

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

CIV 2008-404-3332

UNDER Part 16 of The Companies Act 1993

BETWEEN THE 3 FELLAZ COMPANY LIMITED
Plaintiff

AND LAND DEVELOPMENT SOLUTIONS
LIMITED
Defendant

Hearing: 1 May 2009

Appearances: S W Greer for the Applicant
No Appearance for the Respondent

Judgment: 1 May 2009

ORAL JUDGMENT OF ASSOCIATE JUDGE ROBINSON

Solicitors/Counsel: Thomson Wilson, PO Box 1042, Whangarei
Malcolm Whitlock, Solicitor, Auckland
S W Greer, Barrister, PO Box 12448, Penrose, Auckland

[1] The liquidator applies under s 243(1)(b) of the Companies Act 1993 for the appointment of Trevor Whitfield and Perry Michaela Finnegan as liquidators and for his discharge as liquidator. He brings the application at the request of the majority of creditors who passed a resolution to that effect at a meeting of creditors for the company on 16 March 2009.

[2] As required by the Companies Act the liquidator brings the application. However, he does not support the application and wishes to continue as liquidator. Mr Reynolds was appointed liquidator on 16 September 2008. The appointment followed proceedings by the Three Fella Company Ltd. That company had served a statutory demand claiming to be owed \$58,820.23.

[3] On 28 October 2008 the liquidator prepared a report. In that report the liquidator pointed out that he was unable to prepare a statement of affairs of the company. He records being unable to access financial records for the company and being unable to obtain an accurate statement of the company's position from the company's director. He also records that the reasons for insolvency of the company are not known as the director at that time was in Italy. Because Mr Reynolds had reason to believe that the return to creditors would be less than twenty cents in the dollar, he indicated that he did not intend to call a meeting of creditors because of the expense involved.

[4] After a number of attempts by the liquidator to contact Mr Cozolino, the liquidator, received a telephone call from James Foley who explained he was the lawyer acting for Mr Cozolino and that Mr Cozolino wished to enter into a compromise with creditors and apply to take the company out of liquidation. After further pressure from the liquidator, Mr Cozolino and Mr Foley eventually met on the 25 November 2008. At that meeting Mr Cozolino provided Mr Reynolds the liquidator with a creditors schedule. That schedule contained the following creditors:

- a) 1464 Remuera Limited - \$50,000 loan

- b) Paul Jackson & Associates - \$9,600 accountancy fees
- c) Reyburn & Bryan - \$54,000 surveyor
- d) The Three Fellas Company Ltd - \$58,820 contractor
- e) Inland Revenue - \$85,000 for interest
- f) Cozolino - \$1,300 shareholder loan
- g) Apphold consulting - \$8,000 professional advice
- h) Dyer Whitechurch - \$10,000 for legal services
- i) The value of creditors therefore was \$726,720.

[5] Following the meeting there were a number of letters from Mr Foley then acting on behalf of Apphold Consulting Ltd in which a request was made for a creditors meeting. That meeting was eventually held in March 2009. Before it was held, the liquidator received a telephone call from Mr Wayne Peters, a solicitor of Whangarei advising that he acted for Donna Logan claiming she was owed \$4,620,243 by the company. Eventually Miss Logan completed a proof of debt.

[6] It was a majority of creditors at the meeting on 16 March 2009 that supported the replacement of Mr Reynolds as a liquidator. The meeting of creditors resolved by the majority of seven votes at a value of \$5,171,826 to three votes at a value of \$2,299,600 in support of the resolution removing Mr Reynolds. Following the meeting Mr Reynolds has obtained further information relating to the debt to the Inland Revenue Department. The Inland Revenue Department had submitted a claim for over \$2,000,000 for Goods and Services Tax. The department it now appears accepts that no Goods and Services Tax is payable. This reduces the departments debt considerably and is of considerable benefit to the remaining creditors because the department will not be a preferential creditor to that amount. However, it seems that the department's assessment of Goods and Services Tax was a default assessment.

[7] In support of the resolution removing Mr Reynolds and appointing Mr Whitfield and Finnegan as liquidators, it is submitted that the proposed liquidators have more experience in dealing with tax matters, than Mr Reynolds has been spending a lot of time investigating claims by creditors, that time it is suggested is wasted time and it is emphasised that as a majority of creditors support Mr Reynolds removal, the application should be granted. On the other hand Mr Reynolds in opposing the application he was bringing points out that much time and expense could have been saved if there had been more co-operation, that now that he has obtained further details relating to Miss Logans's claim and the Inland Revenue Department debt he anticipates being able to complete the liquidation of this company in three hours. When the matter first came on for hearing before me last week, I adjourned the proceedings to obtain amongst other things estimates of costs from liquidators. The only estimate I have is that Mr Reynolds says he can complete this liquidation in three hours. The proposed liquidators have given no estimate as to the costs involved pointing out that they have not had access to the company's records and consequently cannot make such an assessment. It is submitted on behalf of the proposed liquidators that the Court must give considerable weight to a resolution that has the support of the majority of creditors.

[8] Section 243(7) provides:

“If at a meeting of creditors it is resolved to apply to the Court for the appointment of a person as liquidator in place of the liquidator appointed pursuant to paragraph C of subsection 241 of this Act, the liquidator of the company must forthwith apply to the Court for the appointment of that person as liquidator and the Court may if it thinks fit appoint that person as the liquidator of the company.”

[9] Consequently, it is clear from the wording of that section that Mr Reynolds is obliged to bring the application and is complying with his obligations in this regard. It is also clear from that section that the final decision as to who is to be liquidator is the Court's and not the creditors. The order placing this company into liquidation is an order of the Court. The liquidator has been appointed by the Court and

consequently the Court must have an overriding power and a determinative power in who should be the liquidator.

[10] Amongst the factors the Court must take into account are the wishes of the creditors. In this case, I take into account that the majority sought another liquidator. It follows that a minority sought the continuation of Mr Reynolds as the liquidator.

[11] Another factor I should take into account is the need for the liquidator to be independent. There is no evidence here that Mr Reynolds has not been independent. Another factor I take into account is the relationship between Mr Cozolino on the one hand and some of the creditors. It is significant that Mr Cozolino was overseas when the liquidator was appointed. It is also significant that Mr Cozolino together with Apphold Consulting initially appeared to try and negotiate out of the liquidation. They wanted to come to a compromise with the creditors.

[12] If the main concern relates to the costs of the liquidator then those costs could have been reduced considerably, it seems to me, if Mr Cozolino and Miss Logan had been more co-operative. So far as costs are concerned there must be extra costs involved in changing the liquidators at this late stage. Thus it is reasonable to assume that refusing the application will save those extra costs. It is said that the proposed liquidators have more experience in income tax issues than the existing liquidator. However, there is nothing to suggest that Mr Reynolds a well known and respected accountant would not have the required tax experience in dealing with the Inland Revenue Department.

[13] In the circumstances therefore I have resolved not to grant this application. It does seem that Mr Reynolds has been acting entirely properly but in difficult circumstances where he has not had the co-operation he is entitled to from Mr Cozolino and possibly from some of the creditors. For the reasons I have given therefore the application is declined. There will be no order as to costs.

Associate Judge Robinson