IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-91
[2021] NZHC 515

UNDER	the Companies Act 1993, section 241
IN THE MATTER OF	an application for the liquidation of The Pop-Up Globe Foundation Limited
BETWEEN	COMMISSIONER OF INLAND REVENUE Plaintiff
AND	THE POP-UP GLOBE FOUNDATION LIMITED Defendant

Hearing: 12 March 2021

Appearances: Cloete Van Der Merwe for the Commissioner
Janko Marcetic for the shareholder, The Pop-Up Globe Interntional Limited

Judgment: 12 March 2021

ORAL JUDGMENT OF ASSOCIATE JUDGE R M BELL

Solicitors:
Inland Revenue Department, Manukau, for the Plaintiff
Chapman Tripp (J Marcetic/M D Arthur/N Whittle), Auckland, for the shareholder

[1] The Commissioner has applied for the Pop-Up Globe Foundation Ltd to be put into liquidation.

[2] A statement of defence has been filed. The shareholder raises the defence under s 241AA of the Companies Act 1993 that the shareholder had already passed a resolution appointing liquidators. A decision is required how s 241AA applies in the circumstances of this case.

[3] The Commissioner served the company on 19 February 2021. On 3 March 2021, the shareholder resolved under s 241(2)(a) of the Act to put the company into liquidation. That was within 10 working days of service.

[4] Section 241AA deals with the validity of the appointment of liquidators by shareholders or a board, after the company has been served with an application to put the company into liquidation. Subsection (2) says:

> (2) A liquidator may be appointed under s 241(2)(a) or (b) only if—
>
> (a) the liquidator is appointed within 10 working days after the application is served on the company; or
>
> (b) if the application is made under s 241(2)(c)(iv) the creditor who filed the application consents to the appointment after s 241(2)(a) or (b).

[5] Sub-clause (b) is new. It was introduced under s 31 of the Insolvency Practitioners Regulations (Amendments) Act 2019. Under the earlier law, the shareholder and the board still had 10 working days after service of the proceeding in which to put the company into liquidation and that would be effective. A problem sometimes arose where the company passed a resolution after the 10 working days, but the creditor seeking the liquidation order was happy with the shareholders' choice of liquidator. Notwithstanding the creditor's satisfaction with the company going into liquidation and the choice of liquidator, the voidness of the appointment after 10 working days could not be undone. The purpose of the new sub-clause (b) is to allow

the situation I have just described, to be legally effective. That is, even if the shareholders resolved *after* the 10 working days, the appointment of the liquidators will be effective if the petitioning creditor consents.

[6] Subsection (2) offers alternatives. That is shown by the word "or". Appointment by the shareholders will be effective if done within the 10 working days or, if done outside the 10 working days, it is done with the consent of the creditor applying for liquidation. In this case, the facts come clearly within 2(a), and 2(b) does not apply. The appointment of the liquidators was effective notwithstanding that the Commissioner's consent was not given or sought.

[7] Accordingly, because the liquidators have already been appointed, I dismiss this application. Notwithstanding the dismissal of the application, the Commissioner has been vindicated in bringing the proceeding and I award the Commissioner costs as sought.

[8] While I have awarded costs to the Commissioner, the shareholder also seeks costs on their successful defence of the proceeding. I give Mr Marcetic the opportunity to file a written submission as to why costs to the shareholder should also be awarded.

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Associate Judge R M Bell