

**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

A N D **PETER ROBERT SEWELL**

Second Plaintiff

A N D **IAIN BRUCE SHEPHARD** and
**CHRISTINE MARGARET
DUNPHY** as liquidators of Command
Services Limited (in liquidation)

Defendants

A N D **GEOFFREY LLOYD BONNER, IAN
OLIVER CADDIS, GARY HERBERT
HALL, STEPHEN ALFRED JAMES
HOCKLY, and VISHAN POONAN** as the
majority of the informal liquidation committee of
Command Services Limited (in Liquidation) and
ANDREW KENNETH MIERS a creditor.

Second Defendants

AMENDED STATEMENT OF DEFENCE

DATED: 11 JULY 2013

Ian Caddis

Solicitor for the Second Defendants

618 Marine Drive,

Days Bay 5013

LOWER HUTT

P.O. BOX 39-123

WELLINGTON MAIL CENTRE

TELEPHONE 562-8085

e-Mail: ian@iancaddis.com

Counsel Acting: Ian Caddis

Statement of Defence to Amended Statement of Claim

The second defendants by their solicitor say that:-

1. They admit each and every of the several allegations expressed or implied by paragraph 1 of the plaintiffs' statement of claim and say that Geoffrey Lloyd Bonner a director of Extol Engineering Limited, Ian Oliver Caddis as representative of Potter Interiors Limited acting under a power of attorney dated 9th May 2013 which has not been revoked, Gary Herbert Hall, a director of Hardisty Engineering Limited, Stephen Alfred James Hockly, a director of Twin Lakes Industries Limited,(formerly Twin Lakes Sheetmetals Limited) and Vishan Poonan, a director of Building Automation Systems Limited, together constituting the majority of the members of the informal liquidation committee of Command Services Limited (the failed company) and Andrew Kenneth Miers a director of Ductari Limited, all of which companies are creditors of the failed company with the same interest in the subject matter. (collectively the **Second Defendants**)
2. They admit each and every of the several allegations expressed or implied by paragraph 2 of the plaintiffs' amended statement of claim.
3. They admit each and every of the several allegations expressed or implied by paragraph 3 of the plaintiffs' amended statement of claim.
4. They admit the allegation expressed by paragraph 4 of the plaintiffs' amended statement of claim.
5. They admit the allegations expressed or implied by paragraph 5 of the plaintiffs' amended statement of claim.
6. They have no knowledge of and therefore deny the allegations expressed or implied by paragraph 6 of the plaintiffs' amended statement of claim and say they are aware of similar pre-litigation allegations by the applicants that have proved to be incorrect.

7. They have no knowledge of and therefore deny the allegations expressed or implied by paragraph 7 of the plaintiffs' amended statement of claim and say that, in particular, they have no knowledge of the quantum of any payment that had not been received.
8. They admit the allegation expressed by paragraph 8 of the plaintiffs' amended statement of claim.
9. They admit that pre-receivership debts owed by the failed company were frozen on the appointment of receivers to Mainzeal and say that the failed company also failed to meet earlier obligations unrelated to the payment due from Mainzeal on 31 January 2013 but save as is otherwise expressly admitted they deny each and every of the several allegations expressed or implied by paragraph 9 of the plaintiffs' amended statement of claim.
10. They admit that 6th February 2013 was a public holiday but save as is otherwise expressly admitted they have no knowledge of and therefore deny the allegations expressed by paragraph 10 of the plaintiffs' amended statement of claim and say that at a meeting of the informal liquidation committee, together with liquidator, Iain Shepherd, at 11:00 am on the 17th day of May 2013, they were able to briefly peruse the minute book and interests register of the failed company, which included no reference to the directors meeting alleged.
11. They have no knowledge of and therefore deny the allegations contained by paragraph 11 of the plaintiffs' amended statement of claim
12. They admit that at least some creditors received the letter referred to in paragraph 12 of the plaintiffs' statement of claim but save as is otherwise expressly admitted, they have no knowledge of and therefore deny the allegations expressed or implied by paragraph 12 to 12.3 inclusive, of the plaintiffs' amended statement of claim.
13. They have no knowledge of and therefore deny the allegations expressed by paragraph 13 of the plaintiffs' amended statement of claim.

14. They admit the allegation expressed by paragraph 14 of the plaintiffs' amended statement of claim.

Incorporation of the successor companies

15. They admit the allegations expressed by paragraph 15 of the plaintiffs' amended statement of claim and say that the formation of this company preceded the liquidation of the failed company by some 47 days.
16. They have no knowledge of and therefore deny each and every of the allegations expressed or implied by paragraph 16 of the plaintiffs' amended statement of claim and say in particular that the proposition that a new installation company should be formed for the purpose of completing work on the project on the basis presented by paragraphs 15 through 19 of the plaintiffs' amended statement of claim is inconsistent with the applicant plaintiffs duty of loyalty to the failed company and with the discharge of all of their obligations as directors and the obligations of the failed company to its creditors.
17. They admit the allegation expressed by paragraph 17 of the plaintiffs' amended statement of claim and say that the plaintiffs were under a statutory duty to the failed company and its creditors pursuant to section 131 of the Companies Act 1993 to act in the best interests of them and not solely in the best personal interests of the applicant plaintiffs' to the exclusion of the failed company and its creditors.
18. They admit that Command Management Limited was incorporated on 4 March 2013, but have no knowledge of and therefore deny each and every of the several allegations expressed or implied elsewhere in paragraph 18 of the plaintiffs' amended statement of claim, and note that all of these alleged assignors were included in the liquidators' creditors' list, appear to have had voting rights as priority creditors, and some are understood to have voted by postal vote at the creditors' meeting held the 9th of May 2013 the voting at which meeting could not be verified as appointment of scrutineers by the meeting was refused by the liquidator.

19. They admit the allegations expressed by paragraph 19 of the plaintiffs' amended statement of claim.
20. They have no knowledge of and therefore deny the allegations expressed by paragraph 20 of the plaintiffs' amended statement of claim.
21. They admit the allegation that 31 cents on the dollar was in fact offered to creditors in satisfaction of their claims but say that it was proposed by the plaintiffs as directors of the failed company stipulating:-
- (a) that payment would be made by a newly incorporated phoenix company, Command HVAC Limited;
 - (b) which had already assumed one or more of the failed company's contracts; and
 - (c) which was not a party to the compromise proposal; and
 - (d) as voluntary contributions from that company, and
 - (e) out of an imprecisely quantified sum said in meeting with the second defendants on the 8th day of April 2013 at the premises of WHK Chartered Accountants in Lower Hutt to be less than the approximately \$950,000 due to the failed company but a sum greater than \$800,000 received by Command HVAC Limited in respect of work that had been performed by the creditors of the failed company prior to 6th February 2013; and
 - (f) further, that approximately 44, a simple majority by number of the 87 creditors disclosed by the compromise proposal were to be paid in full; and
 - (g) at the meeting with the applicant plaintiffs on the 8th day of April 2013 they each offered to vote in favour of the compromise proposal subject to modifications mainly relating to the otherwise absent transparency of the proposal which would have effectively guaranteed the success of the compromise, but this offer was refused by the plaintiffs;
- and save as is otherwise expressly admitted they have no knowledge of and therefore deny the remaining allegations expressed by paragraph 21 of the plaintiffs' amended statement of claim.
22. They admit the allegations expressed by paragraph 22 of the plaintiffs' amended statement of claim.

Proof of debt filed with Mainzeal

23. They admit the allegation expressed by paragraph 23 of the plaintiffs' amended statement of claim but save as is otherwise expressly admitted they have no knowledge of, and therefore deny the remaining allegations expressed by paragraph 23 of the plaintiffs' amended statement of claim and in particular any implied allegation that any such claim has been admitted to proof by the Mainzeal liquidators.

Creditors' compromise not approved

24. They deny the allegation expressed by paragraph 24 of the plaintiffs statement of claim and say that at least one creditor was pressed by the compromise administrator and the applicant plaintiffs' to change his vote on a number of occasions beginning in the latter part of 9 April 2013, and continuing through 10 April 2013 and this pressure did not cease until another creditor lodged a complaint on 11 April, with the New Zealand Institute of Chartered Accountants, at which time the vote was declared by the compromise administrator to have been lost.

25. They admit the allegations expressed by paragraph 25 of the plaintiffs' statement of claim, but say that only 87 of the 147 creditors on the liquidators' list of creditors were disclosed by the compromise proposal, and of the 87 disclosed, 44 smaller creditors received offers that breached the fundamental pari passu rule of insolvency, to be paid in full almost immediately, and a further 5 were shareholders or shareholder interests. By these means, a numerical majority vote favouring the proposal was effectively guaranteed for the benefit of those creditors who were to be and / or had already been, preferentially paid and to the benefit of the plaintiffs, mostly at the expense of the second defendants.

Appointment of liquidators to the failed company

26. They have no knowledge of and therefore deny the allegation expressed by paragraph 26 of the plaintiffs' statement of claim and say that on 16 April 2013 an application for liquidation of the failed company was served on it by delivering it to its director, plaintiff/ applicant Anusheel Chandra at the registered office of the company at which time director Chandra stated among other things, that the

appointment of liquidators had been completed by his signing the resolution on the previous Thursday, 11 April 2013.

- 27 They admit that the shareholders of the failed company purported to appoint the defendants on the date alleged but say that no minute of any such resolution had appeared in the minute book of the failed company by the 17th May 2013 and save as is otherwise expressly admitted they deny each and every of the allegations expressed or implied by paragraph 27 of the plaintiffs' statement of claim.
- 28 They admit the allegation expressed by paragraph 28 of the plaintiffs' statement of claim
29. They have no knowledge of the date of service on the defendants but admit that the documents otherwise described by paragraph 29 were filed.

Sale of business and assets of failed company

30. They admit that a sale and purchase transaction between one or more of the successor companies occurred on or about the 10th day of May 2013 at a price based on a valuation commissioned by the applicants but adopted by the liquidator but say that but say that the purchase price is at undervalue and represents only a portion of the payment received by the applicant plaintiffs, or by one or more of their successor companies, in respect of the work completed by the creditors of the failed company referred to by paragraphs 6 and 7 of the applicant plaintiffs' statement of claim. They further say that the liquidator of the failed company at no time took actual possession of the assets of the failed company and the whole of the business assets and substantial receivables of the failed company were already in the possession of one or more of the failed companies, and have been since the 27th of February 2013 and well before the date of the alleged sale.
31. They admit that the plaintiffs, the successor companies, and the defendants are working together in respect of the business of the failed company, but save as is otherwise expressly admitted they deny each and every other allegation implied by paragraph 31 of the plaintiffs' amended statement of claim and say that at the meeting of the informal liquidation committee on the 17th of May 2013, liquidator Iain Shephard and counsel, Kevin Sullivan informed the committee that, having

accepted the applicant plaintiffs' money in payment for the assets, they did not now feel that they could oppose the application and the second defendants' say that is a different statement from the allegation made in paragraph 31 of the Plaintiffs' amended statement of claim.

32. They have no knowledge of and therefore deny each and every of the allegations expressed or implied by paragraph 32 of the plaintiffs' amended statement of claim.
33. They have no knowledge of and therefore deny the allegations expressed or implied by the paragraph numbered 33 of the plaintiffs' statement of claim.
34. They have no knowledge of and therefore deny the allegations expressed or implied by paragraph 34 of the plaintiffs' statement of claim.

Successor Company Notice

35. They have no knowledge of the date of signing or of the preparation of the successor company notice but admit that at least some creditors received a notice in the days following that in May 2013.
36. They admit that the notice received by those creditors known to have received such a notice included the details stipulated in paragraphs 36.3.1 to 36.3.5 inclusive, but say that even so, the notice issued fails to comply with the requirements of the legislation.
37. They admit that the plaintiffs wished to avoid the consequences arising from contravention of section 386A (one) of the Act.
38. They admit the allegations expressed by paragraph 38 of the plaintiffs' amended statement of claim.

AND BY WAY OF FURTHER DEFENCE:

They repeat the admissions, denials and allegations expressed or implied by paragraphs 1 to 38 of this statement of defence and refer to paragraph 16 and 17 of the plaintiffs' statement of claim and say that:

- 39 In consequence of the allegations made in paragraphs 16 and 17 of the plaintiffs' statement of claim and the payment referred to by paragraph 21(d) of this statement of

defence, a constructive or resulting trust arises in favour of the creditors of the failed company.

Wherefore the Second Defendants' claim:

- (a) a declaration that the successor company notice dated 16 May 2013 is not compliant with the requirements of section 386D of the Companies Amendment Act 2006

Orders refusing permission to each of the plaintiffs to:

- (b) be directors of the successor companies;
- (c) directly take part in the promotion formation management of the successor companies;
- (d) directly take part in the carrying on of any business that has a similar name to the name of the failed company.

This amended statement of defence is filed by Ian Oliver caddis, a member of the informal liquidation committee of Command Services Limited (in Liquidation), and solicitor for the second defendants.

The address for service on the second defendants is at 618 Marine Drive, Days Bay

Documents for service on the second defendants may be left at that address or may be:-

- mailed to that address; or
- e-mailed to: ian@iancaddis.com.