

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

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CIV-2023-404-0340  
[2023] NZHC 1290**

UNDER the Companies Act 1993  
IN THE MATTER OF the liquidation of Ritz Enterprises Limited  
BETWEEN TAHAROTO MOTELS LIMITED  
Plaintiff  
AND RITZ ENTERPRISES LIMITED  
(IN LIQUIDATION)  
Defendant

Hearing: 24 May 2023

Appearances: A Ho for the Applicants  
S O McAnally and W van Roosmalen for the Plaintiff  
W Hofer for the Liquidators of the Defendant

Judgment: 29 May 2023

---

**JUDGMENT OF ASSOCIATE JUDGE BRITTAIN**

---

*This judgment was delivered by me on 2023 at 4 00 pm.  
Pursuant to Rule 11.5 of the High Court Rules.*

.....  
*Registrar/Deputy Registrar*

Solicitors/Counsel  
Keegan Alexander, Auckland  
Tompkins Wake, Hamilton  
Sean McAnally, Auckland  
Crimson Legal, Auckland

## **Introduction**

[1] The plaintiff, Taharoto Motels Limited (Taharoto), is the lessor of a motel to Ritz Enterprises Limited (in Liquidation) (Ritz) as lessee, pursuant to a registered lease. There is an ongoing dispute between Taharoto and Ritz.

[2] On 31 January 2023, Taharoto served a statutory demand on Ritz for \$30,312.43. Ritz failed to satisfy the demand. On 24 February 2023, Taharoto filed a statement of claim in this Court, seeking an order putting Ritz into liquidation. On 14 March 2023, the liquidation proceeding was advertised in the New Zealand Herald and the New Zealand Gazette. No other creditors filed an appearance.

[3] The liquidation proceeding was called in Court at 10 am on 5 May 2023, before me. This was the first call of the matter. When the proceeding was called, there was no appearance on behalf of Ritz and no appearance on behalf of any other creditor.

[4] Counsel appeared for Taharoto and sought an order appointing Simon Dalton and Benjamin Francis as liquidators of Ritz. Mr van Roosmalen provided a solicitor's certificate under r 31.21 of the High Court Rules 2016 (HCR), certifying that he had made enquiries on 5 May 2023, and that he was satisfied that the debt the subject of the statutory demand remained unpaid. On that basis, I made an order putting Ritz into liquidation and appointing Simon Dalton and Benjamin Francis as liquidators, timed at 10.08 am.

[5] Unfortunately, at the time that he gave his certificate Mr van Roosmalen was unaware that on 13 April 2023 Ritz had paid \$30,312.43 into an account operated by Taharoto's solicitors, together with two further payments of costs, of \$1,912 and \$1,487.76. These payments were made into a trust account of Taharoto's solicitors, with the suffix "50", in circumstances where Taharoto's solicitors expected the payment to be made into a trust account with the suffix "02". The confusion arose because of the way the account details were provided to Ritz's solicitors, which ambiguously included references to both accounts. I accept that Mr van Roosmalen acted in good faith.

[6] When Ritz's directors learned of the liquidation order, one of the directors, Karandeep Singh, moved quickly to file an application for an order terminating the liquidation under s 250 of the Companies Act 1993. That application was filed on 8 May 2023.

[7] Since then, there have been a plethora of memoranda filed by the parties:

- (a) memorandum of counsel for the liquidators dated 8 May 2023, criticising the form of the application and giving notice that the liquidators wished to be heard;
- (b) memorandum of counsel for Taharoto dated 8 May 2023, advising that Taharoto did not oppose an order terminating the liquidation provided that the liquidators' costs were met, and Taharoto was awarded costs in respect of the application under s 250 of the Companies Act;
- (c) counsel for Karendeep Singh filed a memorandum dated 9 May 2023, advancing an alternative application for an order recalling the liquidation order made on 5 May 2023;
- (d) counsel for the liquidators filed a memorandum dated 11 May 2023, advancing substantive grounds in opposition to both applications and supplying a copy of the liquidators' initial report to the Court. The liquidators argued that the application for recall should be dismissed;
- (e) counsel for Karandeep Singh, and the other directors, Amrit Pal Singh and Harjinder Kaur, filed a memorandum dated 15 May 2023 confirming that the directors were seeking recall of the liquidation order under r 11.9 of the HCR. This memorandum was filed by Mr Ho, after the directors of Ritz had changed their legal representation;
- (f) counsel for Taharoto filed a memorandum dated 15 May 2023, objecting to the form of the application for recall, and opposing recall on the basis that the application for recall was an abuse of process,

given the existing application under s 250 of the Companies Act. It was submitted that the grounds for recall were not made out;

- (g) counsel for the liquidators filed a memorandum dated 15 May 2023, opposing recall on procedural and substantive grounds;
- (h) counsel for the directors of Ritz filed a memorandum dated 16 May 2023, responding to the grounds advanced by Taharoto and the liquidators in opposition to recall;
- (i) counsel for the liquidators filed a memorandum dated 24 May 2023, updating the Court regarding the liquidation;
- (j) counsel for Taharoto filed a memorandum on 24 May 2023, confirming that Taharoto no longer opposes the recall;
- (k) counsel for the liquidators filed a memorandum dated 24 May 2023, advising that the liquidators now abide the Court's decision.

[8] On 25 May 2023, I granted orders recalling the liquidation order and discharging the liquidators, by a Minute of that date. I noted that I would subsequently issue this judgment recording my reasons, which now follow.

### **Jurisdiction and principles**

[9] The Court has jurisdiction to make an order terminating a liquidation under s 250 of the Companies Act, and jurisdiction to recall a liquidation order under the Court's inherent jurisdiction and r 11.9 of the HCR.<sup>1</sup> A formal application under r 11.9 is not mandatory; the application can be made by memorandum.<sup>2</sup> A non-party can potentially apply for recall.<sup>3</sup>

---

<sup>1</sup> *Bridon NZ Ltd v Tent World Limited* [1992] 3 NZLR 725 (HC); *Horizon Printing Ltd v Mustang NZ Ltd*, HC Auckland, CIV-2008-404-5146, 24 April 2009.

<sup>2</sup> *Horizon*, above; *Sam's Fukuyuma Food Service Ltd v RWJ Enterprises Ltd* HC Auckland, CIV-2011-404-6558, 14 December 2011.

<sup>3</sup> *Shed 4 Trading Co Ltd v Sanson* [2020] NZHC 2836.

[10] Counsel for the directors of Ritz accepted that the application under s 250 of the Companies Act should be stayed pending disposition of the application under r 11.9 of the HCR. That disposes of the abuse of process point raised by Taharoto.

[11] In both *Sam's Fukuyama*<sup>4</sup> and *Horizon Printing*,<sup>5</sup> the defendant company had failed to pay the amount demanded in a statutory demand issued under s 289 of the Companies Act, giving rise to a statutory presumption under s 287 of the Act that the company was unable to pay its debts. Consequently, the Court had jurisdiction to appoint a liquidator under s 241(4)(a) of the Act. The same applies in this case.

[12] In *Horizon Printing*, the debt the subject of the statutory demand had been paid into the liquidators' trust account after the making of the liquidation order. No other creditors had appeared in support of the liquidation proceeding, and there were no other known creditors. Associate Judge Robinson drew the inference that the defendant company had been able to pay its debts at the time of the hearing of the liquidation proceeding, from the fact that the debt had been paid by the time the application for recall was considered. The liquidation order was recalled.

[13] In *Sam's Fukuyama*, the solicitor's certificate as to the unpaid debt had been issued in error, because the debt had been paid prior to the hearing of the liquidation proceeding. No creditors had filed proofs of debt with the liquidator. Associate Judge Abbott held that it was proper to recall the liquidation order, because the plaintiff was no longer a creditor, and the payment of the debt was sufficient to rebut the statutory presumption of insolvency.

### **Taharoto's position**

[14] Taharoto's withdrawal of its opposition to recall is appropriate, given that the situation has arisen, at least in part, because of ambiguous payment instructions provided by Taharoto's solicitors to Ritz's solicitors. Taharoto's objections to the procedure adopted by Ritz in make the application for recall were not justified.

---

<sup>4</sup> *Sam's Fukuyama*, above n 2.

<sup>5</sup> *Horizon*, above n 1.

## **The initial opposition of the liquidators**

[15] Although the liquidators now abide the decision of the Court, they previously advocated for the liquidation to continue.

[16] The liquidators wished to pursue an investigation into the affairs of Ritz, suggesting issues with the company's tax obligations:

- (a) Ritz has not filed PAYE returns since June 2021;
- (b) Ritz has unfiled income tax returns for the years ended 31 March 2021, 31 March 2022 and 31 March 2023;
- (c) irregularities with the income tax returns filed prior to 31 March 2021; and
- (d) failure to register for Fringe Benefit Tax.

## **Analysis**

[17] The Court was inadvertently misled as to the status of the debt that founded the proceeding. If the Court had been advised on 5 May 2023 that the debt the subject of the statutory demand had been paid in full, then I would not have made an order putting Ritz into liquidation. The question of solvency would have been a live issue. If Taharoto had wished to proceed with the application for a liquidation order then I would have adjourned the matter for a defended hearing.

[18] Regarding the potential debts that might be owed by Ritz to the Commissioner of Inland Revenue, the Commissioner did not file an appearance and there was no appearance for the Commissioner in Court on 5 May 2023. If the Commissioner had appeared and given notice of a creditor's claim, or there was any other information before the Court giving notice of a possible creditor's claim by the Commissioner, then those are matters that would have been considered in a subsequent defended hearing.

[19] I acknowledge that Taharoto has filed a creditor's claim form with the liquidators for the sum of \$20,410.14, said to arise independently of the debt that was the subject of the statutory demand. The Court was not informed of the existence of this alleged debt on 5 May 2023. In support of the recall, Counsel for the directors of Ritz submitted that Ritz had cash on hand at liquidation that substantially exceeded Taharoto's remaining creditor's claim. Although there is no direct evidence to support that proposition, no issue was taken with that proposition in a subsequent memorandum of counsel for the liquidators, which was filed for the purpose of updating the Court.

[20] Ritz would have suffered significant prejudice if the liquidation order was not recalled:

- (a) the liquidators were not prepared to continue to trade the motel business;
- (b) Taharoto has served a note on Ritz under the Property Law Act 2007, giving notice that there are breaches of the lease that are not capable of remedy and that Taharoto intends to cancel the lease by re-entering the property. To avoid those consequences, Ritz was required to apply for relief against forfeiture on 25 May 2023. There was no indication that the liquidators were prepared to take that step.

[21] For the above reasons, I recalled the liquidation order on 25 May 2023.

### **Further orders**

[22] Taharoto has advised that it does not wish to continue with the liquidation proceeding. Taharoto seeks leave to withdraw the liquidation proceeding with no issue as to costs. That is an appropriate position to take.

[23] Once the liquidators learned that there was an application for recall, and the reasons why, it would have been appropriate for the liquidators to immediately abide the decision of the Court on that application, rather than to advocate for the

continuation of the liquidation. Two memoranda of counsel for the liquidators would have sufficed: one advising of the liquidators' position and one updating the Court. The liquidators should receive legal costs on that basis.

[24] The liquidators seek an order that their own fees incurred since their appointment are paid by Ritz. The directors of Ritz, by way of a memorandum from their counsel, have previously requested that the Court review the liquidators' fees.

[25] Counsel should confer regarding the liquidators' fees, which are always subject to the supervision of the Court. If the parties cannot agree then the Court will decide the issue.

### **Result**

[26] I make the following further orders:

- (a) the costs order made on 5 May 2023 is revoked;
- (b) leave is granted to the plaintiff to withdraw the application for an order putting Ritz Enterprises Limited into liquidation, with no order as to costs as between the plaintiff and Ritz Enterprises Ltd or its directors;
- (c) Ritz Enterprises Ltd shall pay the liquidators' costs in respect of two memoranda filed on behalf of the liquidators, calculated on a 2B basis;
- (d) counsel shall confer regarding whether there is agreement on the liquidators' fees to be paid by Ritz Enterprises Ltd to the liquidators;
- (e) if the parties are unable to agree on the liquidators' fees, then the liquidators may file a memorandum giving full particulars of the work undertaken by them and the fees incurred, with supporting invoices, for review by the Court.

---

**Associate Judge Brittain**



