IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV-2013-488-5
[2015] NZHC 2345

IN THE MATTER	of the Companies Act 1993
BETWEEN	DAMIEN GRANT and STEVEN KHOV as liquidators of Quantum Grow Limited (in Liquidation) Plaintiffs
AND	LOTUS GARDENS LIMITED (In Liquidation) First Defendant
	ALAN CANAVAN Second Defendant

Hearing:	4 August 2015
Appearances:	Mr B Norling and A Cherkashina for the Liquidators Mr A Canavan Second Defendant in person Mr G Caro for Official Assignee
Judgment:	25 September 2015

JUDGMENT OF ASSOCIATE JUDGE J P DOOGUE

This judgment was delivered by me on
***25.09.15 at 4.30 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Background

[1] This matter before the Court is an application under s 243(7) of the Companies Act 1993 (the Act) for the appointment of replacement liquidators.

[2] The present liquidator, the Official Assignee (the Assignee) takes a neutral stance in this matter. The application had to be made and has been made but the Assignee does not actively support or oppose Messrs Grant & Khov ("Grant & Khov") being appointed. The position of the Assignee was further that, in the circumstances, the Assignee considers it is incumbent on Grant & Khov to demonstrate why the Court should appoint them as replacement liquidators.

[3] Mr Caro told me that if no changes are made to the liquidators the liquidation will be shortly completed.

[4] The evidence is that four creditors have filed claims in the liquidation of the company. The first claim is that of Quantum Grow Limited ("Quantum Grow") for $67,749.38 of which $42,173 is "preferential" as the Assignee described it in that that sum relates to the costs which were awarded to Quantum Grow relating to the application to liquidate the company and the subsequent appeal processes which followed the decision to appoint liquidators. The second claim is the Commissioner of Inland Revenue for $28,723.86 of which $13,200.13 is "preferential", presumably reflecting the fact that they fall within Part Two of the Seventh Schedule to the Act. The third claim is that of the company's former accountants Yovich Hayward Prevats Johnston Limited ("YHPJ Limited") for $5350. The final claim is that of the trustees of the Lotus Trust, a trust associated with Mr Canavan. That claim is for $42,000.

[5] The Assignee as liquidator of Lotus Gardens Limited (in Liq) ("LGL") held a creditors' meeting by way of postal ballot pursuant to Schedule 5(1)(c) of the Companies Act 1993. The resolution put forward for votes was:

> **Resolution A:**
>
> That the OA apply to the High Court for the appointment of Damien Grant and Steven Khov as liquidators, in place of the OA as liquidator.

Resolution B:

That the OA apply to the High Court for the appointment of John Michael Gilbert as liquidator, in place of the OA as liquidator.

[6] The Inland Revenue was the only other creditor that elected to vote. The Inland Revenue Department also voted in favour of Resolution A.[1] The liquidators as liquidators of Quantum Grow, are creditors of LGL and voted in favour of Resolution A.[2] For the resolution to be adopted, a majority in number and value is required.[3] 100 per cent (by both number and value) of those who voted support the replacement of the Assignee with the liquidators.[4] The effect of the resolution is that the Assignee must make an application to the Court in support of the resolution. The Court may, if it thinks fit, appoint that person as the liquidator. [5] The liquidator made the necessary application which was supported by Grant & Khov and opposed by a director of the company, Mr Canavan. The Assignee took a neutral position and made submissions on matters which he considered relevant to the decision which the Court has to make.

[7] It was common ground between the Assignee and Grant & Khov that the leading case in relation to this issue is *Jacobsen Creative Surfaces Ltd v Smiths City Ltd*.[6] The Court in *Jacobsen* summed up the relevant factors to be taken into account by the Court in such circumstances as follows:

i) Independence. There must be on the part of the liquidator the ability to make informed and unbiased decisions in the interests of all groups.

ii) The resources of the liquidator.

iii) 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.

iv) 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 expertise.

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1 BOD at 99.
2 BOD at 100
3 Schedule 5(5) of the Companies Act 1993.
4 Affidavit of Paul Harte dated 13 March 2015 at [17]. BOD at 5 and 99-101.
5 Section 243(7) of the Act. [BOA at 02].
6 *Jacobsen Creative Surfaces Ltd v Smiths City Ltd (Note)* [1994] 1 NZLR 128 (HC)..

v) The requisite speed with which the liquidation can be carried out.

vi) On occasions, the liquidator's familiarity with the company will be of relevance.

[8] It will be convenient to consider the issues that this case presents for determination by reference to the above statements of principle.

[9] While the matter was not covered in the submissions which counsel initially filed in this case, brief mention needs to be made of the extent to which the Court needs to be satisfied that an order appointing Grant & Khov as liquidators is justified. As I understand it, the position that Mr Caro took was that there is no onus on those seeking an order for replacement of the liquidators to satisfy the Court that such an order should be made. However, in the usual way, there should be some reasons apparent to the Court as to why it ought to make the orders sought. In this case, the reasons might include matters such as the wishes of the creditors.

Independence

[10] The most obvious point to be made is that Grant & Khov are, on one view, not independent. That is because Grant & Khov would not only be the liquidators of the company if their application were to be approved but they would also be creditors in the liquidation.

[11] On the other hand, Grant & Khov would not personally benefit from any recovery that might be made and which is payable to them as creditors. They would be required to distribute any funds recovered in accordance with the priorities established by Schedule 7 of the Companies Act 1993.

[12] There is however another aspect to the matter and that is that Grant & Khov would have an expectation that part of any recovery would be distributed to the company that they represent as creditor, and thereafter would be payable from the administration of Quantum Grow to satisfy the costs that had been incurred in the various procedures that the liquidators had become involved in with that company, including several appearances before Bell AJ, an appeal to the Court of Appeal and an on-leave application to appeal to the Supreme Court. The relevant amount was

some $42,000. As well, the costs of the liquidators in carrying out their obligations would also be a priority under Schedule 7 to the Act.[7] As at the present date, these costs total around $200,000. Mr Caro said though that the figure is likely to be even higher than because the ceiling on that claim had been the amounts that the liquidators had managed to recover to date. That is to say, unless they had recovered funds from which invoices could be paid, they have not charged their services for the liquidation of Quantum Grow. I understand that the submission that Mr Caro makes is that in these circumstances the independence of the liquidators is compromised.

[13] The fact that any funds recovered by a liquidation of the company would partly be distributed to Quantum Grow is another aspect of the status which Grant & Khov would have as creditors of the company. It explains how they came to be creditors of Quantum Grow but it does not add anything to the acknowledged fact that they are such creditors. The background involvement of Grant & Khov in the liquidation of Quantum Grow has resulted in a circumstance where they would be a substantial creditor of Quantum Grow and therefore entitled to a proportion of any sum that the liquidators might distribute from the company to Quantum Grow.

Resources and experience of the liquidators

[14] The proposed replacement liquidators in this case have the experience and the resources to carry out an investigation. They are known to the Courts from their involvement in numerous liquidations. Any questions that arise as to whether they should be appointed are not connected with the competence of the liquidators but whether the course of action which they propose is to the advantage of the company. It is this last matter that I consider next.

Wishes of creditors

[15] It was Mr Norling's submission that:

> 7.1 It is paramount that the views of creditors are taken into account. In particular, the Court of Appeal has relevantly held:
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> > The creditors of a failed company are ordinarily entitled to have its affairs thoroughly investigated to learn whether it has any assets, or the liquidator any rights of recourse, that

[7] Companies Act 1993, sch 7, cl 1(1)(a).

> might repay them. Where a creditor, or in this case the liquidator, is prepared to fund such investigation, the Court will not lightly deny them the opportunity that it represents.[8]

[16] In the present case, the resolution of the creditors meeting decided by a majority in support of replacing the liquidators. The parties who voted on that resolution were those who had by then proved as creditors, namely, the Commissioner of Inland Revenue and the liquidators of Quantum Grow.

[17] In this case the majority of creditors voted in favour of replacement of the liquidator pursuant to s 243. Those creditors were the Commissioner of Inland Revenue and the liquidators of Quantum Grow. Later proof of debt was filed on behalf of the Lotus Trust, a trust associated with Mr and Mrs Canavan, in the sum of $42,000. The latter were not present at the creditors meeting at which the creditors resolved that an application ought to be made to replace the Assignee with Grant & Khov. Even had the Lotus Trust filed a proof of debt of time to be included in the voting at the meeting there is no reason to believe that the resolution would not have been passed in by a majority in accordance with Schedule 5 to the Act.[9] The Lotus Trust claimed debt of $42,000 was put forward after the creditors' meeting. It is not clear whether or not the liquidators have accepted the debt or the proof of debt which Lotus Trust has lodged. For the purposes of the present discussion I will assume that the proof has been admitted. Given that in this case the application would not have been made without there being a majority in support of the appointment of Grant & Khov, it is clear that the majority wish is for that outcome to occur. There is no reason why the majority view ought to be given diminished weight because, for example, the majority supporting the appointment comprises wholly or in part related parties who have an interest in the proposed change of liquidators.

No demonstrated advantage from bringing the proceedings

[18] It could be argued that in a case of the present kind where the majority of creditors is agreed that the nominated liquidator ought to be appointed and then subject to the proposed person being one who is suitable for appointment, the wishes

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8 *Grant v CP Asset Management Ltd* [2013] NZCA 452 at [48]. BOA at 14.

9 Schedule 5(1) requires a majority in number and value to vote in favour of the resolution. See [6] above

of the creditors ought to be the dominant factor. Matters such as the relative skill of one liquidator over another are arguably issues that the parties can make their own commercial judgements about. The majority of the creditors in this case are commercially experienced.

[19] However, Mr Caro's submissions went further and considered the balance of advantages that would follow from the appointment of the intended replacement liquidators over the assignee. While that factor may not assume greater importance in the circumstances of this case for the reasons I have just given, it is worth consideration and it is not entirely without weight.

[20] Essentially the issue comes down to the fact that Grant & Khov assert that if they were appointed they would take a different, and preferable, approach to that which the Assignee has taken. I will now consider the arguments in favour of those contentions.

Additional steps Grant & Khov intend to take

[21] It is difficult to see what advantage would follow from making a change in the liquidators at this point unless there is still an outstanding matter or matters that need to be concluded and which would be better entrusted to Grant & Khov rather than to the Assignee. One of the criticisms that Grant & Khov had made was that the Assignee as liquidator had taken no steps to recover what was said to have been unjustified payments that had been made by the company to a trust associated with Mr and Mrs Canavan; the Lotus Trust.

[22] One of the transactions which it was alleged the liquidators would need to investigate was one that occurred in 2011 involving the company and the Lotus Trust. The Assignee gave evidence that this transaction had been investigated and questions had been directed to the former accountant for the company, a chartered accountant from Whangarei called Mr Morris. The evidence was that Mr Morris explained that the Lotus Trust was the company's landlord. In April 2013 Lyn Canavan, the wife of Alan Canavan, purchased the property from the Lotus Trust. This in turn allowed the trustees to settle their debts with the company recorded in the shareholders' advance account in the signed financial statements to 31 March

2011 and in turn allowed the company to settle its debt with the Bank of New Zealand which was recorded there as a current liability. It was therefore given for the release of the debt.

[23] A further point of criticism advanced towards the Assignee concerned the failure to investigate the whereabouts of certain assets of the company including motor vehicles. Grant & Khov provided the Assignee with a balance sheet for the company as at 23 February 2012. They had recovered it from the Quantum Grow server. That balance sheet listed a number of fixed assets and other assets. Tony Morris of YHPL Limited explained the discrepancies between the financial statements he prepared and the balance sheet provided by Grant & Khov. The later was part of the company's internal accounting records which were not updated yearly to reflect the signed financial statements. So the fixed assets referred to had in fact been sold during the year ended 31 March 2008.

[24] Mr Norling did not resile from the criticisms that were made. He said that while he made no suggestion that Mr Morris, who is a chartered accountant, was giving other than what he understood was truthful evidence, because of his role as a chartered accountant, he appeared to have simply taken the word of the clients concerning what occurred. There had been no independent verification that what the Canavan's had told him was correct.

[25] There was also a discussion about whether the company might be able to bring proceedings to set aside the dispositions intended to defeat creditors pursuant to s 348 of the Property Law Act. The utility of taking those steps was questionable and was unlikely to bring any advantage to the creditors.

[26] Mr Norling drew to my attention that there may be other causes of action which the Assignee does not appear to have closely considered, including a possibility of a claim pursuant to s 300 of the Companies Act for failure to comply with the formal reporting obligations incumbent on directors. He said that there have been claims where a total loss to the creditors has been ordered to be paid by directors who have not kept proper financial records.

[27] Mr Caro's response was that there are obviously sufficient records to enable an accountant in public practice who acted for the company, Mr Morris, to prepare annual financial statements. That would suggest that whatever deficiencies there may have been in the record-keeping the statutory minimum records were actually kept.

Proceeds of any recovery would be consumed by the costs thereof

[28] A key part of the argument put forward by Grant & Khov was that, if appointed, it is their intention to undertake any further investigations at their own expense and they would not have an indemnity from any third party. Any loss therefore would be borne by them.

[29] The substance of the position that the Assignee took was that the further element that needed to be considered when assessing the proposal by Grant & Khov that they would undertake the liquidation on the basis that any costs and expenses would have to be met out of recoveries. The assignee's view is that the Court ought to be concerned by what he considered was the likely outcome of Grant & Khov taking steps to pursue persons such as the Lotus Trust or directors of the company which was that the costs of taking no steps would swallow up any recoveries and therefore there would be no advantage to the company.

[30] Mr Caro also referred me to the New South Wales appeal Court authority in *Hall v Poolman.*[10]

[31] That case was concerned with an appeal from a judgment of the New South Wales Supreme Court in which the Judge had directed that there be an enquiry into the charges of the liquidators appointed in regard to a company. The Judge at first instance, Palmer J had been required to consider the circumstances in which the liquidators intended to acquire the services of a liquidation funder so that proceedings could be brought against directors of the company damages of some $6 million suffered by creditors as a result of the company trading while insolvent.[11] Other relief was sought as well. The judgment below had concluded that the

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10 *Hall v Poolman* [2009] NSWCA 64.
11 At[9].

liquidators had engaged the litigation funding provided because there were no funds available to them to pay for the litigation. The Judge also concluded that even if the claims which the liquidators intended to bring were successful after payment of liquidators' costs, legal costs and other matters, unsecured creditors would receive no more than a fraction of a cent in the dollar for their claims.[12]

[32] In the course of his judgment, the Judge at first instance referred to a practice known as a "churn and burn" that is taking steps that will only generate the fees payable as a result of taking those steps.

[33] In summary, the Court in *Hall v Poolman* found that liquidators seeking to discharge their duties should do so with costs and benefits clearly in mind; the benefits ordinarily being those to the creditors. The costs of the litigation itself had to be reasonably incurred and proportionate.

[34] The Appeal Court went on to say:

> 150 However, if: liquidators have incurred costs in preliminary investigations and in creditors' meetings, and they consider that the prospective benefits to creditors justify further investigation in which they will incur more costs and expenses, and there are then no assets, in the absence of litigation, to pay the costs already incurred; then in our view the liquidators may legitimately and in accordance with their duties pursue litigation with the aid of a litigation funder, and they may do so even if there is little or no likelihood of recovery going beyond recovery of their own costs and expenses and the funder's fees.
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> 151 There are some provisos to this proposition: the pre-litigation costs must have been either necessary or reasonably considered to be justified because of the prospective benefits to creditors; · the litigation costs themselves must have been reasonably incurred and proportionate to the prospective benefits (including not only possible direct benefits to creditors but also the benefits derived through the reimbursement of the liquidator's fees and expenses); and · the litigation funding agreement must not be on manifestly unreasonable terms.
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> 152 Issues of fact and degree, and issues of timing, clearly arise. Nevertheless, we adopt this proposition, subject to these provisos, because in our opinion there is a public interest in liquidators making preliminary investigations into matters that appear to them to warrant investigation, even when there are no assets available to

[12] At [13]

> fund their doing so. Liquidators may be discouraged if it were held to be improper per se for liquidators to try to recover the costs of their investigations by legal proceedings that would not directly benefit creditors.
> ….
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> 157 While it is plain that liquidators should not "churn and burn", in the sense of pursuing litigation simply in order to generate fees without any view to the interests of creditors or the public interest, we disagree with [the views which the first instance judge expressed] if and to the extent that it is intended to convey that liquidators are never entitled to bring proceedings where the only prospect of recovery is reimbursement of the liquidators' own fees and expenses. The position, as we understand it, is set out above. However, on balance we think it would be wrong to read Palmer J's observations as conveying this incorrect proposition, having regard to his Honour's general approach to the factors relevant to his decision. His quoted observation appears to be directed to a case of "churning and burning" and his Honour made no finding, even at the level of "appearance", that that may have occurred in the present case.

[35] While Mr Caro acknowledged that the circumstances of the *Hall v Poolman* case were different from that involving the present company, the case did illustrate the problem that could arise if Grant & Khov were appointed liquidators. He noted that the costs which the liquidators of Quantum Grow had charged to date was some $200,000 resulting in there being no financial net gain to the creditors of the company.

[36] The proceedings do not have to be directly beneficial to the creditors as *Hall* demonstrates. They may result in funds becoming available which can be used to reimburse the liquidators for their expenses and costs in carrying out an investigation of a possible claim.

[37] In *Hall* the Court expressed the opinion that the conclusions they came to were based upon an analogy with the requirement that there should be no fraud on the power.[13] It would seem to be equally justifiable on the ground that a statutory power is to be used only for the broad purposes for which it was conferred. The powers of liquidators to recover property on the part of the company are ultimately to be exercised for the benefit of the creditors. It would be a misuse of a liquidator's

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[13] At [149]

authority for it to be used as a way of generating work which could only ultimately benefit the liquidators themselves.

[38] The Assignee's submissions that the type of proceedings which Grant & Khov would take if they were appointed as liquidators contravene the foregoing requirements because they would have no utility and are unlikely to achieve anything but will result in further costs being incurred. The Assignee points to the example of the size of the costs and expenses that have been incurred by Grant & Khov in the Quantum Grow liquidation with the suggestion being that it is likely there will be a similar pattern followed in the present case if the liquidators are replaced.

[39] The *Hall* decision does not appear to have been considered by a New Zealand Court. In my view the observations which the Court made in *Hall v Poolman* are generally consistent with the statutory obligation which liquidators have under s 253 of the Act which set out set out the principal duty of a liquidator. It provides as follows:

> Subject to section 254 of this Act, the principal duty of a liquidator of a company is—
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> (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—
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> **in a reasonable and efficient manner**.
>
> (Emphasis added)

[40] While the above is a statutory statement of the principal obligation of liquidators, it is not an exclusive exhaustive definition of the duties which liquidators have. Mr Norling submitted that there is a public interest that liquidators should also make enquiries to ensure that the directors of the company have complied with the law and that liquidators who take such steps should be encouraged to do so, so as not

to create a corporate environment whereby directors know they can get away with such conduct because the cost of pursuit will be discouraged by the Courts. Such a submission is unobjectionable as long as it is kept in mind that the public interest type considerations on which the submission is based cannot be relied upon to justify investigation of any company no matter how hopeless the prospects of recovery are or how small the amounts involved are.

[41] I further note the submission that Mr Norling made that there would be no harm in making an order which enabled the replacement liquidators to "have a look under the hood" to see if anything is amiss with the company. While that might be an accurate colloquial description of what Grant & Khov would be doing if they were appointed, I do not consider that it suffices as a criterion for deciding whether or not replacement liquidators ought to be appointed. The expression is inherently uncertain in its meaning. If it involved the liquidators doing no more than taking over the records, documents and information which their predecessors have gathered in carrying out a review of that material in a relatively short period of time, then it might be understandable that the Court would not stand in the way of new liquidators being appointed for that purpose. On the other hand, if it involves substantial steps such as the examination of directors and further rounds of document gathering and possible in-depth investigations of the company's accounts, the exercise could quickly turn into a major one which would result in considerable expense which could mean that the liquidators efforts have little net effect in improving the position of the creditors. It could also lead to other deleterious consequences such as delay.

[42] Viewed overall, of the proposal of Grant & Khov to undertake completion of the liquidation on a non-indemnity basis could work out advantageously from the point of issue of the company. I say could, because there is also the possibility that if large fees and expenses are charged, any recovery that the liquidators might obtain would be consumed in paying their costs.

[43] The proposal by Grant & Khov to take over the liquidation on a non-indemnity basis would not mean that there had been any advantage accruing to the

creditors from the new liquidators taking over but what would be more accurately described as the absence of the disadvantage which is a different thing.

Duplication of effort and expense

[44] The Assignee also submitted that another disadvantage that would arise from changing the liquidators was that there would be duplication of effort incurred through the liquidators having to familiarise themselves with a liquidation by undergoing exactly the exercise and extending the effort with which the Assignee, the present liquidator, had already put into liquidation.

[45] I agree that that would be one effect of changing the liquidators at this stage.

Size of liquidation

[46] The submission was made that this is a very small liquidation and that there is no credible evidence of realisable assets.

[47] I agree that the liquidation is a small one and that that is a relevant factor. The efforts on the part of the liquidators to make recovery must be proportionate to the matters at stake. In a small liquidation there will be less detriment to the creditors if there is not a recovery and at the same time there may be fewer assets which can potentially be recovered. As well given the uncertain prospects of success in pursuing claims on behalf of a liquidated company, going along with proposals that further steps should be taken to pursue remedies for the company should only be considered after careful thought.

Delay

[48] If there were to be a change of liquidators, it is undoubted that completion of the liquidation would be put back. Instead of it being completed shortly, it could be prolonged for a lengthy period. An estimate that it might extend out for a further year would not be unrealistic in my view.

Discussion of balance of the advantages and disadvantages and changing the liquidators

[49] The following are my conclusions on the question of whether there is likely to be any advantage to the company from appointing new liquidators.

[50] The new liquidators would intend to explore certain possible claims. The existing liquidator says that that has all been done and there is no reasonable likelihood that additional viable claims will be found which can be brought on the company's behalf.

[51] There is some doubt based upon the view that the OA has put forward that there remain any viable claims which the liquidators could bring against third parties. Quite apart from anything else a number of the claims would now be time barred. Further, taking for example the proposed claim under s 348 PLA, the Assignee pointed out the requirement that at the time when the transactions took place it was necessary for the entity to be insolvent. He said that there was no basis for concluding that the assets that were sold in 2008 were disposed of at a time when the company was insolvent.

[52] I bear in mind that the various observations that the Assignee has made emanate from the present liquidator who may be supposed to have a good insight into the current state of affairs of the company.

[53] On the other hand, the different perspective which the Assignee has concerning the question of potential unexplored claims may be explained by the consideration that as Mr Caro noted, the Assignee is a liquidator of last resort. Mr Caro described as such. It is also the case that in cases where the company has no assets for distribution to creditors, the Assignee is not required without the consent of the Minister of Commerce who carry out any duties or powers which would involve expense.[14] A private liquidator on the other hand is free to carry out such investigations even though there are no assets for distribution. Although Mr Caro did not explicitly say so, I assume that having regard to the relatively small

[14] S 254(b) Insolvency Act 2006.

size of the liquidation in this case and absence of any public interest considerations it would be unlikely that the Assignee would take steps such as Court proceedings to recover property belonging to the company.

[54] That said, in regard to the question of whether there are any potential unexplored claims remaining, I consider that the opinion of the Assignee based upon his knowledge of the actual state of affairs with the company, is entitled to weight.

[55] My overall judgment is that it is uncertain whether there are any as yet unexplored avenues of recovery that remain to be considered.

[56] The company has no assets. It cannot fund claims against directors and other persons. On the other hand, Grant & Khov proposed to accept the financial risk of pursuing the claims and therefore a failure on their part will not prejudice the company.

[57] The next consideration is that liquidators when taking the steps that are proposed to be taken must be able to justify their actions on the grounds that they are related to potential benefits to the creditors. It would not be a legitimate exercise of the liquidator's role of making decisions about recovery action to undertake enforcement action primarily motivated by the objective of producing earnings for the liquidators.

[58] It is not possible to come to a firm view on the material before the Court as to whether the proposed new liquidators would recover sufficient from any actions which would cover the costs but also produce a surplus which could be distributed between the creditors of the company.

Reasons for originally appointing Assignee

[59] Mr Norling in his submissions attached significance to the reasons why Bell AJ appointed the Assignee as the liquidator. He referred to the fact that the Judge spoke of the need to appoint someone who could hold the fort until such time as the very question of whether the liquidation was going to proceed could be finally

determined by a possible appeal to the Supreme Court. He referred to the fact that it might be possible for the Assignee to stand down – presumably if the appeals were unsuccessful and the liquidation order was to stand. Mr Norling said that this could be viewed as indicating a preference on the part of the Judge for Grant & Khov to be the permanent liquidators. Implictly, Mr Norling submitted that this consideration should be given some weight.

[60] Much water has flowed under the bridge since the Assignee was originally appointed as the liquidator. That occurred some 14 months ago. The Court is now dealing with quite a different situation. At that time the liquidation process had not been commenced. Substantial progress has since been made with the liquidation. The position that I am in considering the current application is quite different from that in which the Judge found himself when first considering the competing candidates for appointment as liquidator. I do not consider that the Court is assisted by the judgement that the Judge formed at that time in quite a different factual context.

Liquidators' familiarity with company

[61] One of the arguments which was put forward by counsel for Grant & Khov was that it would be advantageous for them to be appointed liquidators because they were familiar with the company.

[62] Mr Norling referred me to the decision in *McCloy v Titan Foundation Ltd* which is substantially similar to the current facts.[15] Mr Norling said that the matters that the Court considered in that case were applicable to the current factual circumstances:

i) The liquidators have detailed knowledge of LGL (together with other related entities), trusts associated with the Canavan's and the individuals responsible for management of the companies.

ii) The liquidators' background knowledge will enable them to discharge their duties as liquidators more quickly and efficiently than other appointees.

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[15] *McCloy v Titan Foundation Ltd* HC Auckland CIV-2008-404-2243, 23 April 2008.. BOA at 09.

iii) The relationship between QGL and LGL will not compromise the liquidators' independence, competence and integrity and will not affect their ability to carry out their task as liquidators professionally and efficiently.

iv) The liquidators brought the proceeding against LGL in their capacity as liquidators of QGL. As such any conflict is more apparent than real.

v) The creditors of LGL will obtain a right to challenge the appointment of the liquidators and may have them removed should they seek to do so.

[63] Mr Norling submitted:

> 9.1 Relevantly, the ASSIGNEE accepts that "clearly Grant & Khov have some background knowledge as a result of the liquidation of Quantum Grow."[16]
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> 9.2 This knowledge has been obtained because QGL and LGL are related entities and LGL seems to have taken part of the business of QGL. Further, the two shared premises and computer servers. This background knowledge is extensive and is partially detailed by Mr Jones.[17] In particular, the liquidators have knowledge of:
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> a) The way in which assets are taken and hidden;
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> b) Obstructive behaviour around producing company records and attending interviews;
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> c) The way in which revenue is diverted;
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> d) Effective methods to obtain hidden assets;
>
> e) How the business of QGL was separated including parts to LGL; and
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> f) Assets of LGL.
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> 9.3 That background knowledge is central as to why the liquidators ought to be appointed over other private practice liquidators as it will result in efficiencies in the conduct of the liquidation. It follows that this information will increase the prospect of a recovery. Particularly in a case where those in control hide assets for their own personal gain. In any case, even if there is no recovery for the benefit of creditors, creditors deserve a thorough investigation, particularly where it comes at no cost to them.

[64] A related issue which seems relevant but which goes beyond strict considerations of familiarity with the company, is the fact that the liquidation of the

16 Synopsis of submissions at [35].
17 Affidavit of Mr Jones. BOD at 175 – 180.

company could potentially be affected by relationships between the various entities of what can be called the Canavan group of entities. The intertwined nature of entities as illustrated by a brochure which was produced in evidence by the Assignee and which Mr Caro made reference to. The document apparently came into existence in in 2012. It identified four constituent elements to the group which were going to be adopted. As the brochure stated:

> … Quantum Grow Limited has been broken up into:
>
> Sutol Asia Pacific;
>
> NFT Group;
>
> Quantum Grow Limited;
>
> L G 2.[18]

[65] There have already been dealings identified by the liquidators in which Quantum Grow and the company have been the parties involved. In particular circumstances of this case, I would consider that the familiarity of the liquidators with some of the constituent elements of the wider Canavan group strengthen their claims to be the preferred liquidators of the company.

Other factors

[66] Grant & Khov through their counsel state that, if appointed, unlike the present liquidator, they would arrange for a personal check to be made of the physical premises of the company.

[67] The implicit suggestion is that the Assignee ought to have undertaken this step and that it may lead to recoveries on behalf of the company.

The Canavan's position

[68] Mr Canavan addressed the Court briefly. He raised his concerns about the fact that Grant & Khov as liquidators of Quantum Group had applied for search warrants which were executed over various properties and, I understand, including those of his family personally. He denied that there had been any improper dealing

[18] The brochure identifies "L G 2" as being the trading name of Lotus Gardens Limited.

by the directors of the company. He expressed concern that the costs that the liquidators have already spent on the liquidation of Quantum Group, he described them as being aggressive.

[69] However the Canavans have more than the debt which the company is said to owe to them at stake in this matter. No doubt they would welcome an end to the investigations of the company which will inevitably involve consideration of their position as related parties to the company. For those reasons their views opposing the appointment of Grant & Khov are to be given little, if any, weight.

Conclusion

[70] The central question that the Court has to decide is whether on balance it is preferable to now discharge the Assignee as liquidator and appoint Grant & Khov to replace him.

[71] I consider that the fact that Grant & Khov are liquidators of the creditor which applied for the liquidation of the company is not a disentitling factor. They took those steps in their capacity as representing the creditors of Quantum Grow.

[72] I accept that they have the resources and the competence and experience to deal with the liquidation. They have some familiarity with the company itself and some additional knowledge of the wider structure of which the company is a part and which may have given rise to transactions which deserve further scrutiny.

[73] The case which Grant & Khov advance is that a rigorous investigation of potential avenues for recovery has yet to be undertaken and that is what they would do if appointed. However, on the important question of whether this fresh approach by replacement liquidators would actually identify any further recoverable property the Court is left in a state of uncertainty. There has been a liquidator in place for over a year now and one inference that is open to the Court is that any possible claim should have emerged by now. There are also reasons to believe that some of the claims which Grant & Khov regard as having promise, such as the claim under section 348 PLA, may not be viable because of the requirement that the debtor had to be insolvent at the time will become insolvent as a result of making the

disposition.[19] It is questionable whether this requirement can be established given that the alleged transactions occurred in 2008.

[74] On the other hand given the restrictions under which the Assignee operates,[20] it would seem unlikely, because there were no assets, that substantial resources have been committed to investigating some of the claims.

[75] On balance I consider there is no convincing case available that there are unexplored avenues for recovery which would benefit the company. However, this is only one of several factors.

[76] I also conclude that the consideration that the liquidators intend to meet the cost of any investigation and consequent proceedings themselves without seeking contribution from the creditors or an indemnity from any of them is a factor which supports the desirability of their being appointed. This is not a case where the choice between paying out accumulated property of the company by way of distribution to the creditors, on the one hand, or spending it on further investigations to see whether additional recoveries can be made. I accept that there are indications that the particular transaction which Grant & Khov wish to investigate is unlikely to bear fruit. The evidence is not one way though. For example, proposed investigation of disposal of assets of the company which the Assignee attaches little value to could be seen as being at variance with the insured value which the company itself adopted for its stock and assets of $580,000.

[77] I accept that the appointment of Grant & Khov would lead to a delay in finalising the completion of the liquidation. Contrasted with that position is the view of the Assignee that if he were to remain in office the liquidation could be completed shortly. In addition to the inherent delay in completing the liquidation, there is the prospect that there will be further inquisitorial type procedures embarked upon by Grant & Khov if they are appointed liquidators in addition to those already carried out.

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19 Property Law Act 2007, s 136.

20 Section 254(b) of the Act.

[78] A weighty factor that supports the application is the wishes of the creditors. It is not insignificant that the Commissioner of Inland Revenue who must be regarded as a commercially experienced creditor and one who is accustomed to making judgements in circumstances such as the present, supports the application to appoint Grant & Khov. It goes without saying that the Commissioner should be taken as being motivated only by considerations of what is in its interest as a creditor in making its decision and that the election to put its weight behind Grant & Khov has been arrived at in a detached manner.

[79] Taking these competing interested into account, I consider that the company should not be denied the opportunity for a further scrutiny of its affairs by liquidators who are competent and well resourced. The case is even stronger for such an appointment when it is borne in mind that there would not be any direct financial prejudice to the position of the company given that the liquidators intend to carry the risk that their enquiries will not reveal any further sources of recovery.

[80] The application is therefore granted.

Costs

[81] There will be an order appointing Damien Grant and Steven Khov as liquidators of Lotus Gardens Limited (in liquidation).

[82] I reserve leave to the parties to apply for directions consequent upon the order which I have just made.

[83] If the parties are unable to resolve the question of costs by agreement they are to file memorandum not exceeding five pages on each side within 10 working days of the date of this judgment.

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J.P. Doogue
Associate Judge