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

APPLICATION NO. 24/2021

IN THE MATTER	of s 408(3) of the Companies Act 2017
AND	
IN THE MATTER	of an application for **SEASPRAY ENTERPRISES LIMITED** to be re-registered under the Companies Act 2017

Applicant

Date of Application: 11 March 2021

Appearances: Mr T P Arnold for Applicant

Judgment: 3 May 2021

JUDGMENT OF HUGH WILLIAMS, CJ AND POTTER, J.

[0099.dss]

Introduction, Legislation & Application

[1] For a number of years Seaspray Enterprises Ltd[1] has run a tourist accommodation business in land and buildings on Rarotonga owned by one of its directors, Ms Kingan. Ms Kingan and her husband live in Auckland New Zealand but visit Rarotonga regularly. For reasons which will appear, it is relevant to note that they are not directors of any New Zealand registered company.

[2] The Companies Act 2017[2] came into force on 10 December 2019. Sections 407-411 – the whole of Subpart 4 of Part 20, the "Miscellaneous" Part – and ss 338 and 344-349 in Subparts 3 and 4 of Part 16, dealing with removal of companies from the Cook Islands' register, are the provisions principally relevant to the present application, especially the former. Subpart 4 reads:

---

1 "Seaspray".
2 "The 2017 Act".

Subpart 4 – Re-registration:

407 Application for re-registration of existing company

(1) an existing company may apply for re-registration under this Act

(2) An application for re-registration must be –

(a) in the prescribed form; and

(b) signed by the person completing the application; and

(c) filed with the Registrar within 1 year after the commencement of this Act; and

(3) The application must specify, in respect of the company once re-registered –

(a) the name of the company, which must comply with section 11; and

(b) whether the constitution of the company differs from the appropriate default constitution; and

(c) whether the constitution with which the company proposes to be re-registered adversely affects existing shareholder rights and obligations; and

(d) the full name, residential address, and postal address of each director of the company; and

(e) that each person named as a director of the company has consented to act as a director of the company; and

(f) the full name of every shareholder of the company, and the number of shares held by each shareholder; and

(g) the registered office of the company; and

(h) the postal address of the company, which may be the registered office or any other postal address; and

(i) any other prescribed information.

(4) The application for re-registration must be accompanied by –

(a) the prescribed fee; and

(b) a copy of the constitution to the extent that the company elects not to use the appropriate default constitution or to modify it.

(5) If the constitution with which the company proposed to be re-registered adversely affects shareholder rights and obligations, the application must be accompanied by the written consent of each shareholder to re-registration.

408 Failure to apply for re-registration

(1) An existing company that has not applied for re-registration in accordance with section 407 is a nullity.

(2) For the purposes of subsection (1), subparts 3 and 4 (but not subpart 5) of Part 16 apply as if the former company were a company that had been removed from the Cook Islands register under subpart 2 of Part 16.

(3) On the application of a director, shareholder, or creditor of an existing company, the Court may-

(a) direct the Registrar to make an application for re-registration on behalf of the company; and

(b) make any other orders necessary to effect the re-registration of the company.

…

410 Re-registration

(1) The Registrar must, without delay on receiving an application for re-registration of an existing company or existing overseas company that complies with section 407 or 409, as the case may be,-

(a) enter the company on the Cook Islands register; and

(b) issue to the company a certificate in the prescribed form of its re-registration.

(2) A certificate of re-registration issued under subsection (I) is conclusive evidence that-

(a) all the requirements for re-registration have been complied with; and

(b) on and from the date of re-registration stated in the certificate, the company is a company or overseas company registered under this Act.

(3) The re-registration of an existing company or existing overseas company under this section does not-

(a) create a new legal entity; or

(b) affect the shares or share capital of the company except as provided by this Act; or

(c) affect the property, rights, or obligations of the company except as provided by this Act; or

(d) affect proceedings by or against the company.

(4) A company is not required to make an annual return under this Act in the year in which it is re-registered.

411 Meaning of existing company, etc

For the purposes of this subpart, –

existing company –

(a) means a company registered under the 1970-1971 Act that, immediately before the commencement of this Act, was entered in the register of companies maintained under the 1970-1971 Act; but

(b) does not include a company that is in liquidation

existing overseas company means an overseas company registered under the 1970-71 Act that, immediately before the commencement of this Act, was entered in the register of companies maintained under the 1970-1971 Act

existing shareholder rights and obligations means the rights and obligations of the existing shareholders in relation to –

(a) voting at meetings of shareholders;

(b) the appointment and removal of directors;

(c) preferential or fixed entitlements to dividends;

(d) the distribution of surplus assets of the company.

[3] As just recounted, s 407 sets out the re-registration process which includes, in s 407(2)(c), the obligation to file the application within one year from the 2017 Act's commencement, namely by 10 December 2020.

[4] Seaspray did not apply for re-registration within that time limit and, as a result, on 10 December 2020, the Registrar removed it[3] from the Register of Companies.

[5] Ms Kingan now applies for an order from the Court directing the Registrar to make an application to herself[4] for Seaspray's re-registration.

[6] Because of the number of companies in a similar position to Seaspray, it is thought it may be helpful to make the general observations appearing in this Judgment concerning Subpart 4 of Part 20 and Subparts 3 and 4 of Part 16 of the 2017 Act as they apply to Seaspray, and may apply to those other companies.

Re-registration and Submissions

[7] Though s 407(1) is phrased in permissive terms – an existing company[5] "may" apply for re-registration – because s 408(1) makes an existing company which did not apply for re-registration in due time a nullity, for companies which intended to continue to carry on business after the 2017 Act came into force, the option of applying for re-registration effectively became mandatory.

[8] That said, apart from the obligation in s 407(2)(c) to apply for re-registration within one year after the 2017 Act came into force, the requirements for re-registration do not appear to be onerous. Pursuant to s 407(2)-(5) the requirements of an application for re-registration are clearly set out. Compliance should not be exacting if applications follow the form required by the 2017 Act, with the Registrar being under an obligation under s 410(1) to re-register promptly companies which comply with the statutory re-registration procedure.

---

3 And more than 1000 other companies similarly situated. The Registrar designated the removals as "striking off" the companies, but technically, as they occurred automatically, any striking off was only the administrative step necessitated by the removals.

4 All applications for incorporation must be to the Registrar: s 7(2)(c). The Registrar has power to restore companies to the register and the Court may so order, but only when removal has occurred on grounds which are inapplicable to Seaspray: ss 350, 351.

5 As defined by s 411. Aspects of this judgment may also apply to existing overseas companies as also defined by s 411, but they are not the primary focus of the judgment.

[9] Section 410(3) importantly provides continuity for re-registered companies in that it makes clear that re-registration creates no new legal entity and does not affect the company's shares or its property rights or obligations or proceedings by or against it, but that is not the position while those companies remain removed from the register.

[10] The difficulties for Seaspray and similar companies lie in s 408(1)-(2).

[11] Section 408(1) makes existing companies which have not applied for re-registration nullities. Nullity has the well-settled meaning in law of rendering something devoid of legal effect, legally non-existent and to be treated as never existing[6].

[12] In addition to s 407(1)(c), the second statutory hurdle for Seaspray and other companies whose directors and others wish them to be restored to existence and trade but did not apply for re-registration before 10 December 2020, and are therefore, by s 408(1), nullities, is that s 408(2) applies Subparts 3 and 4 of Part 16 to them. Those are the Parts dealing with the effect of removal of companies from the register[7], the consequent vesting of their property in the Crown and the Crown's power of disclaimer of property vested in it[8]. Although nullity for failure to apply timeously for re-registration is not the legal equivalent of removal from the register on one of the grounds in s 338, s 408(2) effectively equates the two and applies the consequences in Subpart 3 to them.

[13] Therefore, on its face, what s 408(1)(2) bring about is, first, that companies which have not been re-registered no longer exist in law and never have and, secondly, that all their property has been, by virtue of the inclusion of Subparts 3 and 4 of Part 16 in s 408(2), escheated to, i.e. vested in, the Crown, subject to the right of persons claiming the property of such companies to apply to the Court[9] and the Crown's power of disclaimer within the terms of Subpart 4. This state of affairs arose automatically on 10 December 2020[10] and will continue until an application for re-registration is made by a qualified person and, if open to her, the Registrar grants the application.

---

6 *Dictionary of NZ Law; Strouds Judicial Dictionary of Words and Phrases, 10th ed (2020)Vol 2, p 863.* As it was pithily put in relation to nullity of marriage, such a declaration means "not just that the parties are not married, but that they never were" *re Wombwell's Settlement* [1922] 2 Ch 298, 305. See also *Moreton v Montrose Ltd* [1986] 2 NZLR 496, 507 (NZCA) per McMullin, J; *Neylon v Dickens* [1977] 1 NZLR 595, 598 (PC).

7 Sections 344-346.

8 Sections 347-349.

9 Section 345.

10 Section 407(2)(c).

[14] That result will obviously be a matter of concern not just to companies which have not applied for re-registration and those who deal with them but also, given the terms of s 346, former directors, shareholders and others whose liability is preserved while the state of nullity enures. Many, like Seaspray, though nullities, are highly likely to have continued to trade using assets and making profits to which they were not entitled, and paying debts and meeting obligations which were unenforceable against them[11].

[15] Faced with this potentially undesirable result, both for Seaspray and for all other existing companies similarly situated, Mr Arnold, counsel for the applicant, submitted that s 408 should be interpreted so as to avoid the conclusion that those who are entitled to apply for their company to be re-registered, but have not applied within time to be re-registered, had no ability to seek to be re-registered once the one year time limit in s 407(2)(c) expired. Without that, he submitted, the terms of Subpart 4 of Part 20 would now preclude re-registration applications and consequential applications such as applications to have the company's property revert to it[12] or to retransfer the company's land. He submitted that s 408 should be interpreted as if the company remained an existing company[13] so that, under s 408(3), directors, shareholders or creditors[14] might apply at any time to allow companies registered under the Companies Act 1970-71 to be migrated to the register under the 2017 Act.

[16] In making that submission, Mr Arnold relied on the Regulation-making power in ss 405(1)(q) and 406(b). The former gives the Queen's Representative power to make Regulations "to give effect to the provisions of this Act" and, more specifically, "… for any other matters contemplated by this Act, necessary for its full administration, or necessary for giving it full effect". The latter empowers the making of "transitional" Regulations "providing provisions relating to the re-registration of companies, which may be in addition to, or in place of, or which may amend, the re-registration provisions" in Part 20. In support of that submission, he relied on the explanatory notes to the Bill and the advice given by the Ministry of Justice on the relevant provisions.

---

11 Though pre-removal obligations remain enforceable against their directors, shareholders and others: s 346.

12 Though most would re-vest automatically: s 353(1).

13 Within the s 411 definition, even though the company is no longer in existence and, being a nullity, never has been.

14 Being a nullity, the company cannot apply for its own re-registration: *re Durweston Properties Ltd* (1992) 6 PRNZ 95, 96.

[17] Mr Arnold submitted that s 408(3) was intended by Parliament to allow re-registration applications to be made at any time including after the s 407(2)(c) period expired.

Can re-registration still be effected?

[18] There can be no doubt that Seaspray, the other companies similarly situated and their directors and shareholders, are in an invidious position. Because of the clear wording of s 408(1), they are no longer in existence and must be treated in law as never having existed and, by s 344(1), all their property has been vested in the Crown since 10 December 2020 but, under s 346, the liability of their director, former directors, shareholders and others persists.

[19] A statutory amendment could certainly cure the position, but statutory amendments take time. Although the notion of subsidiary legislation – a Regulation – adding to, supplanting or amending the provisions of primary legislation – an Act – contradicts the normal and well-accepted hierarchy of regulatory powers and is thus jurisprudentially extremely odd, in s 406(d) Parliament, in the exercise of its plenipotentiary legislative powers, appears to have contemplated that possibility and delegated its powers in that regard to the Queen's Representative. But the promulgation of Regulations also takes time and, without such, s 406(b) cannot be of assistance to Seaspray and the other companies, beyond the Court noting that the section contemplates amendments to the re-registration provisions of Subpart 4 of Part 20.

[20] It is surprising that the important provisions for re-registration only appear in a Subpart of Part 20, the Part covering Miscellaneous matters, when its provisions create the difficulties discussed in this judgment for such a large number of companies.

[21] The question then becomes whether, absent statutory amendment or s 406(b) Regulations, there is a construction of the 2017 Act which can provide a pathway for competent re-registration applications to be filed outside the 12 month limit, be granted and relieve the difficult position in which Seaspray and the other companies have been placed by the unfortunate statutory wording discussed in this judgment.

[22] In effect, that renders down to whether, in applications for re-registration under s 407(2) which "must" be filed with the Registrar within a year after the 2017 Act's commencement, but have not been, the "must" can be read as "may," and therefore optional and not obligatory, directory rather than mandatory. If so, acting under s 408(3)(b), the Court could conceivably have power to extend the s 407(2)(c) 12 month time limit to the day the Registrar receives the re-registration application under an order made by the Court under s 408(3)(a)[15] plus any other incidental orders appropriate to the particular company, or to direct the Registrar not to comply with the time limit.

[23] There are authorities to the effect that failures to meet statutory requirements do not automatically lead to invalidity, with the former dichotomy between mandatory and directory requirements giving way to an assessment of the substance of the case, the nature and purpose of the legislation and the degree and effect of non-compliance[16], but authorities to that effect are mainly drawn from the field of judicial review, and assessments as to whether administrative actions comply with statutory requirements are an insufficient foundation for a finding contradicting the plain words of a statute.

[24] Further, in considering the "must" as "may" question, it is accepted that it is pertinent to bear in mind the overarching approach to statutory construction enjoined by s 5(j) of the Acts Interpretation Act 1924(NZ)[17] namely that every Act is deemed "remedial" and is to be construed in such a "fair, large and liberal" way "as will best ensure the attainment of the object of the Act … according to its true intent, meaning and spirit" and that it is clear from s 3, the Purpose provision, that, in passing the 2017 Act, Parliament intended to provide for "efficient registration" of companies with "flexible and adaptable structures", subject only to "proper but not excessive regulation and administration".

[25] Further, it is accepted that a finding that those designated as able to apply for the re-registration of companies in Seaspray's position have no capacity to apply for re-registration or have the power to make such applications but with no chance of success because of continuing breach of s 407(2)(c) applied *stricto sensu,* could be seen as undermining Parliament's intention as expressed in s 3, provide an absolute time bar to re-registration and resumption of their existence for a large number of companies, would be

---

15 That must be the operative date as applications for re-registration must be filed with the Registrar: s 407(2)(c).

16 Eg: *Waikanae Christian Holiday Park Inc v. New Zealand Historic Places Trust Maori Heritage Council* [2015], NZCA 23, CA 679/2013, 24 February 2015, at [55] and authorities there cited.

17 Remaining in force in the Cook Islands, though repealed in New Zealand.

arguably contrary to the attainment of the Act's express objectives and might run counter to the 2017 Act's express purposes. A liberal and highly purposive interpretation, as required by s 5(j), could avoid that outcome.

[26] All of that, however, cannot prevail against the clear and express wording of the 2017 Act.

[27] In phrasing the 2017 Act as it has, Parliament has demonstrated a clear understanding of, and reliance on, the semantic differences between the peremptory "must" and the discretionary "may"- contrasting s 407(1) with s 407(2)(3)(4)(5) is the most obvious example – and must be taken to have intended differing requirements depending on which word it used.

[28] So when, in s 407(2)(c), Parliament used "must" for the requirements for re-registration applications, the correct interpretation can only be that the requirement was obligatory and inflexible and that a failure to comply with it automatically brought the consequences of that failure in its train, particularly as the company to which the application related became a nullity under s 408(1). No interpretation or construction of that differentiation in the plain words of the 2017 Act, however purposive or remedial, could properly lead to any different conclusion.

[29] Mr Arnold submitted that the breadth of s 408(3)(b), empowering the Court to "make any other orders necessary to effect the re-registration" of Seaspray, was wide enough to enable the Court effectively to disregard or alter the s 407(2)(c) time limit. But, with respect to counsel, that cannot be the case because Parliament, in giving the Queen's Representative power to make s 406(b) Regulations adding to, supplanting or amending the statutory re-registration provisions, clearly turned its mind to the possibility of those provisions proving inapt, and provided a means, however unusual, to redress that situation. For the Court to undertake the course urged by Mr Arnold, and effectively fashion such Regulations itself, would run the risk of it usurping the very power Parliament thought fit to confer on, and reposed with, the Queen's Representative, a situation it would be improper for this Court to contemplate.

Conclusion

[30] Summing all that up, the appropriate conclusion is that Parliament has used clear words in its phrasing of s 407(2)(c) and s 408(1)(2; that failure to comply with the time limit in the former automatically brings about the consequences in the latter; and that the broad wording of s 408(3)(b)[18] does not give the Court power to override the mandatory wording of s 407(2)(c).

[31] The Seaspray re-registration having been filed after 10 December 2020, there is, on the wording of the 2017 Act, no power to grant it, or any other re-registration application in the same situation.

[32] That is the first of the two reasons for the application for Seaspray's re-registration being dismissed.

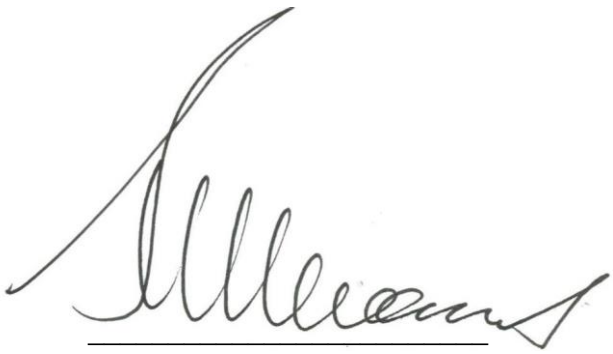
[33] The second reason for dismissing the Seaspray application is that the Essential Requirements of a company in s 6, requires every company to have one or more directors of whom at least one must live in the Cook Islands, or live in New Zealand and be a director of a company that is registered in New Zealand. As noted at the outset of this Judgment, Seaspray and its directors cannot comply with that Essential Requirement. In addition, under s 338(b), any application for re-registration would fail for ongoing breach of one of the grounds requiring removal from the register.

[34] On that additional ground, the application for Seaspray's re-registration must be dismissed.

[35] It is appreciated that the findings in this judgment may cause consternation for those involved in re-registration applications for any of the 1,000+ nullity companies which have been filed since 10 December 2020, but, for the reasons stated, failure of all those applications is mandated by the present wording of the 2017 Act. An urgent statutory amendment or s 406(b) Regulations may be warranted to provide a different path for such applications outside the present wording of the 2017 Act. Such a course is beyond the ambit of the present application.

---

[18] Limited to existing companies, a status no company which is a nullity can occupy as it is treated as never having existed, and thus incapable of being registered under the Companies Act 1970-71.



Hugh Williams, CJ

Potter, J