

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 186 OF 2016 (NSJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

AND IN THE MATTER OF NATURAL DAIRY (NZ) HOLDINGS LIMITED
(IN PROVISIONAL LIQUIDATION)

VIDEO LINK

APPEARANCES: Ms Katie Pearson and Gemma Lardner on behalf of the
Petitioner.
Mr. Simon Dickson and Ms Jessica Bush on behalf of the
Company

Before: The Hon. Justice Nicholas Segal

Heard: 2 June 2017

Draft Judgment Circulated: 6 June 2017

Judgment Delivered to Counsel: 6 June 2017

Released for Publication: 7 June 2017



JUDGMENT ON THE FULL POWERS SUMMONS

1. After carefully considering the written submissions and evidence filed on behalf of the joint provisional liquidators (the *JPLs*) and the directors of Natural Dairy (NZ) Holdings Limited (in Provisional Liquidation) (the *Company*) and the submissions made during the hearing on Friday 2 June, I have decided that I should make the order sought by the JPLs in their full powers summons.

2. I am satisfied that in all the circumstances the JPLs need the additional powers sought in order to be able to achieve the purposes and perform the role for which they were appointed.
3. In my Decision dated 20 December 2016 dealing with the appointment of the JPLs I concluded that the evidence adduced in support of the application to appoint the JPLs established (in satisfaction of the conditions contained in section 104(2)(b) of the Companies Law (2016 Revision)) that there was a need to appoint provisional liquidators in order to prevent the dissipation or misuse of the Company's property and to prevent mismanagement or misconduct by the Company's directors. In particular, I decided that provisional liquidators were needed so as to enable first, a proper investigation to be conducted into, and action taken to preserve and protect the Company's rights of action in respect of, possible mismanagement of and misconduct in the Company's affairs (and that there was evidence of a prima facie breach of duty by the Company's directors) and secondly, to prepare and proceed properly and promptly with the resumption proposal (these are the *two main tasks*).
4. The powers initially given to the JPLs in my order dated 22 December 2016 (the *Original Order*) focussed on the action which it was clear they would immediately need to take in connection with the two main tasks and also the action which was related and ancillary thereto. The ancillary powers included the power to take possession and control of the Company's bank accounts, and cash, and its books and records and to control and approve all payments to be made out of the Company's bank accounts and liquid property, save in relation to certain payments below an agreed limit in respect of liabilities reasonably incurred by the directors in exercising their residual powers (to the extent that such powers continued after and subject to the terms of the Original Order), if such a limit and terms could be agreed between the JPLs and the Company's directors (which in the event proved not to be possible).
5. While the JPLs' initial powers focussed on the action relating to the two main tasks it was always the case that the JPLs would need, and the Court was entitled to give them, all and any powers required so as first to assist, support and facilitate the achievement of the two main tasks, secondly to prevent the dissipation and misuse of the Company's assets and mismanagement or misconduct by the Company's directors, and thirdly to protect the position of members and creditors by preserving the Company's property and rights pending the hearing of the petition. Once the



statutory pre-conditions for the appointment of provisional liquidators are established the Court has a discretion to grant the provisional liquidators such powers as the Court considers necessary and appropriate to prevent such dissipation, misuse, mismanagement and misconduct and to ensure that the Company's assets are properly protected pending the hearing of the winding-up petition. I do not see why the precise extent of the powers cannot be adjusted and extended so as to respond to particular problems and needs identified by the provisional liquidators and changing circumstances (having regard to and consistently with the need to prevent dissipation, misuse, mismanagement and misconduct and to protect the Company's assets and stakeholders in the period while the petition is pending and before it is heard).

6. Furthermore the usual effect of the appointment of provisional liquidators is that the board of directors becomes *functus officio* save in relation to certain limited residual powers (see *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105 at 1113 and *Re Mawcon Ltd* [1969] 1 WLR 78 at 82). It is of course open to the Court to order that the directors retain particular or wider powers and in this case the Original Order envisaged that the Company's directors would continue to act for the Company on matters which the JPLs were not dealing with.
7. Following the filing of further evidence and a further hearing on 26 January 2017, on 1 February (the *1 February Order*) I made a further order which varied and extended the powers of the JPLs. It was clear from the further evidence that in order to enable the JPLs to achieve the two main tasks and to protect and preserve the Company's assets and rights, they would need additional powers. In particular they needed and were granted the power to borrow funds on behalf of the Company (this was limited to US\$50,000), to bring or defend proceedings where necessary to preserve or protect the Company's position or assets, to exercise the Company's rights as shareholder in its immediate subsidiaries and to take possession, collect and get in all the Company's property, where necessary or expedient to protect or preserve such property.
8. I am satisfied that the JPLs have demonstrated that they need the further powers they have sought. It seems to me that in order to be able efficiently and effectively to make progress with and perform the two main tasks it needs to be clear that the JPLs have full and unfettered powers over all the assets of the Company. This is relevant for the purpose of borrowing sufficient funds to enable them to progress and perform the two main tasks and to take the other action needed to achieve the purposes of the



provisional liquidation I have outlined above; for dealing with potential investors, subsidiaries (including indirectly held subsidiaries) and third parties who are in possession of relevant information and documents or whose co-operation is needed for these tasks and purposes and for collecting and preserving the Company's assets. It is clear that the retention of residual powers by the Company's directors is seriously unhelpful and damaging to the ability of the JPLs to perform their functions and also has resulted in confusion, complications, additional work and unnecessary delays and costs. I give great weight to the views of the JPLs, as officers of the Court (although I have also carefully considered and taken into account the views and submissions made on behalf of the directors) and the JPLs' views as to what powers they need in order to ensure that the provisional liquidation is viable and to achieve the purposes for which they were appointed. I also note that I have given both parties – in particular the directors who need to recognise the importance of supporting the officers of the Court – plenty of opportunities to reach agreement and find an acceptable *modus operandi* but despite my various exhortations urging reasonable co-operation, this has not been forthcoming or possible. In all these circumstances, I consider that the right course is to extend and amend the JPLs' powers in the manner they have requested.

9. I have attached the form of order that I am prepared to approve (in a clean copy and a copy showing the amendments to the draft order submitted by the JPLs).
10. I have removed the requested power to appoint and remove directors, at least at this stage. This is first because I do not see that there is an immediate need for this where the assets and property of the Company are under the exclusive control of the JPLs and the directors' authority to act for and bind the Company is suspended (I have included a declaration to that effect); and secondly because I would wish to receive submissions on whether a provisional liquidator can be given such a power (it may well be that he can, it is just not an issue that has yet been addressed in the parties' submissions).
11. I appreciate that it may become necessary to revisit this point, particularly in the context of a resumption proposal whose implementation might involve the removal of existing and the appointment of new directors. However, as I made plain during the hearing on 2 June, I consider that it is premature to address issues that may or may not arise in connection with a particular form of resumption proposal. It is not yet clear



whether a resumption proposal will be agreed and if one is agreed how it will be structured and implemented. Furthermore, as I also explained at the hearing, I consider that while the JPLs should have the power to lead on and progress without interference the resumption proposal (and develop their preferred structure, terms and implementation mechanics) it will be important, before entering into binding terms or agreements in relation to a resumption proposal, for them to discuss their preferred structure and terms with the directors and bona fide shareholders, and probably key creditors, subject to suitable and satisfactory confidentiality protections, so that other stakeholders can have their say and provide their comments, with a view to establishing what alternative structure and terms might be available and an approach that is in the best interests of the Company, its creditors and shareholders. Clearly if the JPLs consider that there are grounds and good reasons why such discussions cannot take place they can apply to the Court, on an *ex parte* basis if that is justified, for directions. In addition, once the JPLs are in a position and wish to enter into binding agreements they should apply for directions and an order from the Court sanctioning the entry into of binding agreements. Other stakeholders can (once again subject to giving proper confidentiality undertakings) then appear and make submissions on such an application. I accept that there might be circumstances in which, based on strong and sufficient grounds (perhaps because of real urgency or commercial confidentiality) it would be necessary to have a hearing in which some or all such other stakeholders might be unable to participate but I would hope that that would not be the case and will expect the JPLs to make every effort to ensure that bona fide and genuine stakeholders are consulted so that their views can be taken into account (even if they may ultimately not be determinative).

12. I have also not made an order as to the costs of the JPLs' full powers summons as the issue has not been argued. My provisional view is that the JPLs' costs should be payable as an expense of any liquidation and out of the Company's assets on an indemnity basis with an order as to the timing of payment to be made following the discharge of the JPLs or at the hearing of the petition if earlier. If the parties wish to argue for an alternative order they should file written submissions within 14 days of the date on which the order on the summons is issued.



13. I would invite Harneys and Mourant to consider whether any other and consequential relief is now needed and if so to advise the Court in due course.



THE HON. JUSTICE SEGAL
JUDGE OF THE GRAND COURT

