrar of Companies
Companies Office
WELLINGTON

Dear Sir/Madam

Economy Service Limited - WN26779
Restoration to Register - Objection

1. We act for Arie Roskam and on his behalf lodge objection to the advertised restoration to the Register of Companies of Economy Service Limited.

2. It appears, when it existed, Economy Service Limited operated a company formation registration and search services and it seems inappropriate that a company so involved with those matters should (whether deliberately or otherwise) fail to file any documents since the last document filed on 30 November 1994 (being the 1994 annual return). We say this as this is the state of the documents at the time that the company was struck off - it may have in recent times purported to have filed on its behalf further documents.

3. It would be appropriate to have a audit of the operation purported to be on behalf of the company since it was struck off until the present time to ascertain whether or not it is appropriate for the company to be restored (for the benefit of its creditors).

4. We anticipate that if the promoters of the company wish to persevere with restoration they should make an application to the court for restoration under section 304 of the Companies Act 1955.

Yours faithfully
BUDDLE FINDLAY

JUSTIN TOEBES
Partner"

However at this hearing I was informed that Mr Roskam was a defendant in proceedings brought by Economy Services Limited, those proceedings having been instituted in the District Court at Wellington. Since the objection to restoration to the register was made, those proceedings have been dismissed against Arie Roskam on the basis that the company was not in existence at the time the proceedings were issued. It is clear from that information that Mr Roskam has an interest in this company not being restored to the register, although on the face of it, it would seem his purpose has already been achieved. It may be that restoration will restore the parties to their former position but I am not required to resolve that question now.

Continuing to pursue the objection, the objector through solicitors sought orders for discovery which have since being made and complied with. Finally on 20 May 1997, Gendall J made orders that Mr Roskam be served with the affidavits, including an affidavit from Assistant Registrar of Companies, Mr P A Middleton, indicating that the Registrar had no objection to the restoration of the company to the register.

Mr Roskam was directed to file a notice of opposition and also to file any affidavits,

and indicate whether he wished to be heard or he would file submissions. A notice of objection has now been filed but no affidavits in opposition. In summary the objector says that if the company holds significant assets on trust for its director and shareholder, Mr Caddis, (which it does by virtue of a deed of trust), there would be no need for the company to be restored to the register because it has no assets.

Following the order for discovery we have an affidavit indicating that the company acknowledges that it holds its undertaking in trust for Mr Caddis but also that it will act as directed by Mr Caddis when required. There is an irresistible inference in my view that the company is trading at the direction of the beneficiary of the trust as the trust deed pursuant to Clause 2 contemplates.

> "THE Trustee hereby declares that henceforth it shall accordingly stand possessed of the said assets of the company in trust for the Beneficiary and in the meantime shall subject as hereinafter mentioned deal with the assets of the company as the Beneficiary may from time to time direct."

Essentially however, I regard this particular circumstance to be irrelevant to this application. It seems to me that unless the objector can point to some illegality arising out of such trust arrangement, or that the Companies Act is not being complied with, it is not a pertinent matter for the Court to examine on an application of this kind. What is relevant is the circumstances under which the company was removed from the register and any likelihood of further breaches of the Company Act its or regulations. In this case it seems to be accepted that this was an oversight and immediate steps were taken to redress it. But for the objection those steps would have been completed well and truly by now.

I should say that there is a question raised on the affidavits from Mr Munt, a solicitor employed by Economy Services Limited, that notwithstanding the company's removal from the register, he knowingly commenced proceedings in the company name. I do not have all the information about that matter but I am informed that the Law Society have been appraised of it. It is difficult to comment except to say that the Act following restoration envisages the company being deemed to have continued in existence, notwithstanding the removal from the register, and whilst that may not

excuse Mr Munt, it is a factor to be taken into account, particularly when it would seem the objection overall has no merit.

The authorities in this matter were reviewed by Hammond J in *Re Saxpack Foods Limited* [1994] 1 NZLR 605. In that case he was dealing with the previous provisions under S.336 which were substituted by the by Companies Amendment Act 1993. However much the same test it seems to me, applies. As the Judge said in that case (608), it is the overall justice of the case which is to be examined on such an application.

In this case it is plain the company has been carrying on business. Indeed the company is acting as a debt collection agency, a perfectly legitimate business and one in respect of which no complaint appears to be made. It is for the Registrar of Companies to ensure that the Act has been complied with and will be complied with. Now the annual returns have been filed, that is indeed the position. There are no other outstanding matters.

The action by Mr Roskam seems to be motivated by collateral concerns and with a view to perhaps obtaining an advantage in the proceedings which I have referred to earlier. In the event he appears to have consolidated that advantage but whether it continues is a matter for the future.

For my part, I think that any concern about the company continuing to trade in the knowledge that it had been removed from the register, is of some minor significance in the circumstances, although I do not want to be seen to in any way suggest that should be the norm. However in company such as this, involved as it is in ongoing court proceedings, it would not be surprising if actions were taken which caused entries in the Mercantile Gazette amongst other things, after the date it became aware of the fact that it ceased to be registered. As I have said before, the legislature acknowledges that that may be a problem, and that if there is hiatus caused by such omissions or oversights, S.306 ensures that continuity prevails.

The Court has power to cure these mistakes, and it is in the overall good interests of commerce that that be done and that the matter be approached on the basis that when

orders are made they are retrospective in effect otherwise there is unnecessary disruption to the normal path of commerce. This does not mean to say that there may be occasions where there have been gross acts of deliberate non-compliance with company law act or regulation requirements, in which case no doubt the Registrar will pursue those before giving his approval, if at all, to the restoration of the company to the register. This is not one of those cases and I take the view that the objectors interest in this matter has been wrongly motivated. Oversights of this kind do happen. They have been explained and it is appropriate that the Court restores the company to the register and it is accordingly restored.

Mr Withnall does not require me to make any ancillary orders which I could made pursuant to S.304(4) but I intend to give leave to the company to apply should that become necessary in respect of any outstanding matter affected by the period of time which the company has effectively been out of existence.

The application therefore succeeds. I consider that costs should follow the event and the applicant should have costs. To some extent the objector has increased the costs, without justification in my view by obtaining, orders for discovery which reveal matters that are only peripheral relevant to the issue to be considered. On the other hand the original omission was one that ought not to have occurred irrespective of mistakes as to address. There should be systems in place which ensure that with or without a reminder from the company's office, returns are filed. Then there is the question as to whether on the ex parte application more should have been said about the objector and to that extent some of the further discovery might have been avoided. I have not overlooked that possibility as well.

Mr Withnall suggests that costs in the order of $2,500 would be appropriate. I think that is reasonable figure but for the other matters that argue for a less than full order for costs. In all the circumstances the applicant is entitled to costs in the sum of $1,500 together with all approved disbursements.