SUPREME COURT OF QUEENSLAND

CITATION:	*Re Cloudzillr Pty Ltd (in liq) ACN 158 431 148* [2017] QSC 25
PARTIES:	**JOANNE DUNN AND JOHN PARK AS LIQUIDATORS OF CLOUDZILLR PTY LTD (IN LIQUIDATION)** (applicants) **v** **CLOUDZILLR INC, A DELAWARE CORPORATION** (respondent)
FILE NO/S:	BS No 7885 of 2016
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 March 2017
DELIVERED AT:	Brisbane
HEARING DATE:	16 and 24 August 2016; written submissions on behalf of the respondent dated 12 September 2016; written submissions on behalf of the applicants dated 19 September 2016
JUDGE:	Burns J
ORDERS:	**The orders of the court are that:**

1. It is declared that:

(a) The meeting of the members of Cloudzillr Pty Ltd (in liq) held on 5 May 2016 was validly called;

(b) By the special resolution passed by the members of Cloudzillr Pty Ltd (in liq) on 5 May 2016, the company was voluntarily wound up;

(c) By the ordinary resolution passed by the members of Cloudzillr Pty Ltd (in liq) on 5 May 2016, the applicants were appointed as liquidators of the company.

2. The costs of and incidental to the application brought by the applicants shall be the applicants' costs in the liquidation.

3. The cross application is dismissed.

4. The respondent shall pay the applicants' costs of and

incidental to the cross application to be assessed on the standard basis.

CATCHWORDS: CORPORATIONS – MEMBERSHIP, RIGHTS AND REMEDIES – MEMBERSHIP OF A COMPANY – WHO IS A MEMBER – where a meeting of members was called for the purpose of winding up the company now in liquidation – where it was resolved at the meeting that the company be voluntarily wound up and that the applicants be appointed as liquidators for that purpose – where the respondent contended that all of the shares in the company had previously been transferred to it – where the respondent contended that none of the persons who voted at the meeting of members was a member of the company and entitled to vote – where the name of the respondent was not recorded as a member of the company on the register maintained by the Australian Securities and Investments Commission – where no register for the company maintained in accordance with s 168 of the *Corporations Act* 2001 (Cth) was produced or able to be located – whether the respondent was a member of the company pursuant to s 231 of the *Corporations Act* – whether the persons who resolved that the company be voluntarily wound up were members of the company and entitled to vote.

CORPORATIONS – WINDING UP – WINDING UP VOLUNTARILY – RESOLUTIONS – VALIDITY – where a meeting of members was called for the purpose of winding up the company now in liquidation – where it was resolved at the meeting that the company be voluntarily wound up and that the applicants be appointed as liquidators for that purpose – where there were procedural irregularities associated with the calling of the meeting – whether the resolution passed at the meeting was valid.

Corporations Act 2001 (Cth), s 168, s 231, s249H, s 249J(3)(ca), s 482, s 504, s 511, s 1322, s 1322(1)(b)(ii), s 1322(2), s 1322(3), s 1322(4), s 1322(4)(b)

Australian Hydrocarbons NL v Green (1985) 10 ACLR 72, cited
Double Bay Newspapers Pty Ltd v Fitness Lounge Pty Ltd (2006) 57 ACSR 131; [2006] NSWSC 226, cited
Federal Commissioner of Taxation v Patcorp Investments Ltd (1976) 140 CLR 247; [1976] HCA 67, followed
Kopilovic v Gatley (2005) 53 ACSR 64; [2014] WASC 62, followed
Re Pembury Pty Ltd [1993] 1 Qd R 125, followed
Vero Workers Compensation (NSW) Ltd v Ferretti Pty Ltd (2006) 57 ACSR 103; [2006] NSWSC 292, cited
Weinstock v Beck (2013) 251 CLR 396; [2013] HCA 14, cited

COUNSEL:	M J Hocking (sol) for the applicants K D Falkenstein (sol) for the respondent
SOLICITORS:	David & Co for the applicants General Standards Lawyers for the respondent

[1] This case concerns the validity of a resolution made by some of the registered members of a company to place it into voluntary liquidation.

[2] The relevant resolution was made on 5 May 2016. By it, a number of persons whose names were recorded as members of Cloudzillr Pty Ltd on the register maintained by the Australian Securities and Investments Commission resolved that the company be wound up and that the applicants, Ms Dunn and Mr Park, be appointed as joint liquidators. Four days later, one of the directors of the company, Kurt Falkenstein, asserted that all of the shares in the company had been transferred in 2012 to the respondent, Cloudzillr Inc, a corporation based in Delaware in the United States of America. As such, he maintained, none of the persons who attended and voted at the meeting on 5 May 2016 was a member of the company and, for that reason, the resolution of 5 May 2016 was invalid. Mr Falkenstein otherwise contended that the company was solvent and that the winding up should be terminated.

[3] To the extent they were able to do so, the applicants investigated Mr Falkenstein's claims but were unable to determine whether the share transfers to which Mr Falkenstein referred had been completed. Furthermore, they were not provided with, and were unable to locate, a register for the company. Nevertheless, by reference to the register maintained by ASIC, they did confirm which of the persons who attended and voted at the meeting were recorded as members on that register and were, at least on the face of it, entitled to vote. Otherwise, during the course of their investigation the applicants became aware of two irregularities associated with the calling of the meeting.

[4] The applicants contend that the meeting of 5 May 2016 was validly called and that the resolutions to wind up the company voluntarily and to appoint them as liquidators were properly made. By this application, orders are accordingly sought pursuant to s 1322 of the *Corporations Act* 2001 (Cth) in relation to Mr Falkenstein's claims and to address the irregularities discovered during their investigation. Declarations are also sought under s 511 of the Act. Lastly, the applicants seek an order that the costs of this application be costs in the liquidation of the company.

[5] The respondent to this application is the Delaware corporation. It was represented at the hearing by Mr Falkenstein, a solicitor in private practice in Victoria. As already mentioned, Mr Falkenstein was a director of the company now in liquidation and, according to an affidavit sworn by him in response to the application, he is also a director of the respondent.

[6] The respondent has filed a cross application for various orders pursuant to the Act: that the liquidation be terminated (s 482); that the applicants' fees be capped (s 504); and

that the register be rectified so as to record the respondent as the company's sole member (s 1322(4)(b)). The respondent also seeks an order that its costs be "borne as part of the liquidation, and that such costs be assessed to scale, and not on a solicitor-client basis, and that in all other respects the parties bear their own costs".[1]

[7] Before considering these competing claims, it is useful to set out something of the background to the issues that now divide the parties as well as some observations about the effect of the affidavit evidence before the court.

Background

[8] In April 2012, Mr Falkenstein was working on a part-time basis as a consultant to a firm of solicitors in Brisbane. It was in this capacity that he was introduced to Mr Stuart Guest-Smith and Mr Surendranath Tippireddy. Mr Guest-Smith and Mr Tippireddy had developed, or caused to be developed, an Internet-based content delivery platform that was designed for use by subscribers from the health and fitness industry to distribute instructional training files in a digital (as opposed to a CD or DVD) format. They wanted to commence business in the marketing and sale of subscriptions to the platform and, to that end, it was proposed that a company be incorporated as the vehicle for that business. According to Mr Falkenstein, it was further proposed that:

(a) Mr Guest-Smith would be the company's chief executive officer and largest shareholder;

(b) Mr Tippireddy would be the company's chief technical officer and second largest shareholder;

(c) Four other people would become shareholders and take up positions in the company, as follows:

  (i) Mr Dallas Clarke – lead engineer;

  (ii) Mr Aidan Green – lead designer;

  (iii) Ms Marietta Mehanni – industry adviser; and

  (iv) Ms Donna Ellerton – industry adviser; and

(d) Mr Falkenstein would also become an adviser in exchange for a fixed proportion of the issued capital in the company.

[9] In the event, the company now in liquidation was registered on 18 May 2012. Mr Guest-Smith, Mr Tippireddy and Mr Falkenstein were appointed as the directors and Mr Falkenstein was also appointed as the secretary. A total of 9,450,000 ordinary shares was issued in the company. They were held by its members as follows:

(a) Mr Guest-Smith – 3,800,000;

(b) Mr Tippireddy – 1,950,000;

(c) Mr Clarke – 1,650,000;

(d) Mr Green – 1,500,000;

(e) Ms Mehanni – 200,000;

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1 Application filed on behalf of the respondent on 14 September 2016 at A.2(e).

(f) Ms Ellerton – 100,000; and

(g) Mr Falkenstein – 250,000.[2]

[10] A little over a month later, Mr Falkenstein, Mr Guest-Smith and Mr Tippireddy entered into discussions that the respondent now contends culminated in the "exchange" of all of the shares in the company now in liquidation for shares in the respondent. This, the respondent argued, meant that the company became a wholly owned subsidiary of the respondent and, further, that the persons listed in the preceding paragraph ceased to be members of the company. If that was so, none of those persons was entitled to vote at the meeting of 5 May 2016.

[11] At first, Mr Falkenstein made an offer on behalf of an entity of which he was the sole director – Sunship Capital Partners Pty Ltd[3] – to invest up to $150,000 in the company. This was communicated in an email dated 21 June 2012 from Mr Falkenstein to Mr Guest-Smith and Mr Tippireddy. Mr Falkenstein proposed that the funds to be invested be "used to secure revenue & relationships in the USA" and that a "USA-domiciled … entity (with a mirrored shareholding to Cloudzillr Pty Ltd)" be acquired for that purpose.[4] The offer was for Sunship Capital Partners Pty Ltd to "subscribe for an additional 12.5% of [the company now in liquidation] for $100,000" together with a promise to "fund another $50,000 if required by the business". Mr Falkenstein wrote, "Our intention is that Cloudzillr will license the IP from Australia into [the USA entity] until it is necessary (if it ever is) to transfer the IP to the USA entity". Although Mr Falkenstein deposed that this offer was accepted by Mr Guest-Smith and Mr Tippireddy on or about 26 June 2012,[5] that would not appear to have been the case.[6]

[12] Be that as it may, on 9 July 2012 the company now in liquidation engaged the San Francisco office of DLA Piper to incorporate the respondent and "advise on the share exchange".[7] Then, on 18 July 2012, Mr Falkenstein forwarded an email to Mr Guest-

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2 These particulars are recorded in the application for registration completed by Mr Guest-Smith and lodged with ASIC on 18 May 2012. See Affidavit of Matthew Justin Hocking filed on 18 August 2012; Exhibit MJH-2.

3 Sunship Capital Partners Pty Ltd was said by Mr Falkenstein to be "a company that acts as the manager of a partnership of trusts between [Falkenbridge] Pty Ltd as trustee for the Sunstein Trust and TL Falkenstein Nominees Pty Ltd as trustee for the TL Falkenstein Family Trust" (Affidavit of Kurt Daniel Falkenstein filed on 24 August 2016 at par 2.1), although no additional proof of the existence of these arrangements was advanced. The company, Sunship Capital Partners was deregistered on 11 May 2014: Affidavit of Matthew Justin Hocking filed on 18 August 2012; Exhibit MJH-3.

4 Affidavit of Kurt Daniel Falkenstein filed on 24 August 2016; Exhibit KDF-3. This exhibit appears to have been mistakenly referred to in the body of the affidavit (par 2.1) as Exhibit KDF-2.

5 Affidavit of Kurt Daniel Falkenstein filed on 24 August 2016 at par 2.2.

6 Mr Falkenstein purported to exhibit a "true copy of that acceptance", but the document exhibited was not an acceptance. Rather, it was an email from Mr Guest-Smith to Mr Falkenstein (copying in Mr Tippireddy and Mr Tom Falkenstein) which was sent on 24 June 2012: see Affidavit of Kurt Daniel Falkenstein filed on 24 August 2016; the first of two exhibits marked Exhibit KDF-4. In it, Mr Guest-Smith acknowledged receipt of the offer of 21 June 2012 but indicated that he was seeking external advice in relation to it.

7 Affidavit of Kurt Daniel Falkenstein filed on 24 August 2016; the second of two exhibits marked Exhibit KDF-4. It should be noted that, although a copy of a letter of engagement bearing that date is exhibited to Mr Falkenstein's affidavit, it is addressed to Mr Falkenstein in his capacity as a director of the company now in liquidation and supplies no detail as to the true scope of the retainer. Nor is Mr Falkenstein's claim that DLA Piper was retained on behalf of the company now in liquidation supported, for example, by a copy of an authorising resolution of its board of directors, let alone of its members.

Smith and Mr Tippireddy which attached a draft Share Subscription Deed for the incorporation of the respondent.[8] Relevantly to the claims now made on behalf of the respondent, Mr Falkenstein proposed in the covering email that the respondent (once incorporated) would:

> "[Issue] shares to the current shareholders of [the company now in liquidation] in return for the transfer of those shares, making [the company now in liquidation] a wholly owned subsidiary of [the respondent]."[9]

[13] By the draft Share Subscription Deed, two conditions precedent to the coming into operation of its substantive provisions were stipulated: *first*, that the written consent of each shareholder in the company now in liquidation to the transfer of their shares is received by the completion date (29 July 2012) and, *second*, that the shareholders execute a Deed of Assignment of the intellectual property in the content delivery platform. Although the draft terms would have provided some support for the claims now made on behalf of the respondent if they were carried into effect, it does nto appear that the Share Subscription Deed was ever executed or, for that matter, that the conditions precedent were fulfilled by 29 July 2012. As against that, the evidence does establish that the respondent was incorporated (on 1 August 2012) and, further, that a number of steps were taken by the shareholders of the company now in liquidation to to transfer their respective parcels of shares to the respondent.[10] However, the problem confronting the respondent is that the material falls well short of establishing that any of these transfers were ever completed or, if they were, that the transfers were reflected on the register for the company now in liquidation.[11]

[14] To illustrate the point just made, among the many exhibits are documents executed by Mr Guest-Smith, Mr Tippireddy, Mr Green and Mr Clarke to transfer their individual shares to particular trusts in relation to which each was trustee, documents executed by those persons (in their capacity as trustees) to transfer the shares purportedly then held on trust to the respondent,[12] documents executed by Ms Mehanni and Ms Ellerton to transfer their shares to the respondent[13] and a copy of an undated "Share Exchange Agreement" by which the agreement of the company now in liquidation and its shareholders to transfer their shares to the respondent was recorded.[14] The Share Exchange Agreement appears to have been executed by Mr Guest-Smith, Mr Tippireddy, Mr Green and Mr Clarke on behalf of their respective trusts and by Ms Mehanni and Ms Ellerton on their own behalf. The agreement was also executed by Mr Falkenstein on behalf of Sunship Capital Partners Pty Ltd. However:

(a) According to the Share Exchange Agreement, the various share transfers from the members of the company now in liquidation to the respondent were agreed to be made in exchange for the issue of shares in the respondent. Put another way, that was the consideration for the bargain. As to that, although Mr Falkenstein deposed

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8 Ibid; Exhibit KDF-5.

9 Ibid.

10 See, for example, Exhibits KDF-8 to KFD-13 to the affidavit of Kurt Daniel Falkenstein filed on 24 August 2016.

11 In this respect, the accuracy of the analysis contained in the submissions in reply made on behalf of the applicants (at pars 25 to 77) cannot be seriously doubted.

12 Affidavit of Kurt Daniel Falkenstein filed on 24 August 2016; Exhibits KDF-9A to KDF-9D.

13 Affidavit of Joanne Emily Dunn filed on 3 August 2016; Exhibit JED-13.

14 Affidavit of Kurt Daniel Falkenstein filed on 24 August 2016; Exhibit KDF-10 and Affidavit of Joanne Emily Dunn filed on 3 August 2016; Exhibit JED-13.

that each shareholder in the company now in liquidation was issued with shares in the respondent,[15] the board minutes exhibited in support of that deposition[16] are unsigned and incomplete.[17] In additon, those minutes contemplate the entry into a further or different agreement with each separate shareholder, but there is nothing to suggest that any of those agreements ever came into being. Thus, there is no satisfactory evidence that any shares in the respondent were actually issued to the shareholders of the company now in liquidation or that those persons became registered as such;

(b) Similarly, there is no evidence that the shares in the company now in liquidation were issued to the respondent or that it was ever recorded in the register for the company as its sole member;

(c) Lastly, there is no evidence that Mr Falkenstein transferred his shares in the company now in liquidation to Sunship Capital Partners Pty Ltd so as to vest the latter with title to transfer the relevant parcel of shares to the respondent.[18]

[15] Those things observed, I turn to more recent events.

[16] On 20 March 2015, Mr Guest-Smith ceased to be a director of the company now in liquidation.

[17] By email dated 14 April 2016 Mr Tippireddy called a meeting of members for the purpose of voluntarily winding up the company. Various reasons were advanced:

(a) There was insufficient revenue or customers to justify continuing the business of the company;

(b) The content delivery platform required upgrades and this, in turn, would require a further investment of money and time;

(c) The company was required to pay creditors of the respondent, including the California Tax Office, reducing the cash available to it in order to carry on the business;

(d) The subscriber base would need to be extended outside the fitness industry and this, too, would require a further investment of money and time;

(e) Mr Tippireddy had been the only person running the business for the preceding 14 months, including sales, support, development, legal affairs and accounting. Because the business could not generate enough revenue to pay Mr Tippireddy a

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15 Affidavit of Kurt Daniel Falkenstein filed on 24 August 2016 at par 2.9.

16 Ibid; Exhibit KDF-11.

17 The minutes refer to an annexure (called "Exhibit A") which identifies the transferees and the number of shares transferred to each, but that annexure is not reproduced with the minutes. If, as is suggested in the applicants' submissions in reply (at par 39), the annexure was mistakenly incorporated in Exhibit KDF-12A, the share purchases detailed on the annexure do not correspond with the share transfer documents which are exhibited in the material before the court.

18 It should be noted however that amongst the material is a document lodged with ASIC by Mr Falkenstein which seeks to make two corrections to the register: a correction of his date of birth and a change in the "shareholder name" from his name to "Sunship Capital Partners Pty Ltd". This document is dated 29 June 2012. Although the date of birth appears to have been corrected on the register maintained by ASIC, the change in name was for some unknown reason not effected.

full-time wage, he had been performing this work in his own time in addition to working on a full-time basis in another capacity elsewhere.[19]

[18] The email and attached notice of meeting of 14 April 2016 was forwarded to Mr Falkenstein, Mr Green, Mr Clarke and Mr Guest-Smith. It was also forwarded to a number of persons who were not recorded on the register maintained by ASIC as members of the company now in liquidation. Among them was Mr Yuri Quaresma. Then, a copy of the notice was forwarded by email to Ms Mehanni on 21 April 2016 and to Ms Ellerton on 27 April 2016. Thus, 20 days' notice of the meeting was given to Mr Falkenstein, Mr Green, Mr Clarke and Mr Guest-Smith, nine days' notice was provided to Ms Mehanni and six days' notice was provided to Ms Ellerton. The Act required 21 days' notice to be given: s 249H. Further, although by s 249J(3)(ca) of the Act, notice can be given by electronic means such as an email nominated by the relevant member, the applicants were unable to locate any such nominations. As against that, there was evidence that email had been the primary method used for communications from and to the company, including for the purpose of calling meetings.[20]

[19] The subject meeting was then held on 5 May 2016. Of the persons named on the ASIC register as its members, in attendance were Mr Tippireddy and Mr Green, and Mr Tippireddy held proxies from Mr Clarke and Ms Mehanni. Mr Guest-Smith, Ms Ellerton and Mr Falkenstein did not attend. Nevertheless, the registered members who did attend (by person or proxy) were sufficient to constitute a quorum.[21]

[20] It is important to record that Mr Falkenstein received notice of the meeting but, despite that, chose not to attend. This was established during the course of the hearing when Mr Falkenstein advanced a number of different reasons for his non-attendance:

(a) That he spoke with Mr Tippireddy prior to the meeting to request Mr Tippireddy to "let [Mr Falkenstein] know how the meeting goes" and to express the view that, "If the consensus is you want to liquidate, I'll acquiesce to that and we'll go through the process";[22]

(b) That a friend, Mr Mark Bazarotti, was to attend the meeting on his behalf but failed to do so;[23]

(c) That he did not attend the meeting because he "had a family trip to France";[24] and

(d) Because "it wasn't a validly constituted meeting" of the company.[25]

[21] Whilst it might be thought that these reasons do not all sit happily together, it is only necessary to observe that when faced with notice of the meeting and its clearly stated purpose – to pass a resolution to wind up the company – Mr Falkenstein made a conscious choice not to attend. Likewise, when Mr Falkenstein submitted that "someone

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19 Affidavit of Joanne Emily Dunn filed on 3 August 2016; Exhibit JED-5.
20 Affidavit of Joanne Emily Dunn filed on 3 August 2016 at par 19(a).
21 Mr Quaresma was also recorded in the minutes of meeting as a member of the company and appearing by proxy but a quorum was achieved regardless.
22 Transcript (24 August 2016), T. 1-17.
23 Ibid 1-18.
24 Ibid 1-20.
25 Ibid 1-21.

forgot to update the ASIC Register and that [this] was the only error",[26] it should be kept in mind that he also accepted during the course of the submissions that he, as company secretary, had been "the primary corporate administrator of the company's affairs".[27]

[22] On 9 May 2016, one of the applicants, Ms Dunn, forwarded an email to Mr Falkenstein to advise of their appointment together with a request that he make contact with her in order to discuss the liquidation. Mr Falkenstein responded by email on the same day. In it, he asserted that all of the shares in the company were owned by the respondent and that the register maintained by ASIC did not reflect the true position. He attached a copy of the Share Exchange Agreement and called on the applicants to cease winding up the affairs of the company.[28] Two days later, he attempted to convene a meeting of the stockholders of the respondent to consider the passing of various resolutions that he must have thought would reverse the effect of those passed at the meeting of the members of the company in liquidation on 5 May 2016. It is not clear from the material what, if anything, came of this attempt.

[23] A meeting of the creditors of the company in liquidation was held on 26 May 2016. Mr Tippireddy and Mr Falkenstein both attended this meeting. The shareholding in the company as well as the respondent were discussed. During the course of those discussions, Mr Falkenstein was asked why, after he received notice of the meeting of members, he did not respond with his concerns about the shareholding, to which Mr Falkenstein replied that he "wanted to see how the meeting would progress".[29] He also advised the meeting that he "had been aware that the members' details recorded in ASIC's register were incorrect but … did not consider it appropriate to update the records given that it was not a legal document and the cost of doing so was estimated at $3,000".[30] Mr Falkenstein proposed a resolution that the meeting be adjourned to allow him to make an urgent application to the court to "confirm the validity of [the applicants'] appointment" but that resolution was lost on the voices.[31]

[24] In subsequent communications between the applicants and Mr Falkenstein, Mr Falkenstein stated his intention to bring an application to court to terminate the winding up. When no such application was forthcoming, the applicants determined to themselves bring an application. That was an entirely appropriate course. At the same time, by circular dated 30 June 2016, the applicants advised the creditors and registered members of the company now in liquidation of their intention to bring an application and, further, sought information regarding the "purported share transfers".[32] No response was received to that circular. Finally, it was in the course of preparing the application now before the court that the applicants became aware of the irregularities in the calling of the relevant meeting, that is to say, the provision of short notice of the meeting and the use of email to provide that notice.

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26 Ibid 1-17.
27 Ibid 1-16.
28 Affidavit of Joanne Emily Dunn filed on 3 August 2016; Exhibit JED-13.
29 Affidavit of Joanne Emily Dunn filed on 3 August 2016 at par 36(a)(ii).
30 Ibid 36(a)(iii).
31 Ibid 36(a)(iv).
32 Ibid 42 and 43.

[25] For the sake of completeness, it should be recorded that an order was made at the hearing of 24 August 2016 (with the consent of the respondent) authorising the sale of the assets of the company now in liquidation.[33]

Consideration

[26] A company's members are those persons who are members on its registration along with such other persons who subsequently agree to be members *and* whose names are recorded in the company's register as members: s 231 of the Act. As such, the recording of the person's name on the register is a precondition to membership of the company. A mere entitlement to be recorded as a member is not enough; "the beneficial ownership of shares, without registration, does not make a person a shareholder.[34]

[27] Largely for the reasons I have already expressed, and whilst it may be accepted that most (if not all) of the shareholders in the company now in liquidation agreed in 2012 to transfer their shares to the respondent in exchange for a proportionate allocation of shares in that corporation, it cannot be concluded on the evidence before the court that this in fact occurred. To the contrary, there are good reasons to doubt that what was then agreed was carried into effect.

[28] In the first place, if an exchange of shares actually took place so that the members of the company on registration became shareholders in the respondent, it is odd that, with notice of these applications, none of these persons came forward to support the respondent's claims. The opinion expressed by Ms Dunn on behalf of the applicants is that the company in liquidation is likely to be hopelessly insolvent. On the other hand, there is no suggestion on the material that the affairs of the respondent are in that state. Accordingly, if the true position is that the members of the company on registration hold shares in a solvent corporation as opposed to shares in a company that is likely, in the opinion of the applicants, to be insolvent, I would have thought that those persons, or at least some of them, would have been concerned to support the respondent's contentions, but none did.

[29] Secondly, neither the register for the company now in liquidation nor the register for the respondent was produced in evidence. So far as the company's register is concerned, Mr Falkenstein swore that it was held by Mr Guest-Smith but that Mr Guest-Smith had not made any documentation available to the company since relocating to the United States of America in November 2014.[35] Why the company register would be held by Mr Guest-Smith when Mr Falkenstein was at all times the company secretary is not made clear but, even if that was capable of explanation, it is difficult to understand the submission otherwise made by Mr Falkenstein to the effect that the company kept a share register "in one place and at the company's registered offices".[36] The registered office of the company has changed over time but it has always been in Australia. It is in any event unnecessary to resolve that apparent conflict; the fact remains that no satisfactory evidence has been placed before the court to support the conclusion that the

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33 Transcript (24 August 2016), T. 1-27.

34 *Federal Commissioner of Taxation v Patcorp Investments Ltd* (1976) 140 CLR 247 at 295; *Kopilovic v Gatley* (2005) 53 ACSR 64 at [48].

35 Affidavit of Kurt Daniel Falkenstein filed on 24 August 2016 at par 1.11.

36 Submissions on behalf of the respondent dated 12 September 2016 at par 1.5.

name of the respondent was entered on the register for the company or, indeed, that the respondent was entitled to be entered on the register. In the absence of such evidence, the court must proceed on the faith of the register maintained by ASIC.[37] Doing so, the members of the company in liquidation as at 5 May 2016 were the members on registration, that is to say, the persons identified above at [9] and each was entitled to vote in support of the resolutions passed that day. Those persons of course do not include the respondent.

[30] Turning then to the irregularities in the calling of the meeting, by s 1322(1)(b)(ii) of the Act, a reference to a procedural irregularity includes a reference to a defect, irregularity or deficiency of notice or time. By s 1322(2), a proceeding under the Act is not invalidated because of a procedural irregularity unless the court is of the opinion that the irregularity has caused or may cause substantial injustice. The failure to give 21 days' notice of the meeting of 5 May 2016 as required by s 249H of the Act and the adoption of email as the means of forwarding the notices were irregularities within the meaning of these provisions. It is for the respondent to show that substantial injustice has resulted or is likely to result from one or both of those irregularities.[38]

[31] No injustice was caused, or might be thought to have been caused, by the irregularities in this case. Each member received notice of the meeting in a manner that was in accordance with the usual mode of communications in the affairs of the company. Importantly, Mr Falkenstein received notice of the meeting but, for whatever reason, chose not to attend. He could not say, and did not say, that he was deprived of sufficient time to consider the proposed resolution or that he suffered any other relevant prejudice. None of the other registered members of the company in liquidation have raised any concerns about the manner in which the meeting was called.

[32] The Act operates in such a way that the resolutions passed on 5 May 2016 must be regarded as valid unless and until the court orders otherwise. For the reasons I have just expressed, I am not persuaded that the irregularities in this case caused (or may cause) injustice, let alone substantial injustice. It is therefore unnecessary in my view for the court to make any order under s 1322(2) or s 1322(3) of the Act. It is nevertheless desirable that the court pronounce in favour of the validity of the resolutions in the form of a declaration. There is utility in making such a declaration; not only will it settle the dispute between the parties but it may also remove any confusion from the point of view of other interested persons including creditors of the company.

[33] A declaration will accordingly be made pursuant to s 1322(4) of the Act. In that regard, the onus rested on the applicants to establish, relevantly, that the irregularities were essentially of a procedural nature *and* that no substantial injustice has been or is likely to be caused to any person.[39] I am satisfied that the applicants have discharged that onus in both respects.

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37 In this regard, there is no requirement under the Act for the persons who were members of a company on its registration to also be entered on the company's register before those persons may properly be regarded as members pursuant to s 231.

38 *Re Pembury Pty Ltd* [1993] 1 Qd R 125 at 126-127.

39 See *Australian Hydrocarbons NL v Green* (1985) 10 ACLR 72 at 83. And see, more generally, *Weinstock v Beck* (2013) 251 CLR 396 at [39].

[34] Lastly, I deal with the cross application.

[35] The jurisdiction conferred by s 482 of the Act to terminate a winding up may be exercised in a wide variety of circumstances. Of course, it can scarcely be doubted that a resolution to voluntarily wind up a company which is found to have been passed by persons who were not in fact members of the company would qualify as one such circumstance but, even then, the court would usually also need to be satisfied as to the company's solvency.[40] In all cases the court has a discretion, and this is to be exercised having regard to the interests of the company's contributories, creditors and appointed liquidators as well as the public interest that insolvent companies should be wound up.[41]

[36] The circumstances to which the respondent pointed to justify the making of an order terminating the winding up (along with the other relief sought) depended on acceptance of the claims made by the respondent in response to the principal application. I have rejected those claims. In addition, the respondent contended that the company in liquidation was solvent but, as I have already remarked, the material before the court is insufficient to make a finding one way or the other regarding that issue although the position is likely to be that expressed by Ms Dunn. I am in any event unpersuaded by the evidence or arguments advanced on behalf of the respondent to the contrary.

[37] The cross application must accordingly be dismissed with costs.

Disposition

[38] For these reasons, it will be declared that:

(a) The meeting of the members of Cloudzillr Pty Ltd (in liq) held on 5 May 2016 was validly called;

(b) By the special resolution passed by the members of Cloudzillr Pty Ltd (in liq) on 5 May 2016, the company was voluntarily wound up;

(c) By the ordinary resolution passed by the members of Cloudzillr Pty Ltd (in liq) on 5 May 2016, the applicants were appointed as liquidators of the company.

[39] Otherwise, it will be ordered that the costs of the principal application be costs in the liquidation, that the cross application be dismissed and that the respondent pay the applicants' cost of the cross application.

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40 *Double Bay Newspapers Pty Ltd v Fitness Lounge Pty Ltd* (2006) 57 ACSR 131 at [16].

41 *Vero Workers Compensation (NSW) Ltd v Ferretti Pty Ltd* (2006) 57 ACSR 103 at [17].