

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

CIV 2009-404-004217

UNDER the Companies Act 1993
IN THE MATTER OF of an application pursuant to s 329 of the
Companies Act 1993
BETWEEN SABRINA NUTARELLI
Applicant
AND EFI-TECH LIMITED
First Respondent
AND REGISTRAR OF COMPANIES
Second Respondent

Hearing: 27 July 2009

Appearances: S Hindle for the Applicant
H Holland for the First Respondent
No appearance for the Second Respondent

Judgment: 27 July 2009

[ORAL] JUDGMENT OF WYLIE J

Solicitors/Counsel:

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Rogers Law, P O Box 300 041, Albany, North Shore City 0752

H Holland, P O Box 128 224, Remuera, Auckland 1541

[1] Ms Nutarelli has filed an application seeking to restore a company, LAMSNZ Ltd, to the companies register. The application was filed on 10 July 2009.

[2] The application is made under s 329 of the Companies Act 1993. It was commenced by way of originating application. Section 329 is not expressly referred to in r 19.2. I accept that an originating application is however appropriate and I permit Ms Nutarelli to make the application by way of originating application in terms of r 19.5(1).

[3] LAMSNZ was removed from the register under s 318 of the Companies Act 1993 on 25 February 2009. It was removed because it failed to file its annual return for the year ended 31 March 2008. That annual return had to be filed by October 2008.

[4] The registrar gave public notice of the intention to remove the company from the register in the New Zealand Herald and Gazette on 23 and 29 January 2009 respectively. He called for objections. One objection was received from an entity known as EFI-Tech Limited (“EFI-Tech”). There were no other objections.

[5] The objection from EFI-Tech was dated 3 May 2009. It was withdrawn on 30 June 2009.

[6] At the time that company was involved in a dispute with Ms Nutarelli regarding repairs to a Lamborghini Murcielago motor vehicle. Ms Nutarelli had requested EFI-Tech to undertake the repairs on behalf of LAMSNZ. At the time of the request that company had already been struck off. EFI-Tech was not paid and summary judgment proceedings were commenced by EFI-Tech against Ms Nutarelli and another individual in the District Court at North Shore.

[7] There was correspondence between the parties, and in the event the summary judgment proceedings were settled by Ms Nutarelli agreeing to make a payment to EFI-Tech.

Application for restoration

[8] Ms Nutarelli was a director of LAMSNZ Ltd and as such, she is entitled to apply to have the company restored to the register – see s 329(2) of the Companies Act 1993. Where an objection is lodged, the registrar is not permitted to restore the company to the register – see s 328(4) of the Act. Rather application must be made to this Court. The Court can order that the company be restored if it is satisfied as to one or more of the circumstances detailed in s 329(1) of the Act.

[9] Here I am satisfied on the materials filed that at the time LAMSNZ Ltd was removed from the register reason existed for the company to continue in existence. LAMSNZ Ltd was the registered proprietor of a property at Gulf Harbour. It was de-registered for failing to file an annual return. In the circumstances, it is appropriate that the company should be restored to the register and I so order.

[10] I have jurisdiction under s 329(3) of the Act to require that any provisions which the company has failed to comply with before it was removed from the register, be complied with. It is clear from Ms Nutarelli's affidavit that although she has filed an annual return for the year ending 31 March 2008, that return is deficient because errors have been identified in it. I raised this matter with Ms Hindle appearing for Ms Nutarelli this morning and she has confirmed that an amended annual return for the year ending 31 March 2008 can be promptly filed. I direct that such return be filed within a period of 10 working days from the date of this judgment.

Costs

[11] As I have noted above, EFI-Tech withdrew its objection which was initially filed with the registrar of companies.

[12] Ms Hindle seeks costs against EFI-Tech on a 2B basis. She argues that the parties did not settle all issues when they settled the summary judgment proceedings, and that an award of costs is appropriate. She submits that the notice of opposition was filed with the registrar for improper purposes in order to embarrass and put

pressure on Ms Nutarelli. She refers me to the decision in *Re Saxpack Foods Ltd* [1994] 1 NZLR 605.

[13] Mrs Holland appearing for EFI-Tech resists the application for costs. She submits that the issue has been settled as between the parties, and further that there is no principled basis on which an order for costs can be made against her client company. Indeed she seeks costs against Ms Nutarelli on the basis that EFI-Tech has been required to attend today to resist Ms Nutarelli's costs application.

[14] I am satisfied that the parties did not settle the issue of costs in these proceedings. I have read the documentation attached to an affidavit filed by Mr Frost, who is a director of EFI-Tech. It seems to me clear that there was an initial offer made by Ms Nutarelli's solicitors to settle matters, that there was a letter from EFI-Tech's legal advisors agreeing to accept the sum proposed in settlement, but recording that EFI-Tech would not agree to any deduction of costs for any other matter or for the summary judgment proceedings incurred or to be incurred by Ms Nutarelli. On 25 June 2009, Ms Nutarelli's solicitors responded to EFI-Tech's legal advisors agreeing to pay the sum specified, in "full and final settlement of its summary judgment application". The proposal made by EFI-Tech's solicitors in relation to all costs in all matters was not expressly accepted. Rather the agreed sum was paid and accepted. I cannot see that the issue of costs in these restoration proceedings has been agreed between the parties.

[15] A more significant issue is whether or not costs should be awarded. LAMSNZ Ltd was struck off the companies register because of a failure by it or its directors to file the appropriate annual return. EFI-Tech did object to the company being restored to the register. The letter of objection was sent direct by Mr Frost to the Registrar. It was not altogether accurate, but it did clearly record the objection made by EFI-Tech. As a consequence, this matter had to come before this Court notwithstanding the fact that the objection was subsequently withdrawn. On the materials before me, it is perhaps surprising that EFI-Tech opposed LAMSNZ Ltd's restoration to the register, but I cannot be satisfied that the objection was lodged for an improper purpose. As I have noted EFI-Tech was not responsible for the fact that LAMSNZ Ltd was struck off the companies register. Further it was Ms Nutarelli

who involved LAMSNZ Ltd with EFI-Tech at the outset – and notwithstanding that at that stage LAMSNZ Ltd had already been struck off. I have considered *Re Saxpack Foods Ltd* and also the decision in *Re Economy Service Limited; Caddis v Roskman* (1997) 8 NZCLC 261,441. Both it seems involved situations where the objectors maintained their objections when the applications for restoration came before the High Court. That is not the case in the present situation. EFI-Tech withdrew its objection before these proceedings were commenced. It is unfortunate that the application for restoration had to come before this Court. That however is as a result of the operation of s 328(4) of the Act. There is nothing to suggest that EFI-Tech was aware that this application would result from its objection.

[16] In the present circumstances, in my view it would be inappropriate to award costs to either party. Costs should lie where they fall.

Wylie J