

DUPLICATE

**In the High Court of New Zealand  
Wellington Registry**

**CIV: 2013-485-689**

**Under** Part 18 of the High Court Rules

**In the matter** of the Companies Act 1993

**Between** **ANUSHEEL CHANDRA**

(first plaintiff)

**And** **PETER ROBERT SEWELL**

(second plaintiff)

**And** **IAIN BRUCE SHEPHARD AND CHRISTINE  
MARGARET DUNPHY**

(defendants)

**AMENDED STATEMENT OF CLAIM  
Dated 2 July 2013**

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**GIBSON SHEAT  
LAWYERS  
WELLINGTON**

Solicitor: J W McDougall/E M S Cox  
(james.mcdougall@gibsonsheat.com)

Counsel acting: C F Reid

Plaintiffs' Solicitor  
1 Grey Street  
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**THE** first and second plaintiffs by their solicitor say:

### **Parties**

1. The first and second plaintiffs (collectively, **the plaintiffs**):
  - 1.1 are company directors; and
  - 1.2 were previously directors of a failed company (as defined by s 386B of the Companies Act 1993) (**the Act**), Command Services Limited (in liquidation) (**the failed company**); and
  - 1.3 are directors of phoenix companies (as defined by s 386B of the Act), being:
    - 1.3.1 Command Management Limited;
    - 1.3.2 Command HVAC Limited;
    - 1.3.3 Command Care Limited.(collectively, **the successor companies**)
2. The defendants:
  - 2.1 are joint and several liquidators of the failed company; and
  - 2.2 have filed a notice with the Registrar of Companies changing the registered office of the failed company to Level 2, Zephyr Building, 82 Willis St, Wellington.

### **Background to application for exemption**

#### *Incorporation of failed company*

3. The failed company was incorporated on 22 October 1993. Since incorporation, the failed company has carried on business as a consultant and installer of heating, ventilation and air conditioning (**HVAC**).

#### *Collapse of Mainzeal and impact on failed Company*

4. The failed company was a subcontractor to Mainzeal Property and Construction Limited (in receivership and in liquidation) (**Mainzeal**).

5. The failed company had been contracted by Mainzeal to install HVAC systems on a number of project sites in the lower North Island, including the Tory St and VUW Hub projects.
6. On 31 January 2013 payment by Mainzeal to the failed company for work carried out under the Tory Street contract became due and owing.
7. On 1 February 2013 the failed company served a Notice to Stop Work on Mainzeal in respect of the Tory St contract because the payment had not been received.
8. On 6 February 2013 Colin McCloy and David Bridgman were appointed as joint receivers to Mainzeal. The receivers suspended all work on all Mainzeal's sites pending review of Mainzeal's position.
9. Pre-receivership debts owing to Mainzeal contractors were frozen on the appointment of receivers.
10. On the afternoon of 6 February 2013, a Public Holiday on which the failed company was not working, the directors of the failed company became aware that receivers had been appointed to Mainzeal. An urgent meeting between senior managers was called to discuss the implications and plan for a change in deployment of labour.
11. Between 7 February and 20 February 2013 the plaintiffs attended various meetings and engaged in discussions with other Mainzeal subcontractors and business consultants to address the issues arising from Mainzeal being placed into receivership.
12. On 21 February 2013 the failed company wrote to all its creditors:
  - 12.1 advising that debts owed by the failed company as at 6 February 2013 would be frozen while awaiting further developments in the Mainzeal receivership;
  - 12.2 requesting the creditors' support to continue trading; and
  - 12.3 confirming that debts incurred by the failed company from 6 February 2013 and onwards would be paid in full.

13. On 26 February 2013 directors of the failed company met with Deloitte, their insolvency and restructuring advisers; and Gibson Sheat, their solicitors; and agreed that the failed company would make a creditors' compromise under Part 14 of the Act (**the compromise**).
14. On 28 February 2013 Andrew James Bethell, Brian Mayo-Smith and Stephen John Tubbs were appointed as joint liquidators of Mainzeal.

*Incorporation of the successor companies*

15. On 27 February 2013 a successor company, Command Care Limited was incorporated by the plaintiffs. The successor company intends purchasing the service division of the failed company from the defendants.
16. On 28 February 2013 Gill Consultants advised the directors of the failed company that if a new installation company was formed, the principals of the Tory St project would negotiate a new deal to complete work on that project. Directors of the failed company resolved to form Command HVAC Limited and commence negotiations for completing the Tory St project.
17. On 28 February 2013 Command HVAC Limited was incorporated by the plaintiffs and on 15 March 2013 Command HVAC signed a contract for completion of works at Tory St.
18. On 4 March 2013 the plaintiffs resolved to form a company to purchase the assets of the failed company, including taking assignments of the employment contracts of the failed company. On the same day Command Management Limited was incorporated.
19. The plaintiffs were appointed as directors of the successor companies and have filed director consent forms with the Registrar of Companies in respect of their directorships of each successor company.

*Creditors' compromise and creditors meeting*

20. On 6 March 2013 directors of the failed company met with Deloitte and instructed Deloitte to prepare the compromise documentation.

21. On 18 March 2013 directors of the failed company met again with Deloitte to finalise the compromise. It was agreed that 31 cents in the dollar would be offered to creditors in satisfaction of their claims.
22. On 22 March 2013 the directors of the failed company gave notice to creditors of the meeting, to be held by way of postal ballot, to vote on a creditors' compromise with the failed company. All votes were to be received by 5.00pm on 9 April 2013.

*Proof of debt filed with Mainzeal*

23. On 5 April 2013 the failed company filed a proof of debt form with the Mainzeal liquidators for \$2,807,669.15 in respect of its claims.

*Creditors' compromise not approved*

24. On 9 April 2103, at 5pm, voting on the compromise closed.
25. The compromise failed and was not approved. In excess of 25% of the creditor votes, on value, voted against the compromise.

*Appointment of liquidators to failed company*

26. At 1pm on 22 April 2013, the failed company was placed into liquidation by a special resolution of shareholders.
27. The shareholder resolution appointed the defendants as joint and several liquidators of the failed company.

**Requirement for application to Court**

28. On 29 April 2013 the plaintiffs filed this claim for exemption under s 386E of the Act permitting them to be directors of the successor companies and directly take part in the promotion, formation, management of the successor companies and directly take part in the carrying on of a business that has a similar name as the failed company's pre-liquidation name.
29. On 1 May 2013 the statement of claim, application for directions and memorandum of counsel were served on the defendants.

*Sale of business and assets of failed company*

30. The successor companies have purchased the assets and business of the failed company.
31. The successor companies have worked with the defendants to carry out the sale and purchase of the assets and business of the failed company.
32. On 10 May 2013:
- 32.1 Command HVAC Limited and the defendants, on behalf of the failed company, entered into an agreement for sale and purchase of the failed company's HVAC business (comprised largely of the failed company's installation contracts);
- 32.2 Command Care Limited and the defendants, on behalf of the failed company, entered into an agreement for sale and purchase of the failed company's maintenance and service contracts; and
- 32.3 Command Management Limited and the defendants, on behalf of the failed company, entered into an agreement for sale and purchase of the failed company's plant and equipment, intellectual property and goodwill. A valuation was obtained before entering the agreement.
- (the agreements).**
33. On 13 May 2013 the agreements settled.
34. Settlement statements and tax invoices were issued by the defendants for each agreement.

**Successor Company Notice**

35. On 16 May 2013 the plaintiffs signed a successor company notice prepared by their solicitors (**the notice**).
36. The notice:

- 36.1 was sent by the successor companies to all creditors of the failed company for which they had addresses;
- 36.2 between 16 May 2013 and 30 May 2013 and within 20 working days of the agreements being entered into with the defendants;
- 36.3 specified:
- 36.3.1 the name and registered number of the failed company;
- 36.3.2 the circumstances in which the failed company's business had been acquired by the successor companies;
- 36.3.3 the names the successor companies have assumed for the purpose of carrying out business;
- 36.3.4 the type of business each successor company is to carry out;
- 36.3.5 named the plaintiffs in and specified:
- a. their full names;
  - b. the duration of their directorship of the failed company; and
  - c. the extent of their involvement in the management of the failed company.

*Relief*

37. The plaintiffs wish to avoid contravening s 386A(1) of the Act.
38. To avoid such liability, a successor company and/or its directors may:
- 38.1 file an application with the Court, pursuant to s 386E, exempting the directors from the prohibitions contained in s 386A(1) and permitting them to act as directors of the successor companies; and/or;
- 38.2 issue a successor company notice under s 386D of the Act and comply with the relevant statutory provisions.

**WHEREFORE** the plaintiffs claim:

- (a) a declaration that the successor company notice dated 16 May 2013 complies with the requirements of s 386D of the Companies Act 2006.

And by way of alternative relief an order granting permission to each of the plaintiffs to:

- (b) be directors of the successor companies;
- (c) directly take part in the promotion, formation or management of the successor companies; and
- (d) directly take part in the carrying on of a business that has a similar name as the failed company's pre-liquidation name.

This Statement of Claim is filed by **EDWARD MICHAEL SOMERS COX**, solicitor for the Plaintiffs of the firm of Gibson Sheat.

The address for service of the abovenamed Plaintiffs is at the offices of Gibson Sheat, Lawyers, 1 Grey Street, Wellington. Documents may be:

- a. Posted to the solicitor at Gibson Sheat, Lawyers, Box 2966, Wellington; or
- b. Left for the solicitor at the document exchange for direction to Gibson Sheat, Lawyers, DX SP22035; or
- c. Transmitted to the solicitor by facsimile to Gibson Sheat, Lawyers, Fax No. 04 496 9991.