IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2022-404-2292
[2022] NZHC 3354

UNDER	the Companies Act 1993
IN THE MATTER OF	PODULAR HOUSING SYSTEMS LIMITED (IN LIQUIDATION)
BETWEEN	BENJAMIN BRIAN FRANCIS and SIMON DALTON as liquidators of Podular Housing Systems Ltd (In Liquidation) First Applicants
	ILAN GROSS Second Applicant
AND	CHARLES INNES Respondent

Hearing: On the papers

Appearances: Bret Gustafson for the Applicants

Judgment: 12 December 2022

JUDGMENT OF ASSOCIATE JUDGE C B TAYLOR
[Appointment of liquidators]

This judgment was delivered by me on ***12 December 2022*** *at* ***3:00pm***
pursuant to Rule 11.5 of the High Court Rules

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Registrar/Deputy Registrar

Solicitors:
Crimson Legal (Alden Ho), Epsom, Auckland, for the Applicants
Copy for:
B D Gustafson, Auckland, for the Applicants

[1] The first applicants, Benjamin Brian Francis and Simon Dalton, as liquidators of Podular Housing Systems Limited (In Liquidation) (the **Company**), and the second applicant, Ilan Gross, as the 95 per cent shareholder of the Company, have applied to the Court for the following directions and/or orders:

By the first applicants under s 284(1)(a) of the Companies Act 1993 (the **Act**)

(a) The First Applicants seek directions and/or orders:

(i) Confirming the first applicants have been duly appointed as liquidators of the Company by way of shareholders' special resolution passed on or about 25 November 2022;

(ii) alternatively, appointing the first applicants as liquidators of the Company;

(iii) costs against the respondent.

By the second applicant under s 241(2)(c)(iii) of the Act by the second applicant

(b) In the alternative to the directions and/or orders sought by the first applicants in [1](a) above, the second applicant seeks the following orders in his capacity as shareholder of the Company:

(i) appointing the first applicants as liquidators of the Company;

(ii) costs against the respondent.

Background

[2] The Company was incorporated on 28 July 2020. It was in the business of building and selling architecturally-designed modular buildings.

[3] The second applicant was a 95 per cent majority shareholder of the Company. The respondent, Mr Charles Innes, is a 5 per cent shareholder in the Company. The respondent was also the sole director of the Company.

[4] On or about 22 July 2022, the Company entered into:

(a) a general security agreement with the second applicant for $220,000 (**GSA**);

(b) a general security agreement with Lumen Business Solutions Ltd (the **Lumen GSA**). The second applicant is the sole director of Lumen Business Solutions Ltd (**Lumens**). The sole shareholder is Daniel Gross.

[5] On or about 29 September 2022, the Company entered into:

(a) a deed of variation with the second applicant increasing the maximum priority under the GSA to $2,500,000; and

(b) a deed of variation with Lumens impressing the maximum priority under the Lumens GSA to $2,500,000.

The Company unable to pay its debts

[6] Even with a further transfer of funds from the second applicant and Lumens, the Company was still not able to pay its debts as they fell due and the Company was therefore insolvent.

[7] As a majority shareholder of the Company and party to the GSA, the second applicant wanted the Company to be placed in liquidation. In November 2022, the second applicant asked the respondent, as director of the Company, to call a shareholders' meeting to pass a resolution that the Company be placed in liquidation. However, the respondent refused to call a shareholders' meeting.

[8] At some point prior to November 2022, the respondent is understood to have left New Zealand and currently resides overseas.

The liquidation of the Company

[9] In lieu of the shareholders' meeting, on 25 November 2022 the second applicant signed a special resolution resolving that:

(a) the Company be liquidated; and

(b) the first applicants be appointed jointly and severally the liquidators of the Company.

The respondent did not sign the shareholders' resolution.

[10] The first applicants proceeded with investigating the financial affairs of the Company in accordance with their duties as liquidators, and issued their first liquidators' report dated 2 December 2022.

The respondent's desire to appoint different liquidators

[11] Counsel submits that the respondent has made the second applicant aware that he wants to change the liquidators of the Company as follows:

(a) On 30 November 2022, the second applicant received an email from Tony Maginness of Baker Tilly Staples Rodway in relation to the appointment of the liquidators. Mr Maginness alleges that it appears that the first applicants have not been validly appointed as liquidators of the Company;

(b) Attached to Mr Maginness' email was a resolution of shareholders in respect of the Company, resolving that:

(i) the Company be put into liquidation; and

(ii) Tony Maginness and Jared Booth be appointed as joint and several liquidators of the Company.

(c) On 1 December 2022 the respondent emailed the second applicant requesting the second applicant sign a shareholders' resolution, purporting to appoint Mr Maginness and Mr Booth as liquidators.

(d) Since Mr Maginness' email of 30 November 2022, both Mr Maginness and the respondent have been regularly trying to contact the second applicant, asking him to sign and return of the 30 November 2022 shareholders' resolution.

(e) The second applicant will not sign the 30 November 2022 resolution of shareholders because of a perceived lack of impartiality of Mr Maginness created by the respondent's statements. The second applicant desires that the first applicants continue as liquidators of the Company so there can be a full and proper investigation into the Company's financial affairs.

Initial findings of the first applicants

[12] Counsel submits that during the course of the first applicants' initial investigations into the financial affairs of the Company, serious issues have been identified including the following:

(a) the Company is clearly insolvent with the estimated deficit being $5,282,152.00 at 25 November 2022;

(b) physical company records are missing and have possibly been removed, making it difficult to identify the assets and liabilities of the Company;

(c) there are various categories of creditors, whose priorities remain unclear;

(d) in excess of $2,000,000 of deposits that have been paid to the Company by its customers, that do not appear to have been spent for the purposes for which they were paid;

(e) vehicles belonging to the Company cannot be located; and

(f) concerns have emerged in relation to the conduct and management of the Company.

Upcoming creditors' meeting and urgency

[13] The first applicants have given notice of a creditors' meeting at 10:30am on 13 December 2022 in Auckland. That meeting will consider the Company's affairs and list of creditors, the appointment of the first applicants as liquidators, consider the view of creditors in relation to the liquidation, consider whether to appoint a liquidation committee, and consider any other business as may be properly put to the meeting. The first applicants have received proxies from various creditors.

[14] Counsel have submitted there is urgency associated with the application and it is in the interests of justice to grant leave for the second applicant's alternative application under s 241(2)(c)(iii) of the Act to be commenced by way of originating application.

Analysis

[15] The questions to be answered in this judgment are:

(a) should the Court make a declaration pursuant to s 284(1) of the Act declaring that the first applicants are validly appointed as liquidators of the Company pursuant to the shareholders' resolution passed on 25 November 2022?

(b) if the first applicants are not validly appointed as liquidators of the Company pursuant to the shareholders' resolution, should the

application of the second applicant to appoint the first applicants as liquidators of the Company, pursuant to s 241(2)(c)(iii) be granted?

The law

[16] Section 122 of the Act states:

> **122 Resolution in lieu of a meeting**
>
> (1) Subject to subsections (2) and (3), a resolution in writing signed by not less than –
>
> (a) seventy-five per cent; or
>
> (b) such other percentage as the constitution may require for the passing of the special resolution, --
>
> whichever is greater, of the shareholders who would be entitled to vote on that resolution at a meeting of shareholders who together hold not less than seventy-five per cent, or if a higher percentage is required by the constitution, that higher percentage, of the votes entitled to be cast on that resolution, is as valid as if it had been passed at a meeting of those shareholders.

Should the Court make a declaration pursuant to s 284(1) of the Act declaring that the first applicants are validly appointed as liquidators of the Company pursuant to the shareholders' resolution passed on 25 November 2022?

[17] It appears that this application should have been more properly brought under s 284(1)(g) (rather than s 284(1)(a)) which provides:

> (g) declare whether or not the liquidator was validly appointed or validly assumed custody or control of property.

I will treat the application as if made under s 284(1)(g).

[18] As Mr Gross is only one of two shareholders and Mr Innes has so far refused to sign the special resolution, that resolution clearly does not comply with the requirements of s 122(1) of the Act as it is not signed by at least 75 per cent of the shareholders of the Company. The first applicants have sought an order that the Court validate their appointment, pursuant to the Court's powers under s 284(1) of the Act. As noted at [17], the appropriate power of the Court is under s 284(1)(g).

[19] It is noted that Reg 36 of the Companies Act 1993 Liquidation Regulations 1994 provides that no defect or irregularity in the appointment of a liquidator shall invalidate any act done by him or her in good faith. Counsel submits that this means that everything done by Mr Francis and Mr Dalton to date are valid acts of a liquidator.

[20] I am of the view that it is not appropriate to validate the appointment of the first applicants as liquidators of the Company. The resolution of shareholders is clearly invalid under s 122 of the Act, and in my view the supervisory powers of the Court over liquidations under s 284(1) should not be used to sanction a clear contravention of another section of the Act.

[21] The application for an order validating the appointment of the first applicants as liquidators of the Company is declined.

If the first applicants are not validly appointed as liquidators of the Company pursuant to the shareholders' resolution, should the application of the second applicant to appoint the first applicants as liquidators of the Company pursuant to s 241(2)(c)(iii), be granted?

[22] Counsel submits that this application should be granted for the following reasons:

(a) the Company is clearly insolvent. The first liquidators' report shows a deficit of $5.2 million to creditors, including purchasers of partially completed modular homes located in the current and former Company's premises in Auckland, Hamilton, Rotorua and Christchurch. Mr Dalton has deposed that the Company's books and records have been removed including all hard copy of accounts and computer servers by parties unknown. In the liquidators' first report, they have summarised the current position of the Company and their proposals for conducting the liquidation.

(b) The first applicants are confident, after speaking with some creditors representatives, that their appointment will be confirmed at the creditors' meeting and that the proposals for a directions application as to ownership and priority will be supported. The first applicants also

propose the formation of a liquidation committee at the 13 December 2022 creditors' meeting.

(c) No creditor, shareholder, or director of the Company has suggested that the Company should not be in liquidation. Rather, there is disagreement about whether it should be the first applicants as liquidators or Mr Maginness and Mr Booth as proposed by the respondent.

[23] Counsel has submitted that the onus is on the creditors seeking to remove the liquidators and the onus is a heavy one which is not lightly discharged.[1] Counsel submits that the liquidator must be independent and importantly be seen to be independent.[2]

[24] Counsel submits that the comment by the respondent in a WhatsApp message to the second applicant that Mr Maginness is "friendly" as opposed to Mr Francis and Mr Dalton, creates a perception of bias, whether or not it is accurate opinion of Mr Maginness' demeanour. Counsel submits that the statement by the respondent disqualifies Mr Maginness from being appointed liquidator of the Company because of the perception that the respondent has created about lack of independence of the liquidator he wishes to appoint.

[25] Counsel submitted that the test to be applied to an application to remove and replace a liquidator in Australian and the United Kingdom courts, has made it clear that a liquidator may be removed from office if the Court is satisfied that the removal would be in the best interests of the liquidation. Similar judicial statements have been made that cause will be shown for removal of a liquidator where the Court is satisfied that it is for the better conduct of the liquidation or, put another way, it is for the general advantage of those interested in the assets of the company that a liquidator be removed.[3]

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1 *Re St Gregory's Armenian School (In Liquidation)* [2012] NSWSC 1215 and *AMP Music Box Enterprises Ltd v Hoffman* [2002] BCC 1996 (1001-1002).
2 *Multi-core Aerators Ltd v Dyes* [1999] VSC 205, at [45]—[48].
3 Authorities cited at [32] of counsel's memorandum dated 9 December 2022.

[26] Counsel submits that it is in the best interests of the Company's creditors and shareholders that the first applicants be affirmed or appointed by the Court to be liquidators of the Company. This is for the following reasons:

(a) the first applicants are experienced licensed insolvency practitioners who confirm they have no previous contact with the Company or its shareholders before discussing their appointment;

(b) they have undertaken a significant amount of work in the two weeks since their appointment and identified a number of pressing issues that need to be resolved about the ownership and security interests in the Company's assets;

(c) it is in the best interest of the Company's creditors that the first applicants be affirmed or appointed by the Court to be the liquidators of the Company. To replace the current liquidators with Mr Maginness and Mr Booth would provide no benefit to the Company's creditors but would simply delay the resolution of matters while Mr McGuiness and Mr Booth come up to speed with the Company's position. This will also cause duplication of costs, as Mr Maginness and Mr Booth would need to carry out similar investigations to those already completed by the first applicants;

(d) there is perceived lack of independence of Mr Maginness created by the respondent's messages and the Company's creditors are entitled to have confidence that the Company's liquidator is impartial in relation to any potential claims against the respondent.

(e) The first applicants have called a creditors' meeting for 13 December 2022 and the creditors can then vote to affirm their appointment or vote to replace them. That process cannot occur unless the Court first affirms Messrs Francis and Dalton's appointment, or appoints them by Court order before 13 December 2022.

Conclusion on this issue

[27] Having considered the application, counsel's memorandum and the affidavits of Simon Dalton and Ilan Gross filed in support, I am satisfied that the first applicants should be appointed as liquidators of the Company pursuant to s 241(2)(c)(iii) of the Act.

Orders

[28] I make the following orders:

(a) the application by the first applicants for an order pursuant to s 284(1) of the Companies Act 1993 confirming the first applicants have been validly appointed as liquidators of the Company by way of shareholders special resolution passed on 25 November 2022 is dismissed;

(b) pursuant to s 241(2)(c)(iii) of the Companies Act 1993 the first applicants are jointly and severally appointed as liquidators of the Company;

(c) costs are reserved.

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Associate Judge Taylor