

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

CIV 2008-404-007561

BETWEEN THE COMMISSIONER OF INLAND
REVENUE
Plaintiff

AND GREENERY HOLDINGS LIMITED (IN
LIQUIDATION) FORMERLY KNOWN
AS VISTAITA LIMITED
Defendant

Hearing: 10 June 2009

Appearances: C K Wood and S North for the Plaintiff
R B Hucker for the Defendant

Judgment: 10 June 2009

[ORAL] JUDGMENT OF WYLIE J

Solicitors:

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THE COMMISSIONER OF INLAND REVENUE V GREENERY HOLDINGS LTD (IN LIQUIDATION)
FORMERLY KNOWN AS VISTAITA LTD HC AK CIV 2008-404-007561 10 June 2009

[1] This was an application by the Commissioner of Inland Revenue for a declaration that the appointment of liquidators of the defendant company, Greenery Holdings Limited (in liquidation) formerly known as Vistaita Limited, was invalid.

[2] The background to the matter can be shortly stated. The defendant company was incorporated on 15 April 2004 under the name of Vistaita Limited. On 12 December 2008, it changed its name to Greenery Holdings Limited.

[3] On 18 November 2008, an advertisement appeared in the New Zealand Herald indicating that Body Corporate 323166 had filed an application in this Court seeking to put the defendant company into liquidation. The date of hearing of that proceeding was 15 December 2008 at 10.00am. When the matter was called, Lang J struck out the proceeding. There was no order as to costs.

[4] At that time, there was also extant an application by the Commissioner to place the defendant company into liquidation. The Commissioner had filed a statement of claim on 13 November 2008 which had been served on the defendant company on 1 December 2008.

[5] On 17 December 2008, notices were given to the Companies Office by a Mr Raymond Gordon Burgess and a Mr Craig Andrew Young advising that they had been appointed as joint liquidators of the company. The appointments were made by the company's sole shareholder pursuant to a resolution passed under s 241(2)(a) of the Companies Act 1993. The notice given to the Companies Office recorded that the appointment took effect on 12 December 2008 at 4:45pm. That date carried through into other documentation – including the liquidators' first report.

[6] The Commissioner was concerned that that appointment was invalid pursuant to s 241AA of the Act and he promptly advised Messrs Burgess and Young of his position in that regard. No detailed substantive response was received, and in the event a declaration seeking that their appointment be declared invalid was filed on 27 March 2009.

[7] A notice of opposition was filed by the defendant company which had attached to it a copy of the resolution appointing Messrs Burgess and Young as joint liquidators. That resolution was dated 15 December 2008.

[8] It was common ground that if the resolution was passed on that date, s 241AA could have no application and there was nothing to preclude a shareholders resolution under s 241(2)(a).

[9] The matter was set down for hearing today. Late yesterday afternoon, the Commissioner made an application for orders under rr 7.28 and 9.75 seeking respectively that Mr Burgess should appear for cross-examination, and that Mr Young should attend in Court to be examined on oath in relation to his appointment as a joint liquidator.

[10] When the matter was called this morning, Messrs Burgess and Young voluntarily attended in Court. I am grateful to them for their prompt attendance at short notice. They both gave evidence and were cross-examined by Mr Wood on behalf of the Commissioner.

[11] It became clear that the date of appointment of 12 December 2008 given to the Companies Office, and repeated in other documentation, was in error. A simple mistake had been made by Mr Burgess. He communicated the wrong date to Mr Young. The date was not checked and as a result it was repeated in a number of documents. On the face of it, the resolution appointing Messrs Burgess and Young as liquidators was passed on 15 December 2008 at 4:45 pm.

[12] Subsequent to the luncheon adjournment, Mr Wood responsibly advised me that the Commissioner was not in a position to challenge the evidence of Messrs Burgess and Young and that in the circumstances, the Commissioner withdrew his application seeking a declaration as to the validity of their appointment. On the materials before the Court, it seems to me that that was an appropriate step to take and I am grateful to the Commissioner and to counsel for recognising the position.

[13] Mr Hucker on behalf of the respondent company sought costs on a 2B basis. Mr Wood resisted that request primarily on the basis that the error was one made by the liquidators, and the Commissioner has acted responsibly in advancing matters.

[14] Having considered the position, I am minded to fix costs in favour of the respondent at 50% of costs calculated on a 2B basis. This recognises that the initial mistake was one made by Mr Burgess. The Commission acted properly faced with the materials then available to him. However, the Commissioner did know the correct position, probably as from 1 April 2009, and certainly as from 19 May 2009 when Mr Burgess filed his affidavit. Nevertheless, the Commissioner proceeded to take matters further and was ready to argue the matter today. Mr Hucker was required to prepare for a hearing.

[15] In the circumstances, it seems to me that a costs order reduced as noted above is appropriate. Accordingly, I fix costs at 50% of costs calculated on a 2B basis. The respondent is also entitled to its reasonable disbursements.

Wylie J