

update

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Friday Facts: Court approves appointment of special purpose liquidator

*In the recent case of **Lo v Nielsen & Moller (Autoglass) (NSW) Pty Ltd**, the New South Wales Supreme Court considered with approval an application by a creditor for the appointment of two special purpose liquidators.*

Nielsen & Moller (Autoglass) (NSW) Pty Ltd (the “**Company**”) was subject to a creditors’ voluntary winding up under Part 5.3A of the *Corporations Act 2001* (Cth) (the “**Act**”). Mr Wykes had been appointed voluntary administrator and then subsequently liquidator of the Company the (“**Liquidator**”). Ms Lo was a creditor of the Company who had obtained judgment against the Company in the sum of \$38,895.69, which had not been satisfied.

Ms Lo applied for an order that two special purpose liquidators of her choice be appointed as additional liquidators of the Company for the specific purpose of investigating a number of the Company’s financial dealings and the conduct of the Company’s director, Mr Rankine, and previous director, Mr Moller. The financial dealings included, amongst other things, the creation and registration of a fixed and floating charge in favour of Mr Rankine and his wife as trustees for the Rankine Family Superannuation Fund and loans that had been entered into by the Company. The conduct of the directors included potential insolvent trading, shadow directorships, and the movement of a number of valuable assets out of the Company prior to the Company being placed into voluntary administration.

Counsel for Ms Lo submitted to Justice Barrett that the Court should allow the appointment of special purpose liquidators as their investigation would be in the interests of the Company and could result in the Company avoiding the payment of certain creditors. It was also submitted that the movement of valuable assets and some favoured creditors out of the Company prior to the voluntary administration, left the

remaining creditors with no prospect of return. In addition it was submitted that the Liquidator was only appointed by the directors because he had the support of Mr Rankine and persons connected with him.

The Liquidator was not in a position to undertake the investigations sought by Ms Lo because he was not in funds. However, Ms Lo was prepared to fund investigations by two alternate liquidators. The Liquidator consented to the appointment of the additional liquidators but did not wish to resign and Ms Lo did not seek his removal.

Justice Barrett considered the evidence given by Ms Lo and found that aspects of the affairs of the Company needed examination and investigation with a view to recovery for the creditors. He concluded that it would be “...beneficial to the administration of the winding up and in the interests of the general body of creditors for the work Ms Lo envisages for the additional liquidators to be undertaken. Any recoveries that resulted would benefit creditors as a whole.”

Justice Barrett also considered the court’s jurisdiction to appoint an additional or special purpose liquidator. He noted that the Court does not have an explicit statutory power to appoint an additional liquidator in a creditors’ voluntary winding up, but there were cases in which it had occurred. He referred with approval to Justice Santow’s finding in an earlier case that the statutory source of the Court’s jurisdiction to make such an appointment was contained in Section 511 of the Act, which empowers the Court to determine questions arising in the winding up of a company.

Justice Barrett concluded that it was “just and beneficial” to the winding up of Company for the Court to make an order

under Section 511 that additional liquidators be appointed. He ordered the appointment of the two additional liquidators chosen by Ms Lo upon her providing financial assurances to fund their investigations.

This decision is interesting for those creditors who quite often find themselves with little ability to influence the return they may receive in a liquidation. It confirms that the Court will approve the appointment of a special purpose liquidator to investigate matters which may lead to recoveries for the benefit of creditors as a whole.

For more information

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