



## Background

### *The special resolution*

[1] On or about 15 January 2014 Mr Laurence Pope consulted with Mr Grant an insolvency practitioner regarding placing Mr Pope's company, Easy Group Limited (Easy Group) into liquidation.

[2] On 16 January 2014 Easy Group was placed into liquidation by special resolution.

[3] It appears the form of the special resolution was prepared by Mr Grant in accordance with instructions received from Mr Pope. A copy of that document notes:

EASY GROUP LIMITED (IN RECEIVERSHIP) (1627069)  
(The Company)

Appointment of Liquidator  
(Pursuant to Section 241(2)(a) of the Companies Act 1993)

Dated this 16<sup>th</sup> day of JANUARY 2014

Time 9:50 am/pm

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Special Resolution of the shareholders of the Company pursuant to section 122 of the Companies Act 1993

Resolved:

- 1) After having taken all relevant factors into account, and it being considered to be in the best interests of the company:
  - a. That having reviewed the financial position of the Company it is desirable for the company to be liquidated and that Steven Khov and Damien Grant be appointed joint and severally as liquidators; and
  - b. That the liquidators be authorised to distribute to the company's shareholders in specie the whole or any part of the Company's assets in such manner as the liquidators sees fit.

Signed by the shareholders of the Company

  
\_\_\_\_\_  
Laurence Pope  
as Trustee of Osaurus Trust

  
\_\_\_\_\_  
Laurence Pope

[4] Mr Pope signed 'as trustee of Osaurus Trust', and for himself as a shareholder. As drafted, it does not provide for the signature of anyone else.

[5] Ninety nine of 100 shares in Easy Group were held by Mr Pope and ML Trustees 2711 Limited (MLT) as trustees of the Osaurus Trust. One of 100 shares was held by Mr Pope personally.

*Events post liquidation*

[6] Mr Grant and Mr Khov (the applicants) produced their first liquidator's report on 29 January 2014. It noted a surplus of assets over liabilities in the sum of \$1,489,000.

[7] The liquidators' enquiries revealed that MLT was incorporated on 9 October 2009 to act as the corporate trustee of the Osaurus Trust. Those enquiries disclosed Mr Hemphill, lawyer as the sole director of MLT.

[8] On two occasions in August 2014 the liquidator sent letters to Mr Hemphill informing them of their appointment and requesting the provision of documents relating to the Osaurus Trust.

[9] In October 2014 Mr Hemphill was interviewed under oath as s 261 of the Companies Act 1993 (the Act) allowed.

[10] The applicants' communications to Mr Hemphill reported that a significant number of payments had been made by Easy Group to various trusts that Mr Hemphill may have acted for or indeed been a trustee of. The liquidators requested trustee details and trust deeds of three trusts including the Osaurus Trust. The liquidators also requested advice regarding the nature of the relationship between the Trusts and Easy Group.

[11] Mr Hemphill responded to those. Later by email dated 4 November 2014 Mr Hemphill stated:

As should have been apparent from the notice of appointment, ML Trustees 2711 Limited did not consent to your appointment as liquidator. We are instructed to apply to the High Court to rescind your appointment as liquidator.

*MLT's application to declare the special resolution invalid*

[12] On 23 December 2014 MLT applied to the High Court for a declaration that the special resolution of shareholders dated 16 January 2014 appointing Mr Grant and Mr Khov as liquidators of Easy Group was invalid. The applicants responded by seeking confirmation of their appointment as liquidators.

[13] MLT's application was opposed and was called before Justice Heath on 25 February 2015. In his judgment of that date Heath J noted that Mr Hemphill of MLT did not dispute that the circumstances justified a special resolution putting Easy Group into liquidation; that Mr Hemphill's concern was with the appointment of the applicants based, Mr Hemphill said, on their reputation in the commercial community and particularly in the way they were perceived to have carried out their duties as liquidators.

[14] Heath J noted that in a joint memorandum filed the previous day counsel for MLT and for the liquidators indicated that MLT "was now satisfied that Easy Group Limited had validly been put into liquidation and did not wish to pursue its substantive application".

[15] At that time Heath J advised that he was not prepared to make "a confirmation order without a proper application and argument. Heath J added that the validity of the appointment of the purported liquidators goes to whether the company is, in fact, in liquidation".

[16] After further consideration of the matter Heath J concluded that it would be preferable for a separate proceeding to be commenced by the liquidators in which a declaration of valid appointment is sought.

*The liquidators' application for a declaration of validity of appointment*

[17] On 2 March 2015 the applicants applied for a declaration of validity of appointment. That application noted that MLT no longer challenged the appointment of the liquidators, indeed now supported that appointment as did a majority of creditors. The application noted the liquidation of Easy Group was substantially advanced and that creditors would be disadvantaged if new liquidators had to be appointed because of the potential for loss caused by time limitations that would be affected.

[18] On 31 March 2015 a notice of opposition was filed. It noted it was being filed by Mr Pope as trustee of the Osaurus Trust.

[19] The grounds for opposition noted that:

- (a) The special resolution was signed by Mr Pope personally and as a trustee of the Osaurus Trust but not by the director of MLT the Trust company which together with Mr Pope as trustees owned 99 per cent of the shares in the company.
- (b) Clause 14.2 of the Osaurus Trust Deed provided that all powers must be exercised unanimously which required that the trustees be in full agreement in order to be able to execute any documents.
- (c) The liquidators were fully aware that the resolution 'must be signed by the Michael Hemphill the director of ML Trustees 2711 but they failed to do so'.
- (d) That MLT is no longer a trustee of the Osaurus Trust.

**Considerations**

*The evidence*

[20] Counsel Mr Nicholls advised that shortly prior to the notice of opposition being filed, Mr Pope had arranged for the Osaurus Trust Deed to be amended to delete the requirement for the appointment of an independent trustee and to enable Mr Pope to remain sole trustee of the Trust.

[21] Therefore it is not MLT that opposes the applicant's appointment as liquidators. Rather it is Mr Pope alone who fronts opposition on behalf of his trust, even though it was he who signed the special resolution in his capacity as trustee of that Trust.

[22] Mr Pope was, upon his own application, adjudicated bankrupt on 13 August 2014. Mr Pope said this was due to the failure of Easy Group's business.

[23] Mr Pope said that when he consulted Mr Grant on 15 January he was advised the shareholders would need to pass a special resolution. Mr Pope said he informed Mr Grant that the Osaurus Trust owned 99 per cent of Easy Group's shareholding. Mr Pope said he advised that MLT's director Mr Hemphill was away on holiday.

[24] Mr Grant has deposed that it was not until Mr Hemphill's email dated 4 November 2014 that the applicants were first informed of a potential defect concerning that appointment. It is his belief that Mr Pope has pursued his opposition of their appointment because the applicants have identified payments made by Easy Group to Mr Pope and to companies and other entities which he directs.

[25] The form of the special resolution only identifies Mr Pope as trustee of the Osaurus Trust.

[26] For the proceeding before Heath J, Mr Hemphill swore an affidavit. In that he said MLT did not agree to the applicants being appointed liquidators and would not have done so. He said that while it initially appeared there would be no material impact from the applicants acting as liquidators that is no longer the case.

[27] Mr Hemphill has not sworn a fresh affidavit for consideration upon the present application. There is no objection filed from MLT in the present application.

[28] Mr Pope deposes to having researched liquidation reports for 400 of the applicants' prior appointments including 224 completed liquidations and 176 other liquidations. Mr Pope says his research concluded that after a review of the 224 liquidation reports \$4,917,594.08 was paid out to them as their fees, disbursements and other costs when only \$102,689.39 was paid out to unsecured creditors.

*The issues*

[29] At issue is the validity of the special resolution of the shareholders of Easy Group on 16 January 2014.

[30] Under s 241(2)(a) a shareholders' resolution for liquidation must be a special resolution. Under s 2 of the Act a "special resolution" means a resolution approved by a majority of 75 per cent of the shareholders entitled to vote.

[31] The evidence is that the special resolution was drawn up in accordance with Mr Pope's instructions. He signed it for himself and in his capacity "as Trustee of Osaurus Trust". The shares of the company were owned by Mr Pope (as to one share) and by the Osaurus Trust (as to 99 shares).

[32] The objection to the validity of the resolution is because MLT, the other trustee of the Trust, did not sign the resolution.

[33] It is not clear when the applicants became aware of MLT's trusteeship. Mr Pope says he gave advice of this before the special resolution was drawn. It does seem curious then that the special resolution might have been drawn in the way it was.

[34] Certainly no objection was taken regarding the liquidators role until more than 10 months later in circumstances where it appears entities connected with Mr Pope and Mr Hemphill's trusteeship were being investigated by the applicants on behalf of Easy Group.

[35] Mr Hemphill says he would not have approved the applicants' appointment because of his perception of their adverse commercial reputation. Mr Pope's

affidavit dated 31 March 2015 reports upon his investigation of the applicants' record as liquidators.

## Principles

[36] A trusteeship is personal. Only the Trustee can exercise the powers, authorities and directions conferred under a trust. The trustee must exercise his powers in good faith, must not allow others to dictate how he should exercise his powers and must not fetter his discretion. Trustees must act unanimously.<sup>1</sup>

[37] It follows that trustees of shareholding trusts have to act unanimously and, absent any specific delegation of authority, one trustee could not delegate responsibility for voting on a liquidation resolution to another trustee.

[38] The evidence is clear that Mr Pope did not have the authority of the Osaurus Trust to deal with trust matters because that authority had not been given to him by MLT. Further there is no evidence that MLT was aware of the special resolution, much less that it authorised Mr Pope to sign it on MLT's behalf.

[39] It is the liquidator's position that authority has since been ratified by MLT. Trust law recognises that ratification operates retrospectively.

[40] In *Messeena v Carr*<sup>2</sup> Lord Romilly said:

I had some doubts at first whether, as the discretion was to be exercised by the two trustees and only one had acted, the discretion had been properly exercised; but I have come to the conclusion that as the other trustee approved and sanctioned what was done by the one who made the payments, no breach of trust was committed.

[41] In *Visini v Cadman*<sup>3</sup> the Court of Appeal said:

The judgment of Romilly MR in *Messeena v Carr* has settled authority for the proposition that one trustee can subsequently approve another trustee's exercise of a discretion.

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<sup>1</sup> *Finnigan and Horrocks v Butcher* [2012] NZHC 2463 [42].

<sup>2</sup> *Messeena v Carr* (1870) 9 LR Eq 260 at 262-263.

<sup>3</sup> *Visini v Cadman* [2012] NZCA 122 at [17].

## **Conclusions**

[42] The question for consideration, and of significance in the outcome, is whether there has been ratification of the applicant's appointment on 16 January 2014.

[43] It has been the purpose of Mr Pope in opposition to challenge the validity of the applicants' appointment but also to show there may be good reason not to engage the applicants as liquidator in any event.

[44] Mr Pope has provided his own analysis of available records about the applicants' history as liquidators. However the value of that analysis is questionable because it is a personal and not an expert analysis and, because it is irrelevant to matters in issue about whether the applicants were validly appointed.

[45] The actions and fees of liquidators are subject to the supervision of the Court upon any application for review by a shareholder or director of a company in liquidation.

[46] Mr Hemphill claims that he would not have agreed for the applicants to be appointed as liquidators in January 2014. But, it was not until his email of 4 November that Mr Hemphill indicated any opposition to the applicants' appointment. It was not until his affidavit dated 23 December 2014 in connection with the matter dealt with by Heath J on 25 February 2015 that Mr Hemphill said he would never have agreed to the applicants' appointment as liquidators.

[47] Mr Hemphill says he did not prepare the special resolution and was not aware of it until after it had been signed. However it is reasonable to assume he became aware of the resolution within a short time after its making. Mr Hemphill deposes having acting for Mr Pope and his interests since 2007 and that as part of that work Mr Hemphill's firm was often asked to act as trustee.

[48] Mr Hemphill was in correspondence with the applicants in August 2014. On 1 October 2014 he was interviewed under oath by the applicants. No mention was made at that time regarding the applicants' lack of authority to act.

[49] It was not until November that any position challenging that authority was expressed by either Mr Hemphill or Mr Pope.

[50] Available evidence suggests a not inconsiderable amount of work has been undertaken by the liquidators the purpose or cost of which had not been questioned until November 2014. In his affidavit dated 27 February 2015 Mr Grant noted his time records showed the applicants had spent more than 760 hours on investigations for which more than \$209,000 had been billed to the company's liquidation – albeit the liquidators are carrying that cost until the liquidation is completed.

[51] In the Court's view that account of matters is a clear indication that the appointment of the applicants has long since been ratified by MLT. MLT's challenge to the validity of the special resolution was resolved the day before the matter was to be heard by Heath J. In his judgment Heath J noted that MLT had also sought the appointment of another named person as liquidator. As Heath J noted liquidation is commenced by the appointment of liquidators: s 241(1) of the Act. It follows therefore an invalid appointment would invalidate the liquidation.

[52] As noted earlier herein at paragraph [14] counsel for MLT agreed that Easy Group had been validly put into liquidation and that MLT did not wish to pursue its substantive application for declaration of invalidity. Heath J then said that because MLT intended to withdraw its application, he directed that MLT's application be dismissed.

[53] In the Court's view that action also amounts to ratification of the applicants' appointment as liquidators because the special resolution appointed the applicants and because it was upon their appointment that Easy Group was put into liquidation.

[54] Opposition to the present application is not now pursued by MLT but by Mr Pope on behalf of the Osaurus Trust which we are advised no longer has MLT as a trustee. As earlier noted the Court was advised that the Osaurus Trust deed has been amended. It follows that if Mr Pope is, as it appears, the sole trustee then the Trust no longer has an independent trustee as the Trust Deed formerly required.

[55] The opposition to the applicant's appointment focuses upon complaints about the manner in which the liquidators have acted – matters which are properly the subject of other enquiry before the Court and not as this case is concerned with, the validity of that appointment made on 16 January 2014.

[56] In the Court's view the applicants' appointment on 16 January 2014 has been retrospectively validated by the actions and even the lack of action taken by MTL since, even though it did not sign that special resolution.

### **Judgment**

[57] The application is granted and the appointment of the applicants as liquidators on 16 January 2014 at 9:50am is confirmed.

[58] Costs are reserved for determination upon application made in writing to this Court.

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**Associate Judge Christiansen**