IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2009-404-006640

UNDER	Section 283(4) of the Companies Act 1993
IN THE MATTER OF	an application to replace a liquidator
BETWEEN	FISHER INTERNATIONAL TRUSTEES LTD First Applicant
AND	FISHER TRUSTEE LIMITED Intended Second Applicant
AND	WATERLOO BUILDINGS LTD (IN LIQUIDATION) First Respondent
AND	PETER GEORGE CLODE Second Respondent
AND	MELISA MARVIN JANE WATSON Intended Third Respondent

Hearing: 4 November 2009

Appearances: D J Chisholm and M Kirkland for the First Applicant and intended Second Applicant
No appearances for First, Second and intended Third Respondents

Judgment: 12 November 2009 at 3:30 pm

JUDGMENT OF WHITE J

This judgment was delivered by me on 12 November 2009 at 3:30 pm
pursuant to Rule 11.5 of the High Court Rules.
Registrar/Deputy Registrar

Solicitors/Counsel:
Kirkland Enright, PO Box 1290, Auckland 1140

D J Chisholm, PO Box 2629, Shortland Street, Auckland 1140

[1] There are three applications before the Court:

a) An amended application dated 29 October 2009 by the first applicant and intended second applicant for the joinder of the intended second applicant (Fisher Trustee Limited) and the intended third respondent (Melisa Marvin Jane Watson);

b) An amended application dated 29 October 2009 by the first applicant and the intended second applicant to replace the liquidator of the first respondent, Waterloo Buildings Limited (Waterloo), by the Official Assignee; and

c) An application by Waterloo and the intended third respondent (Ms Watson) for an adjournment of the proceedings for two weeks to enable her and Waterloo to obtain legal representation and file the necessary documents in defence of the proceeding.

[2] I propose to address the adjournment application first.

The adjournment application

[3] The adjournment application was contained in a memorandum dated 4 November 2009 from Ms Watson, the current liquidator of Waterloo. The memorandum was filed and served shortly before the half-day hearing scheduled for 4 November 2009, together with a statement of defence, a notice of opposition and affidavits from Ms Watson (undated), D J Oliphant (dated 2 November 2009) and L D Gilbertson (dated 3 November 2009).

[4] Counsel for the applicants opposed the adjournment application on the basis that their submissions in support of the applications for joinder and replacement of Ms Watson as liquidator of Waterloo would be sufficient to persuade me not to grant the adjournment. I therefore heard their submissions, but reserved my decision in order to consider them in light of the documents filed by Ms Watson.

[5] I have now had the opportunity of considering the documents filed by Ms Watson. It is apparent from them that:

a) She is the liquidator of Waterloo, having succeeded Mr Peter Clode who was liquidator from 1 September to 2 October 2009.

b) She obtained a BSc from Auckland University in 2000 and was appointed liquidator of Waterloo by a creditor. She says she has acted independently as liquidator since her appointment and is not disqualified from acting in that capacity.

c) She claims to have taken various steps in the liquidation of Waterloo since her appointment, including finalisation of various Court proceedings by Waterloo against other parties, including the first applicant, and she has held a creditors meeting by postal ballot, receiving a 99% vote in favour of her appointment. She says that the affairs of Waterloo are "tidy".

d) She strongly disputes the status of the first applicant and intended second applicant as creditors of Waterloo.

[6] Ms Watson sought the adjournment on the following grounds set out in her memorandum:

> 2. I was served with a copy of these proceedings, joining me in these proceedings, at 3.30 pm on 2 November 2009. This has left me one day to file any type of document in defence.
>
> 3. I have not had the necessary time to arrange legal Counsel for myself or Waterloo due to short notice. I have put this memorandum, notice of opposition, statement of defence and affidavits in opposition together myself with the help of a "friendly" lawyer who can not appear on my or Waterloo's behalf due to other commitments. I apologise to the Court in advance if the documents are not up to the Court's acceptable standards.
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> 4. Waterloo has no funds available to defend these proceedings at present and I have not had the time to arrange the necessary funding from the other creditors of Waterloo for its defence. However, two of the main creditors, Kai Iwi Tavern Limited and LJK Investments Limited, have made themselves available at short notice to swear

affidavits in opposition. Given more time to respond they would like to be heard in these proceedings and other creditors would also like the time to file affidavits in opposition.

5. I am asking the Court for an adjournment of two weeks in these proceedings to enable myself and Waterloo to be heard. Two weeks would be enough time for me and Waterloo to appoint legal representation and file the necessary documents in defence of this proceeding.

[7] The request for an adjournment on these grounds needs to be considered in light of the evidence from the applicants, which indicates that:

a) The first applicant was, and the intended second applicant is, a trustee for three creditors of Waterloo who claim to be owed over $1 million. The first applicant, which was struck off the register of companies for failing to file an annual return, has been replaced by the intended second applicant, which is the new trustee for the three creditors of Waterloo.

b) Waterloo and two associated companies (Ultimo Ltd and Elevation Trustee Ltd) went into liquidation by shareholders' resolution on 5 November 2008. At all material times the three companies had been controlled by their sole director, Mr Brent Clode, who was declared bankrupt on 12 February 2009.

c) The first liquidator of Waterloo was Mr Brent Clode's brother-in-law, Mr M J Cooper, who was appointed on 5 November 2008. On 1 September 2009, two days before Mr Cooper was declared bankrupt, Mr Brent Clode's brother, Mr Peter Clode, who resides in the United States, was appointed as replacement liquidator for Waterloo. On about 2 October 2009 Mr Peter Clode was replaced as liquidator by Ms Watson, who is apparently a friend of Mr Brent Clode.

d) Mr Brent Clode has remained involved with the liquidators in the conduct of the liquidation. The liquidators are family members or

friends of Mr Brent Clode, are unqualified and have continued to have the same address for service as Mr Brent Clode.

e) Examples of steps taken by Mr Brent Clode in the liquidation include conducting correspondence with creditors of Waterloo, appearing at the 6 July 2009 initial mention of the original proceeding to replace Mr Cooper as liquidator without having any standing to do so, communicating with counsel for the applicants and serving documents on behalf of the liquidator's solicitor.

[8] Against this factual background, it was submitted for the applicants that the orders for joinder of parties and the replacement of Ms Watson as liquidator should be made without hearing further from her. It was submitted for the applicants that Mr Brent Clode had been involved throughout the liquidation and that his conduct in procuring the appointment of nominee liquidators, family members or friends, largely defeated the purpose of the liquidations and left creditors with a sense of mistrust in the process. It was submitted that Mr Brent Clode as the undischarged bankrupt director of Waterloo was in substance controlling the liquidation of the company. The repeated appointment of family members and friends and his open and continuing involvement in the liquidation reinforced that view.

[9] I propose to consider the adjournment application further in the context of the other orders sought, which I will consider separately.

Joinder

[10] The application for the joinder of Fisher Trustee Limited as second applicant and Ms Watson as third respondent is made under r 4.56 of the High Court Rules. Under r 4.56 a Judge may, at any stage of a proceeding, order that the name of a party be added to a proceeding because the person ought to have been joined or the person's presence before the Court may be necessary to adjudicate on and settle all questions involved in the proceeding.

[11] As far as the joinder of Ms Watson is concerned, there is little doubt that in terms of r 4.56 her presence before the Court is necessary to adjudicate on and settle the issue in this proceeding. The fact that she has sought an adjournment for the purpose of being heard suggests that she accepts that she should be joined as a party. As the current liquidator of Waterloo and as the subject of the application for review of her appointment, she needs to be a party to the proceeding.

[12] As far as the intended second applicant is concerned, it is also necessary for an order for joinder to be made to enable the Court to adjudicate on and settle the questions in the proceeding. With the striking off of the first applicant from the register of companies, the second applicant is needed as a party. The issue of the status of the second applicant as a creditor of Waterloo, which has been raised by Ms Watson, needs to be considered in a proceeding to which the second applicant is a party.

[13] I am therefore prepared to make the two orders for joinder. There does not seem to be any reason to hear further from Ms Watson on this issue. Her arguments about the status of the second applicant as creditor will still be able to be pursued either in this proceeding or in the liquidation of Waterloo. Her application for an adjournment is not granted in respect of the joinder application.

Replacement of liquidator

[14] The application for replacement of the liquidator is made under s 283(4) of the Companies Act 1993, which provides:

> The Court may, on the application of the company, or a shareholder or other entitled person, or a director or creditor of the company, review the appointment of a successor to a liquidator and may appoint any person who could be appointed as liquidator under paragraph (a) or (b) or paragraph (c), as the case may be, of subsection (2) of section 241 to be the liquidator of the company.

[15] The following features of this provision are noted:

a) It relates to the appointment of a successor to a liquidator under s 283(a) which provides that –

> "A person, other than an Official Assignee, may resign from the office of liquidator by appointing another such person as his or her successor and sending or delivering a notice in writing of the appointment of his or her successor to the Registrar for registration."

b) The company or a shareholder or "other entitled person", as defined in s 2, or a director or creditor of the company may make the application to the Court.

c) The Court has a discretion whether to "review" the appointment of the successor of the liquidator. If the Court does "review" the appointment, it may then appoint someone else as liquidator.

d) There are no criteria or guidelines in this provision to assist the Court in exercising its discretion to review the appointment of a successor to a liquidator and to appoint another person as liquidator: cf *WHK (NZ) Ltd v Retail Media Ltd (In Receivership and Liquidation)* HC AK CIV-2009-404-003157 at [24]. The fact that the Court's power of review arises when a successor is appointed does suggest, however, that it was considered important for the Court to have this power when an existing liquidator exercises his or her right to appoint a successor under s 283(2) and that the Court's power exists in order to ensure that the successor appointed by a liquidator is a suitable person to hold that office.

e) The persons eligible for appointment as liquidators under s 241(a), (b) and (c) are not specified in the Companies Act 1993.

[16] In view of these features of s 283(4), the Court, when asked to consider exercising its powers of review and appointment, will need to take into account the provisions of the Companies Act 1993 that expressly or implicitly prescribe the qualifications and requirements for the appointment of persons as liquidators under the Act.

[17] The express provisions in the Companies Act 1993 relating to the qualifications of persons eligible for appointment as liquidators are contained in s 280. Instead of listing positive qualifications, s 280 prescribes categories of persons who, unless the Court orders otherwise, are not eligible for appointment. The categories of persons excluded include a person who has, within two years immediately preceding the commencement of the liquidation, been a director of the company, and an undischarged bankrupt: s 280(1)(c) and (d).

[18] In addition to s 280, the provisions of the Companies Act 1993 that prescribe the further qualifications and requirements for the appointment of liquidators include the provisions relating to the duties, rights and powers of liquidators, of which s 253 is particularly significant. It provides:

> **253 Principal duty of liquidator**
>
> Subject to section 254, 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) –
>
> in a reasonable and efficient manner.

[19] Under ss 256-258A a liquidator has a range of other statutory duties, including duties to keep accounts and records of the liquidation (s 256) and to complete a final report and statements relating to the completion of the liquidation (s 257). A liquidator must therefore have the skills and resources necessary to comply with and carry out these duties.

[20] It follows from these provisions that, taking into account the nature of the particular company and its assets and the complexity of the particular liquidation, a liquidator will need to have the qualifications, experience and resources necessary to carry out the liquidation of the particular company "in a reasonable and efficient manner" and to keep accounts and records of the liquidation: cf *Heath and Whale on Insolvency*, Vol 1, at para 20.15.

[21] It is also well-established that the principal requirement for appointment as a liquidator is independence. Liquidators are required to be independent and be seen to be independent: *Heath and Whale on Insolvency*, Vol 1, at para 20.15. The Court has a duty, in the wider public interest, to ensure that the interests of persons concerned in the winding up are best served by the appointment: *Re Anthony Stevens Holdings Ltd (in liq)* HC AK CL 3/87 5 April 1989.

[22] The view that these considerations are relevant to the exercise of the Court's discretion under s 283(4) is supported by the commentary in *Brooker's Company and Securities Law*, 1-1808, CA 283.02, where it is suggested that the considerations are likely to be similar to those which the Court takes into account when considering an application by creditors under s 243(7) for the replacement of a liquidator. In *Jacobsen Creative Surfaces Ltd v Smiths City Ltd* [1994] 1 NZLR 128, Hansen J listed the following factors as relevant to the exercise of the discretion:

> 1. Independence. There must be on the part of the liquidator the ability to make informed and unbiased decisions in the interest of all groups.
>
> 2. The resources of the liquidator.
>
> 3. The wishes of the creditors and contributories. This may include the indications given at the hearing where there has been a change of heart since the creditors' meeting. It is not a matter that of necessity requires adherence to the strict arithmetical calculation.
>
> 4. The competence and experience of the liquidator. This will be his ability to carry out the task required in an efficient manner, and in complex cases will include consideration of his commercial experience.
>
> 5. The requisite speed with which the liquidator can be carried out.
>
> 6. On occasions, the liquidator's familiarity with the company will be of relevance.

[23] The approach to the question whether a liquidator has the necessary qualifications, experience, independence and impartiality has been considered in a number of cases. In *Re Trafalgar Supply Co Ltd (In Liquidation)* [1991] MCLR 293 at 296, Wylie J said:

> I take the view that where there is a body of suspicion, whether in the end justified or not, but with some factual foundation on which suspicion may be built, then it is undesirable that a liquidator should be appointed. There will be left in the minds of creditors a sense of dissatisfaction that an appointee of

> the Court may not have been totally impartial in the performance of his duties. I have endeavoured to express those views in a recent decision of my own, *Re. Halford Ornowski & Associated Ltd* (HC Auckland M666/90, 15/2/91, Wylie J) this year where the circumstances were rather different, but where nevertheless the anxiety on my part to ensure that total independence and impartiality were seen to be exercised was a prime consideration.

This decision was followed in *Re Hilltop Group Ltd* (1998) NZCLC 261, 505 and *WHK (NZ) Ltd v Retail Media Ltd (In Receivership and Liquidation)* HC AK CIV-2009-404-3157 16 July 2009.

[24] In *WHK (NZ) Ltd v Retail Media Ltd (In Receivership and Liquidation),* which concerned an application under s 241AA of the Companies Act 1993 (Restriction on appointment of liquidator by shareholders or board after application filed for Court appointment), Asher J, after referring to the decisions in *Trafalgar* and *Hilltop*, said:

> [25] It could well be that the approach set out in *Re Trafalgar Supply Limited* should be adopted in considering an application under s 241AA, although the matter has not been fully argued before me, and I express no final view on it. Even on such an approach, mere suspicion is not in itself enough. There must be a factual foundation for the suspicion, which could be expressed as there being a serious question to be tried as to whether the liquidators would carry out their duties, and show the requisite objectivity and independence. That objectivity and independence is important where they will have, as here, the role of a watchdog over the activities of the receiver.
>
> [26] Nevertheless, the liquidators are entitled to have the opportunity to explain their actions fully, and to have them analysed with care before any determination is made. The fact that the threshold of suspicion is low may mean that in certain circumstances where the lack of independence is overwhelmingly demonstrated and there is great urgency, that a Court might make orders replacing a liquidator after a truncated hearing. However, I do not consider that the situation here, with the interim orders in place, is so extreme as to deny the existing liquidators the opportunity to fully answer the allegations against them.

[25] In my view the cautious approach to the replacement of a liquidator suggested by Asher J is appropriate and should be followed in the context of an application for review of an appointment under s 283(4). This means that in the normal case an applicant for the review of the appointment of a liquidator under s 283(4) and for an order appointing a replacement liquidator would need to establish on the balance of probabilities that the person who had been appointed did not have

the necessary qualifications, experience, independence and impartiality, and should be replaced by a person who did satisfy these requirements. In a case where the evidence was particularly strong and the need for an urgent decision was established the Court might be persuaded to make orders on an application for an interim injunction, either with or without notice, if the relevant requirements of the High Court Rules and applicable authorities were met.

[26] Counsel for the applicants submitted that the facts of the present case were "far more extreme" than the facts in either *Trafalgar* or *Hilltop* because:

a) In both *Trafalgar* and *Hilltop* the replaced liquidators were chartered accountants. In *Trafalgar* it was made clear that there was no criticism of the liquidators' qualifications, integrity or competence. There was a perception of conflict, however, as the liquidator had previously acted for interests associated with *Trafalgar* and its shareholder.

b) In the present case Mr Brent Clode had appointed related parties with no bona fide insolvency experience and had remained openly involved in the liquidation.

c) Mr Brent Clode was prepared to procure the appointment of his brother-in-law and then his brother, who resides overseas, as liquidators.

d) There could be no serious investigation of the affairs of Waterloo while Mr Brent Clode continued to be involved in the liquidation.

e) Ms Watson appeared to be a friend of Mr Brent Clode and under his influence.

[27] It does appear from the evidence that there may be a factual foundation for the suspicion that Ms Watson does not have the necessary qualifications, experience, resources, independence and impartiality to be the liquidator of Waterloo, but Ms

Watson has not yet taken the opportunity to provide the Court with evidence of her qualifications to be liquidator of Waterloo or to show that she has access to the resources necessary to conduct the liquidation or the necessary confidence and experience to carry out the liquidation independently and impartially.

[28] In the context of an application under s 283(4) for the review of the appointment of a liquidator, the liquidator should normally have the opportunity to provide the Court with evidence of his or her qualifications, experience, resources, independence and impartiality. As Asher J noted in *WHK (NZ)* Ltd at [26], it would only be in a case where the lack of independence was overwhelmingly demonstrated and there was great urgency that a Court might make an order replacing a liquidator after a truncated hearing.

[29] In this case I do not consider that the applicants have yet demonstrated an overwhelming lack of independence on the part of Ms Watson or great urgency. I am therefore not prepared to complete the review of her appointment under s 283(4) without giving her a proper opportunity to respond and be heard. Her application for an adjournment in respect of the application under s 283(4) is granted subject to terms.

Adjournment on terms

[30] In order to ensure that the application under s 283(4) may be considered on the basis that it is the appointment of Ms Watson that is being reviewed, the present position needs to be preserved and a timetable needs to be made for Ms Watson to respond. The present position needs to be preserved by an order preventing Ms Watson from resigning and appointing a successor as liquidator under s 283(2) before the review of her own appointment as liquidator is completed under s 283(4). There also needs to be a timetable to ensure that the hearing of the case is completed without further undue delay.

[31] I therefore make the following orders:

a) Fisher Trustee Limited is joined to this proceeding as second applicant and Melisa Marvin Jane Watson is joined as third respondent.

b) The third respondent is restrained from taking any steps under s 283(2) of the Companies Act 1993 to resign and appoint anyone else as liquidator of Waterloo Buildings Limited until the completion of the review of her appointment under s 283(4) or the Court orders otherwise.

c) The third respondent is to file and serve any further affidavits in opposition to the application for the review of her appointment as liquidator and any submissions in opposition within four working days of the service of these orders and a copy of this judgment on her.

d) The second applicant is to file and serve any affidavits in reply and any further submissions in support within two working days after the third respondent's affidavits and submissions have been filed and served.

e) The Registrar is to be asked to allocate a further fixture for this proceeding in consultation with the parties.

f) Leave is reserved to the parties to apply on notice for an extension of any of the times in these orders should they encounter difficulties in compliance with them.

g) The applicants are to serve these orders and a copy of this judgment on the first and third respondents.

[32] Costs are reserved.

D J White J