

IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2019-

UNDER

Part 16 of the Companies Act

IN THE MATTER OF

ARROW INTERNATIONAL (NZ) LTD (IN LIQUIDATION) a company having its registered office at Arrow International Group Limited, 1 Broadway, Newmarket, Auckland, 1023, NZ

AND

of an application by **ANDREW JAMES BETHELL, ANDREW JOHN McKAY** Chartered Accountants and CAANZ-accredited Insolvency Practitioners of BDO Auckland Level 4, BDO Centre, 4 Graham Street, Auckland 1010 and **COLIN ANTHONY GOWER**, RITANZ-accredited Insolvency Practitioner of BDO Christchurch Ltd, Level 4, 287/293 Durham Street North, Christchurch Central as liquidators of Arrow International (NZ) Limited (in liquidation)

Applicants

**MEMORANDUM OF COUNSEL IN SUPPORT OF
A. ORIGINATING APPLICATION FOR DIRECTIONS PURSUANT TO
SECTION 284(1)(a) OF THE COMPANIES ACT 1993
B. WITHOUT NOTICE APPLICATION FOR DIRECTIONS AS TO SERVICE**

Dated: 19 June 2019

BUDDLEFINDLAY
NEW ZEALAND LAWYERS
Barristers and Solicitors
Christchurch

Solicitor Acting: **Kelly Paterson / Bridie McKinnon**
Email: kelly.paterson@buddlefindlay.com / bridie.mckinnon@buddlefindlay.com
Tel 64 3 379 1747 Fax 64 3 379 5659 PO Box 322 DX WX11135 Christchurch 8140

MAY IT PLEASE THE COURT:

Introduction

1. This memorandum accompanies:
 - (a) an originating application seeking directions pursuant to section 284(1)(a) of the Companies Act 1993 (**Act**);
 - (b) a without notice application for directions as to service.

Background

2. On 28 February 2019 the applicants, Andrew James Bethell, Andrew John McKay and Colin Anthony Latham Gower were appointed administrators of Arrow International (NZ) Limited (in liquidation) (**Arrow**) and to two related companies. Arrow and the related companies were major players in the construction industry, specialising in commercial construction and project management. On 6 June 2019 a resolution was passed at the Watershed meeting to place Arrow in liquidation and for Messrs Bethel, McKay and Gower to be appointed liquidators. This application is now made by the applicants in their capacity as liquidators.
3. A number of the projects that Arrow had underway at the commencement of the voluntary administration were in the form known as PMCM Contracts – effectively an agency project management contract.
4. The affidavit of Colin Anthony Latham Gower filed in support of the application sets out the grounds for the application and annexes copies of the relevant PMCM Contracts. A particular feature of the agency contract was that Arrow acted as agent for the client /contract principal in respect of financial transactions associated with the engagement of consultants, contractors and suppliers and other tasks for the project (referred to as **Trade Contractors, Consultants and Purchase Order Suppliers**). The way it worked was that Arrow would receive monthly invoices or payment claims from Trade Contractors, Consultants and Purchase Order Suppliers, collate those invoices and work out its project management fee/margin and issue one single invoice to the client (which was not an exact aggregation of the invoices from Trade Contractors, Consultants and Purchase Order Suppliers). Once it received payment from the client, it would attend to payment to the Trade Contractors, Consultants and Purchase Order Suppliers. Everything ran through one bank account, except retentions,

which (for contracts entered post-April 2017) were transferred to a separate account if they were to be held by Arrow.

5. At the time Arrow went into voluntary administration, it had received payments from a number of clients for January payment claims but had not paid the sums due to Trade Contractors, Consultants and Purchase Order Suppliers.
6. The key question in the substantive application is whether funds in the bank account of Arrow are:
 - (a) held on trust for either of:
 - (i) PMCM Contract clients; or
 - (ii) Trade Contractors/Consultants/Purchase Order Suppliers; or
 - (b) are not held on trust and are the property of Arrow.
7. There are supplementary questions concerning retentions.
8. As set out in the affidavit of Mr Gower, funds in the vicinity of \$1,437,000 relate to the January payment claim and are affected by this application. That sum is sitting in a separate account, although no undertakings have been provided in respect of it. A further sum of over \$450,000 is affected by the questions related to retentions.

Without notice application for directions as to service

9. An application is made without notice for directions as to service. The application proposes that the substantive originating application be served as follows:
 - (a) On the PMCM Contract clients;
 - (b) On the Trade Contractors, Consultants and Purchase Order Suppliers who were engaged pursuant to a PMCM contract between Arrow and the PMCM Contract client and remain unpaid for a January 2019 payment claim;
 - (c) On all secured creditors of Arrow.
10. In addition, the liquidators will upload the application and accompanying affidavit and this memorandum to their website so that general unsecured creditors who wish to be heard may apply to the Court setting out the basis of

their interest in the proceeding. Documents relevant to the administration/liquidation are uploaded to a particular page on the applicants' website from time-to-time.

11. In all cases, given the number of parties involved, the application proposes that service by email be permitted. It is submitted that corresponding by email in this manner is the most efficient manner of distributing the application to a large number of potential respondents. The exception is that it is proposed to initially serve only the narrative of Mr Gower's supporting affidavit. Recipients will be invited to contact the liquidators' solicitors to obtain a copy of the bundle of documents that accompanies the affidavit. It is anticipated that the bundle will be too large to serve by email initially and separate arrangements will be made to get the bundle to any party that wishes to receive it.
12. It is submitted that service in the manner proposed will bring the application to the attention of all those parties that are potentially interested in it.
13. It is submitted that it is appropriate to grant this application without notice on the basis that personal service of the originating application on the significant number of contract principals, Trade Contractors, Consultants and Purchase Order Suppliers will add a substantial and unnecessary expense to the liquidation and will delay progression of this important issue in the liquidation. Accordingly, it is submitted that it is in the interests of justice that the orders are made without notice.
14. A draft order is filed with this application.

Substantive application

15. The application for directions is made pursuant to section 284 of the Act. The section provides as follows:
 - (1) On the application of the liquidator ... the court may—
 - (a) give directions in relation to any matter arising in connection with the liquidation.
 - ...
 - (3) Subject to subsection (4), a liquidator who has—
 - (a) obtained a direction of a court with respect to a matter connected with the exercise of the powers or functions of liquidator; and
 - (b) acted in accordance with the direction—

is entitled to rely on having so acted as a defence to a claim in relation to anything done or not done in accordance with the direction.

- (4) A court may, on the application of any person, order that, by reason of the circumstances in which a direction was obtained under subsection (1), the liquidator does not have the protection given by subsection (3).

16. It is submitted that the issue of whether the funds held in the bank account of Arrow are held on trust for any party is a matter that is properly the subject of an application pursuant to section 284(1)(a).
17. The authors of *Heath & Whale on Insolvency* offer the following useful summary of the general purpose of directions under s 284:¹

The nature of a liquidator's duties means that, on occasion, difficult legal or commercial decisions may need to be made by him or her. On legal points, the liquidator is entitled to seek directions from the High Court under s 284(1)(a) of the Act. However, the court will rarely assist if purely commercial decisions are in issue; those are aspects with which the liquidator should deal.

18. In Australia, pursuant to an equivalent provision concerning an application for directions by administrators, the Court has said, regarding the limits of the Court's power to issue directions:²

There must be something more than the making of a business or commercial decision before a Court will give directions in relation to, or approving of, the decision. It may be a legal issue of substance or procedure, and may be an issue of power, proprietary or reasonableness, but some issue of this nature is required to be raised. It is insufficient to attract an order giving directions that the ... administrator has a feeling or apprehension or unease about the business decision made and wants reassurance ... there must be an issue calling for the exercise of legal judgment.

19. The directions sought in the *Ansett Australia* case was that the administrators might "*properly and justifiable continually to operate the business*" notwithstanding that this would result in further trading losses being incurred. The Court declined to make directions in that case as it was a business or commercial decision for the administrators to determine the extent to which the company should continue business operations.
20. Directions may be sought in respect of a matter that is declaratory in nature.³
21. Having reviewed all material relevant to PMCM Contracts and the practices and procedures of Arrow with regard to payments, the liquidators are of the view that the funds in the bank account of Arrow are unlikely to be held on trust for the clients or the contractors/consultants/suppliers. However, the

¹ Paul Heath and Michael Whale *Heath & Whale on Insolvency* (online ed. Lexis Nexis) at [22.1] and [22.8(e)], citing (among others) *Finnigan v Butcher*, *Finnigan v Butcher* [2012] NZHC 810.

² *Re Ansett Australia Limited (No. 3)* (2002) 40ACSR 433 at 451.

³ *Re CBL Insurance Ltd (in liq)* [2018] NZHC 2547 at [21] to [25].

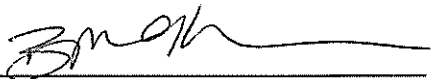
liquidators acknowledge that there is uncertainty associated with this conclusion and, as such, it is appropriate that the PMCM Contract clients any interested party that takes a contrary view be entitled to put that view to the Court for the matter to be determined.

22. Other creditors (principally secured creditors) also have an interest in the matter. The issue of whether the funds are held on trust will determine what funds are available to meet the claims of other creditors.
23. It is submitted that this is properly an issue that should be the subject of an application for directions. The issue goes to the heart of competing claims in the liquidation. It concerns the interpretation of the PMCM Contracts and the historic practices of Arrow, together with the application of jurisprudence on trust related issues. It is not a matter where the liquidators should be expected to exercise commercial judgment.

Conclusion

24. The applicants respectfully seek:
 - (a) Orders in terms of the without notice application for directions as to service;
 - (b) A call over date for the originating application in relatively short order so that the application does not become delayed.
25. Counsel are available to appear at short notice, should that assist the Court in any way.

Dated 19 June 2019



K M Paterson / B McKinnon
Counsel for the applicants