

In the High Court of New Zealand
Wellington Registry

[COPY]

CIV: 2013-

Under Part 18 of the High Court Rules

In the matter of the Companies Act 1993

Between **ANUSHEEL CHANDRA** of 3 Lone Tree Grove, Kelson,
Lower Hutt, company director

(first plaintiff)

And **PETER ROBERT SEWELL** of 84a Pretoria Street,
Lower Hutt, company director

(second plaintiff)

And **IAIN BRUCE SHEPHARD AND CHRISTINE
MARGARET DUNPHY** in their capacity as Liquidators
of Command Services Limited (in liquidation) whose
registered office is Level 2, Zephyr Building, 82 Willis
Street, Wellington

(defendants)

MEMORANDUM OF COUNSEL FOR FIRST AND SECOND PLAINTIFFS

**GIBSON SHEAT
LAWYERS
WELLINGTON**

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

Counsel acting: CF Reid

Plaintiffs' Solicitor
1 Grey Street
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MAY IT PLEASE THE COURT:

1. **THE** first and second plaintiffs (**the plaintiffs**) have filed a statement of claim and application for directions in accordance with rule 18.1 of the High Court Rules.
2. **NO** notice of proceeding has been filed, pursuant to rule 5.24(a).
3. **THE** application for directions seeks orders directing that:
 - 3.1 service of the statement of claim on any third party, including creditors of the failed company, Command Services Limited (in liquidation) be dispensed with; and
 - 3.2 evidence in this proceeding be given by means of an agreed statement of facts in accordance with rule 18.15(1)(a).
4. **THE** Court's jurisdiction to grant this application is contained in rule 18.15 and the inherent jurisdiction of the Court to regulate its own proceedings.

Background

5. **THE** application for directions has been made in conjunction with the filing of the statement of claim as required by rule 18.4(1)(b).
6. **THE** plaintiffs are directors of three successor companies (as defined by 386B of the Companies Act 1993 (**the Act**)) which wish to acquire parts of the business of Command Services Ltd (in liquidation) (**the failed company** as defined by s 386B of the Act.).
7. **THE** defendants are the joint liquidators of the failed company.
8. **THE** defendants were appointed as joint liquidators of the failed company on 22 April 2013 at 1pm.
9. **THE** plaintiffs, in their capacity as directors of the successor companies, have held initial discussions with the defendants regarding the purchase of parts of the business of the failed company.

10. **THE** plaintiffs, by being directors of the successor companies, are at risk of contravening s 386A(1) of the Act unless they qualify for one of the exceptions contained in ss 386D-F of the Act.
11. **THE** plaintiffs have advised the defendants that they require the Court's permission to be directors of the successor companies and that they would be filing an application under ss 386A(1) and 386E(1) of the Act.
12. **THE** plaintiffs have 5 working days from the date of commencement of the liquidation to apply for an exemption under s 386E(1) of the Act.
13. **THE** defendants have given an initial indication to the plaintiffs that they support the application in principle.
14. **THE** plaintiffs also intend to comply with the exception provided for in s 386D of the Act, or at the least, carry out the requisite steps under the section. Section 386D contemplates one successor company acquiring the whole or substantially the whole of the business of the failed company from a liquidator. In this case, three successor companies may acquire various parts of the business of the failed company from the liquidators. It is not clear whether s 386D applies to such a situation. Further, successor company notices cannot be sent under s 386D until agreements for the sale and purchase of the various parts of the business of the failed company have been executed. Such agreements have not yet been executed and it will not be possible for the successor companies to comply with s 386D prior to the expiry of the 5 working day period under s 386E(1).
15. **THE** circumstances above have necessitated:
 - 15.1 an application commenced by statement of claim under rules 18.1(b)(iii) and 18.4(1)(a) seeking orders from the Court granting permission to the plaintiffs to:
 - 15.1.1 be directors of the successor companies;
 - 15.1.2 directly take part in the promotion, formation or management of the successor companies;

15.1.3 directly take part in the carrying on of a business that has a similar name as the failed company's pre-liquidation name; and

15.2 an application under rule 18.4(1)(b) seeking orders for directions.

16. **COUNSEL** respectfully submits that, in the circumstances, the orders sought in the application for directions should be granted because:

16.1 the defendants represent the interests of the creditors of the failed company who may be interested in the application and the orders sought in the statement of claim;

16.2 no prejudice is caused to any third party by making such orders;

16.3 the parties are working together to prepare the evidence for hearing; and

16.4 such orders will enable the Court to determine the proceeding in a prompt and cost efficient manner.

Date: 29 April 2013

Signature

A handwritten signature in black ink, appearing to be 'C F Reid', is written over a horizontal line. The signature is cursive and somewhat stylized.

C F Reid (counsel for the applicants)