

CASE SUMMARY

Two appeals against the Registrar of Companies (“the Registrar”) decision to decline public notice under s 328(3) of the Companies Act 1993 (“the CA 1993”) following the appellants’ application to restore Marketing Agencies Ltd (“MAL”) and Mountforts Pharmacy Ltd (“MPL”) to the New Zealand Register of Companies (“the Register”). The appeals were dismissed by the High Court.

Decision date: 31 July 2020

CSUM 20/09

CASE

**Commercial Management Limited v Commissioner of Inland Revenue [2020]
NZHC 1873 [31 July 2020]**

LEGISLATIVE REFERENCES

s 328 of the Companies Act 1993

LEGAL TERMS

N/A

Summary

Marketing Agencies Limited (“MAL”) and Mountforts Pharmacy Limited (“MPL”) (collectively, the companies) were removed from the New Zealand register (“the register”), in 1998 and 2011 respectively. However, the companies were restored to that register by this Court, pursuant to s 328 of the Companies Act 1993 (“the Act”) on 21 September 2018 (“the restoration”), *Commercial Management Ltd v Commissioner of Inland Revenue* (2018) NZHC 224, (2018) 29 NZTC 23-068. While restored, the companies commenced legal proceedings in the Taxation Review Authority (“the Authority”). Thirteen months later, the Court of Appeal set that order aside, *Commissioner of Inland Revenue v Commercial Management Ltd* [2019] NZCA 479.

The appellants then applied to the Registrar, pursuant to s 328(1)(b) of the Act, to have the companies restored again because they were in legal proceedings at the time the Registrar removed all record of the High Court restoration. The Registrar refused to restore and notify their application because the qualifying criteria for notification were not met. This was an appeal against the Registrar’s refusal to restore the companies.

The High Court dismissed these appeals. Whata J was satisfied that the refusal to notify the applications was lawful. He further noted that while the Registrar was wrong to delete all reference to the High Court restoration order, there is no proper basis upon which the companies may use the s 328 process to achieve restoration. The attempt to do so was a collateral attack on the judgment of the Court of Appeal.

Impact

None.

Facts

The companies were involved in, along with many others, what have become known as the “Russell template” tax avoidance arrangements. Following the decision in *Duvall, FB Duvall Ltd v Commissioner of Inland Revenue* (1997) 18 NZTC 13,410 (HC), Mr Russell made a claim in relation to seven other companies, culminating in a settlement agreement with the Commissioner. Mr Russell also sought to reach agreement in relation to other companies, including MAL and MPL, but the Commissioner made it clear that it would not entertain settlement discussions in relation to removed companies. This led to the 2018 application to restore.

The 2018 application sought to restore the companies to the register under s 329(1)(b) of the Act on the grounds that it was just and equitable for them to be restored. On 28 August 2018, the High Court granted the appellants' restoration application. MAL and MPL were restored to the Register on 20 September 2018. An appeal against the High Court decision was filed on 25 September 2018.

On 19 and 22 March 2019, MPL and MAL respectively commenced proceedings before the Authority under the Tax Administration Act 1994. The MPL notice of claim alleges that \$3,219,154.82 was wrongly paid to the Commissioner, relying on, among other things, the *Duvall* decision. To explain the delay, it is also claimed that the Commissioner's settlement of disputes, pursuant to the *Duvall* decision, only became evident in 2018. MAL's claim, alleging \$219,782.42 was wrongly paid, mirrors the MPL notice.

On 3 October 2019 the Court of Appeal allowed the Commissioner's appeal and set aside the High Court order that the removed companies be restored to the Register (the Court of Appeal decision), *Commissioner of Inland Revenue v Commercial Management Ltd* [2019] NZCA 479.

On 10 October 2019, as a result of the Court of Appeal decision, the Registrar removed MAL and MPL from the Register as if they had never been restored on 20 September 2018.

On 21 November 2019 the Court of Appeal judgment was sealed.

On 22 November 2019 the appellants applied to the Registrar to restore MAL and MPL to the Register under s 328(1)(b) of the CA 1993. The Registrar refused to restore and notify their application because the qualifying criteria for notification were not met.

Issues

Whether the restoration order of the High Court (the restoration order), *Commercial Management Ltd v Commissioner of Inland Revenue* (2018) NZHC 224, (2018) 29 NZTC 23-068, had interim legal effect pending the decision of the Court of Appeal to set aside (the appeal order), *Commissioner of Inland Revenue v Commercial Management Ltd* [2019] NZCA 479.

Whether the Registrar was wrong to refuse to exercise its power to notify the s 328(1)(b) restoration or otherwise restore the companies.

Decision

The Court found that:

- the Registrar was wrong to delete all references to the restoration order from the register and proceeded on an erroneous basis that the companies had not been restored in September 2018 or removed in November 2019. However, the companies cannot rely on the interim restoration to restore them, pursuant to s 328.
- the restoration order was invalid following the appeal order. It has no ongoing force at law and cannot now give rise to actionable rights. The companies' ongoing insistence that the restoration order remains effective in this way is plainly a collateral attack on the judgment of the Court of Appeal.
- Substantively, there is plainly no unfairness to the companies in refusing them the opportunity to seek restoration, pursuant to s 328. The object of the application is to continue litigating matters which the Court of Appeal has made clear have no prospect of success. It was also an exercise in futility, given there was no prospect of the application advancing beyond the notification stage. An objection by the CIR would have inevitably followed and there was no prospect of a successful appeal on the merits.

The appeal is dismissed.

About this document

These are brief case summaries, prepared by Inland Revenue, of decisions made by the Taxation Review Authority, the District Court, the High Court, the Court of Appeal or the Supreme Court in matters involving the Revenue Acts. For Taxation Review Authority matters, names have been anonymized. The findings of the court described in a case summary will no longer represent current law where the matter has been successfully appealed or subsequent amended legislation has been enacted.