

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

**CIV 2009-404-5433**

IN THE MATTER OF    the Companies Act 1993  
  
BETWEEN                COMMISSIONER OF INLAND  
                              REVENUE  
                              Applicant  
  
AND                       REVO INDUSTRIES LIMITED  
                              Respondent

Hearing:           16 September 2009  
  
Counsel:           N H Malarao for Applicant  
                      R B Hucker for Respondent  
  
Judgment:         16 September 2009

---

**JUDGMENT OF RONALD YOUNG J**

---

**Introduction**

[1]    The applicant, the Commissioner of Inland Revenue, applies for:

- a)    leave pursuant to R 19.5 to commence these proceedings by originating application;
- b)    an order that Revo Industries Limited (“Revo”) be restored to the Companies Register pursuant to s 329 of the Companies Act 1993 (“the Act”); and
- c)    an order that the liquidators of Revo, Jeffrey Philip Meltzer and Michael Lamacraft be removed as liquidators once the company is

restored to the Register and instead Vivian Judith Fatupaito of Auckland and Richard Daryl Agnew of Auckland be appointed as joint and several liquidators in their place.

[2] I grant the application for leave to commence these proceedings by way of originating application. It is the appropriate way to bring the matter before the Court.

[3] Revo was placed in liquidation on 22 June 2006. Mr Meltzer and Mr Lamacraft were appointed liquidators. The Commissioner is a creditor of Revo. It is apparently owed in excess of \$400,000.

[4] The final report of the liquidators under s 257 of the Act was filed on 27 February 2007 and at that time the liquidators gave public notice of their intention to remove Revo from the Companies Register. That occurred on 15 May 2007.

[5] As a result of subsequent litigation the North Shore City Council is obliged to issue refunds to a number of companies relating to a development contributions policy. It is suggested that Revo could be in line for a refund of about \$90,000. To enable the North Shore City Council to make the refund it is necessary that Revo be restored to the Companies Register.

[6] To do so an order under s 284(1)(b) of the Act is required. Because the application is being made by a creditor of Revo, namely the Commissioner of Inland Revenue, leave is required before making such an application.

[7] There is no opposition from anyone to the reinstatement of Revo to the Companies Register. I give leave to the Commissioner who is a creditor and requires leave to bring this application. Ordinarily the application would have been made by the liquidators. I note that the Commissioner invited the liquidators, Mr Meltzer and Mr Lamacraft to make such an application but they have refused to do so unless they were pre-funded, not only for the application but also for carrying out the liquidation itself. The Commissioner of Inland Revenue was not prepared to

fund them in this way. For reasons that I will give later in this Judgment, in my view, that was understandable and appropriate.

[8] In those circumstances, therefore, leave is granted to the Commissioner to bring the application to restore Revo to the Companies Register and the company is restored to the Register pursuant to s 329 of the Act.

[9] The final application by the Commissioner is to remove the two liquidators and replace them by two other professional liquidators. The main reason for doing so is what the Commissioner considers to be the inappropriate actions of the existing liquidators who apparently will refuse to act on the liquidation unless they are pre-funded by the Commissioner. The Commissioner does not object to the reasonable fees of the liquidators being deducted from monies payable by the North Shore City Council but does not consider it appropriate to pre-fund the liquidators. The proposed replacement liquidators do not seek to be pre-funded by any creditor and are content to have their fees paid from the items recovered.

[10] Where a company is restored to the Register the previous liquidators are essentially the default liquidators. A liquidator can be removed from office in the circumstances described in s 286 of the Act.

[11] Section 286(3) provides as follows:

**286 Orders to enforce liquidator's duties**

...

- (3) If the Court is satisfied that there is, or has been, a failure to comply, the Court may—
- (a) Relieve the liquidator of the duty to comply wholly or in part; or
  - (b) Without prejudice to any other remedy which may be available in relation to a breach of duty by the liquidator, order the liquidator to comply to the extent specified in the order.

[12] Section 285 defines a failure to comply which provides as follows:

**285 Meaning of “failure to comply”**

- (1) In section 286 of this Act unless the context otherwise requires, failure to comply means a failure of a liquidator to comply with a relevant duty arising—
- (a) Under this or any other Act or rule of law or Rules of Court; or
  - (b) Under any order or direction of a Court other than an order to comply made under that section;—
- and comply, compliance, and failed to comply have corresponding meanings.
- (2) In subsection (1), relevant duty includes the duty of a person in his or her capacity as administrator or deed administrator of a company.

[13] The fundamental duty of a liquidator is set out in s 253 of the Act as follows:

**253 Principal duty of liquidator**

Subject to section 254 of this Act, the principal duty of a liquidator of a company is—

- (a) To take possession of, protect, realise, and distribute the assets, or the proceeds of the realisation of the assets, of the company to its creditors in accordance with this Act; and
- (b) If there are surplus assets remaining, to distribute them, or the proceeds of the realisation of the surplus assets, in accordance with section 313(4) of this Act—

in a reasonable and efficient manner.

[14] In this case the liquidators of Revo will be required to realise the asset of the company held by the North Shore City Council in a reasonable and efficient manner. In my view their refusal to do so unless they are pre-funded means in terms of s 285 they have failed to comply with a relevant duty. Accordingly in terms of s 286(3) I may relieve the liquidators of the duty or order them to comply. Subsection (4) entitles me to remove them should they fail to comply.

[15] The liquidators have made it clear through counsel that they would not comply with any order made under ss (3) because they consider that s 254 means

they do not have to incur any expense to collect assets which are not immediately available for distribution to the creditors of the company.

[16] Mr Hucker submitted that s 254 applies by analogy to private liquidators of a company.

[17] Section 254 provides as follows:

**254 Liquidator not required to act in certain cases**

Notwithstanding any other provisions of this Part of this Act,—

- (a) Except where the charge is surrendered or taken to be surrendered or redeemed under section 305 of this Act, a liquidator may, but is not required to, carry out any duty or exercise any power in relation to property that is subject to a charge:
- (b) Where—
  - (i) A company is put into liquidation under section 241(2)(c) of this Act; and
  - (ii) The Official Assignee is the liquidator of the company; and
  - (iii) The company has no assets available for distribution to creditors of the company,—

the Official Assignee shall not be required, without the consent of the [Minister of the Crown who, under the authority of any warrant or with the authority of the Prime Minister, is for the time being responsible for the administration of this Act], to carry out any duty or exercise any power in connection with the liquidation if, to do so, would or would be likely to involve incurring any expense.

[18] This section applies specifically only where the Official Assignee is the liquidator of the company and the company has no assets available for distribution. Neither applies in this case. The conditions under s 254(b) are cumulative and as I have said only excuse the actions of an Official Assignee. They can have no application to private liquidators.

[19] For the reasons given, therefore, the appropriate order is to remove the existing liquidators and substitute the liquidators identified by the Commissioner as appropriate.

[20] I make the obvious observation that neither Mr Meltzer nor Mr Lamacraft were obliged to continue to act as liquidators of Revo. It was a matter entirely for them. However, where it was clear they would only act if they were pre-paid part or all of their fee and the Commission was not prepared to pre-fund but other professional liquidators were not seeking pre-funding then the appropriate course was for them to resign. Afterall, there is no advantage to any of the creditors in pre-funding in these circumstances.

[21] I do not intend to suggest by this decision that liquidators must proceed to realise assets always without pre-funding. There will be many occasions when clearly it is not reasonable and efficient (s 253) to ask a liquidator to fund a liquidation.

[22] On the other hand in this case there is a relatively straight forward discrete issue which on the face of it requires modest negotiation with the Local Authority and a decision made as to which creditor receives the money. In those circumstances there seems no reason why pre-funding should be necessary.

[23] I therefore order the removal of Jeffrey Phillip Meltzer and Michael Lamacraft as liquidators of Revo Industries Limited and the appointment of Vivian Judith Fatupaito and Richard Daryl Agnew of Auckland as liquidators.

[24] The Commissioner in the circumstances is entitled to costs on a 2B basis against Mr Meltzer and Mr Lamacraft.

---

Ronald Young J

Solicitors:

N H Malarao, Meredith Connell, PO Box 2213, Shortland Street, Auckland  
R B Hucker, Hucker & Associates, PO Box 3843, Shortland Street, Auckland  
email: [hucker@huckerlaw.com](mailto:hucker@huckerlaw.com)