

IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

PLAINT NO. 2/2018

BETWEEN **PACIFIC MARITIME HOLDINGS
INC** Plaintiff
AND **REGISTRAR OF INTERNATIONAL
AND FOREIGN COMPANIES** Defendant

Hearing Date: 23 March 2018

Counsel: Mr B Mason for Plaintiff
Ms C McCarthy for Defendant
Mr W Rasmussen and Mr T Arnold for named creditors

Minute & Orders: 23 March 2018

Judgment: 9 August 2018

**JUDGMENT OF THE HONOURABLE JUSTICE DAME JUDITH POTTER
on preliminary issue of law**

[0922.dss]

Issue

- [1] The preliminary issue of law for determination is agreed;
- a) Whether the net proceeds of sale of the vessel *Tranquillity* (Proceeds) revert to the plaintiff on reinstatement to the Register of the plaintiff; or
 - b) Whether the Proceeds remain in the Public Account subject to claim under s 199(4) of the International Companies Act 1980-81 (ICA) against the defendant as nominal defendant by the plaintiff and any other claimants.

Background facts

- [2] The background facts are agreed. They are set out in paragraphs 1-14 of the Statement of Claim and are detailed in the schedule to this Judgment.

[3] Certain persons claim to be creditors of the plaintiff and make claims on the Proceeds.

Relevant statutory provisions

[4] Under s 197(2) of the ICA the plaintiff was “dissolved” upon being struck off by the Registrar, but “subject to subsection (3A)”.

[5] Subsection (3A) was inserted in s 197 by s 9 of the International Companies Amendment Act 2006. It provides:

(3A) Notwithstanding section 199(1), upon the Registrar restoring to the register the name of an international company pursuant to subsection (3) –

- (a) the international company shall be deemed to have continued in existence as if its name had not been struck off, and unless the Registrar at the time of restoration orders to the contrary, the international company and all other persons shall be deemed to be in the same position as nearly as may be as if the international company had not been struck off; and
- (b) any property, real or personal, including choses in action and whether within or outside of the Cook Islands that has pursuant to section 199(1) become vested in the Registrar, shall be deemed notwithstanding section 199(1), never to have been so vested, other than –
 - (i) property actually sold, otherwise disposed of or dealt with by the Registrar pursuant to section 199(2), which property shall remain the property of any bona fide purchaser or recipient; and
 - (ii) property the subject of an order of the Court, which property shall be deemed to have been dealt with according to the order.

[6] By s 10 of the 2006 Amendment Act, s 199(1) was made subject to s 197(3A). As amended, s 199(1) provides:

199. Outstanding assets of defunct company to vest in Registrar - (1) Subject to section 197(3A), where, after an international company has been dissolved there remains any outstanding property, real or personal, including choses in action, and whether within or outside the Cook Islands which was vested in the company or to which it was entitled, or over which it had a disposing power at the time it was so dissolved but which was not got in, realised upon or otherwise disposed of or dealt with by the company or its liquidator, such property except uncalled capital, for the purposes of the following subsections and notwithstanding any enactment or rule of law to the contrary, by the operation of this section shall be and become vested in the Registrar for all the estate and interest therein, legal or equitable, of the company or its liquidator at the date the company was dissolved, together with all claims, rights and remedies which the company or its liquidator then had in respect thereof.

[7] Subsections (2) and (3) of s 199 empower the Registrar to dispose of and deal with property vested in the Registrar under s 199(1) and to pay the net proceeds into the Public Account.

[8] Section 199(4) provides that any action in respect of monies so paid into the Public Account shall be against the Registrar as nominal defendant but actions are barred unless instituted within six years after the dissolution of the company.

Parties' positions

[9] The plaintiff submits that s 197(3A) is paramount over s 199(1). As neither of the two exceptions in subs 3A(b) apply in this case, the property in question, namely the Proceeds, are deemed never to have been vested in the Registrar, and revert to the plaintiff by operation of law.

[10] The defendant submits that s 197(3A)(b) applies only to assets not yet disposed of or dealt with by the Registrar, and does not apply to the proceeds of realised assets. The defendant notes the absence of explicit provision in s 197(3A) for the proceeds of realised assets which, the defendant contends, are held in the Public Account subject to claim under s 199(4). Further, that s 197(3A) is made subject only to s 199(1), which, the defendant submits leaves the proceeds of realised assets to be governed by subs (3) and (4) of s 199, which are "weighted towards a more stringent process".

Analysis: s 197(3A) and s 199

[11] The 2006 Amendment Act in **Division 8 – Defunct companies**, introduced a regime for striking off and dissolving defunct international companies, reserving a discretion to the Registrar to restore to the register, a struck off company subject to conditions as to payment of costs, fees and charges.

[12] By s 197(2) dissolution of a defunct company is expressly made subject to subs (3A).

[13] Section 197(3A)(a) deems a company restored to the register "to have continued in existence" and the company and/or other persons to be "in the same position as nearly may be" as if the striking off had not occurred.

[14] Consistently with subs (3A)(a), subs (3A)(b) deems “any property” that became vested in the Registrar pursuant to s 199(1) “never to have been so vested”. Two exceptions to this deeming provision are specified: to protect a bona fide purchaser of property sold by the Registrar under s 199(2) and to give priority to any Court orders to which the property is subject.

[15] Given the express provision for restoration to the pre-dissolution position of a company restored to the register, and the deemed non-vesting in the Registrar of “any property” of the company restored to the register, it cannot be validly contended that the proceeds of the sale conducted by the Registrar remain subject to the process for claim under s 199(4). In the case of a restored company, the proceeds are deemed never to have been vested in the Registrar so cannot be subject to the s 199(4) process for claim.

Section 199(4) ICA

[16] Section 199(4) is applicable as the plaintiff’s submissions point out, to situations where restoration to the register which invokes the application of s 197(3A), has not occurred.

[17] The defendant’s submissions posed a dilemma in the notional case of a company reinstated after a period of, say, 20 years. This, it is said, could present difficulties in valuing the reverting assets thus defeating the utility of the six years statutory time limit for claims in s 199(4).

[18] This matter does not require determination in this case. However, valuation is always a matter of fact to be determined by evidence. The perceived difficulty cannot challenge the clear paramountcy stated in both s 199(1) and s 197(3A), of subs (3A) over s 199.

Result

[19] The net proceeds of sale of the vessel *Tranquillity* revert to the plaintiff on reinstatement to the register of the plaintiff.

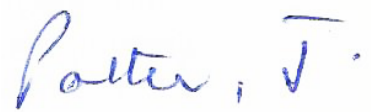
[20] Costs are reserved.

Further Orders

[21] There are notified and known persons/entities making claims against the Proceeds. As a result of this Judgment any such claims will need to be pursued against the plaintiff.

[22] Following discussion with counsel there will be the following orders by consent:

- a) The Registrar is to forthwith pay the Proceeds to the trust account of Henry Law PC. Mr Mason is to ensure the Proceeds so paid are placed on interest bearing deposit. They are to be held as to the Proceeds and interest thereon for the persons entitled thereto as finally determined.
- b) The Registrar is forthwith to provide to the plaintiff a full accounting of expenses arising from and incidental to the sale of the vessel "Tranquillity".
- c) Within 21 days of the date of this Judgment any person making a claim against the Proceeds is to file and serve on the parties to this proceeding and any other known claimant appropriate proceedings against the plaintiff.
- d) Any persons so filing shall diligently pursue such claim until final determination or withdrawal thereof.
- e) If no claims are filed within the period of 21 days aforesaid or a claimant fails diligently to pursue a claim filed, the Proceeds or such part thereof as made or be directed by the Court, shall be disbursed to the plaintiff.
- f) A copy of this Judgment shall be provided by the Court, to counsel for the named creditors and also to two other claimants notified to the Registrar.



Judith Potter, J

Schedule

The Plaintiff by its solicitor says:

Parties

1. The Plaintiff is an international company incorporated and duly registered under the International Companies Act 1980-81 ("ICA") and has its registered office at the premises of Southpac Trust Limited, ANZ House on the main road in Avarua on the island of Rarotonga.
2. The Defendant is the Registrar of International and Foreign Companies duly appointed pursuant to sub-section 8(1) of the ICA whose premises are at the offices of the Financial Supervisory Commission, Bermuda House, Tutakimoa Road, Avarua on the island of Rarotonga.

Particulars

3. The Plaintiff was duly incorporated as an international company 30 September, 2013.
4. The sole director of the Plaintiff on incorporation of the Plaintiff was, and remains, William Edward Duffy ("Duffy"), an Australian citizen who resides at 31 Lyebird Ridge Road, Queensland 4213, Australia.
5. The Plaintiff has issued 100 shares having a par value of USD1.00 each. All shares are owned by Southpac Trust Limited in a trustee capacity.
6. The Plaintiff held an asset namely a 21 metre yacht built in Canada in 1996 by the name of *Tranquility* ("Vessel") which was in 2013 flagged and registered in the Cook Islands.
7. On 29 September, 2016 the registration of the Plaintiff on the register of international companies ("registry") expired.
8. On 1 December, 2016 the Plaintiff was struck off the registry for non-payment of registration renewal fees.
9. Pursuant to subsection 197(2) of the ICA the Vessel vested with the Defendant.
10. The Defendant arranged for the Vessel which was then berthed in Noumea, New Caledonia to be sailed to Auckland, New Zealand for the purposes of its disposition by way of sale.
11. On or about 21 November, 2017 the Vessel was duly sold for a consideration of \$483,000.
12. Upon application by Southpac Trust Limited pursuant to subsection 197(3) of the ICA, and upon filing all statutory returns required by the Defendant and paying to the Defendant all prescribed costs and fees, the Defendant on or about 5 February, 2018 restored the Plaintiff to the register.

13. The Plaintiff has made demand of the Defendant to pay out to the Plaintiff the net proceeds of the sale of the Vessel ("Proceeds") but the Defendant has refused claiming application must be made to the Court pursuant to subsection 199(4) of the ICA.
14. The Plaintiff has advised after deducting the costs and expenses incurred in the sale of the Vessel the net proceeds held in the relevant public account administered by the Financial Supervisory Commission pursuant to the provisions of section 46 of the Ministry of Finance and Economic Management Act 1995-96 are \$169,195.57 (the "Proceeds").