

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

**ORIGINATING APPLICATION FOR DIRECTIONS PURSUANT TO
SECTION 284(1)(a) OF THE COMPANIES ACT 1993
AS TO THE STATUS OF FUNDS**

Dated: 19 June 2019

BUDDLE FINDLAY
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

To: the Registrar of the High Court at Christchurch

And to: All those directed to be served

This document notifies you that—

1. The applicants, **ANDREW JAMES BETHELL**, **ANDREW JOHN McKAY** of Auckland, Chartered Accountants, and **COLIN ANTHONY GOWER** of Christchurch, Chartered Accountant, will apply to the Court for orders:
 - (a) Determining whether funds paid to Arrow International (NZ) Ltd (in liquidation) (**Arrow** or the **Company**) in February 2019 by the following clients of Arrow are held on trust:
 - (i) Papanui Properties Limited;
 - (ii) Harewood Investments Limited;
 - (iii) Resolute Investments 2016 Limited;
 - (iv) NZ Ski Limited;
 - (v) Du Velle Properties Limited;
 - (vi) Massey University;together (the **Clients**).
 - (b) If the answer to 1(a) is yes, determining whether funds or part thereof are held on trust for the benefit of:
 - (i) the Clients; or
 - (ii) the relevant Trade Contractors, Consultants and/or Purchase Order Suppliers.
 - (c) If the answer to 1(a) is yes, confirming that funds deducted by Arrow as retentions under a PMCM Contract entered prior to 1 April 2017 and retained (at the time) in Arrow's main trading bank account are held on trust for the benefit of Trade Contractors under those pre-1 April 2017 PMCM Contracts.
 - (d) If the answer to 1(a) is no, confirming that retentions calculated by and held by Arrow in its separate retentions bank account in respect of PMCM Contracts are held on trust for the benefit of Trade Contractors for those Contracts entered into after 31 March 2017.

- (e) the reasonable costs of this application be paid out of the assets of Arrow.
2. The grounds upon which the orders are sought are as follows:
- (a) On 28 February 2019, the applicants were appointed administrators of the Company, together with Arrow International Group Limited and Construction Labour and Resources Limited (together, the **Companies**). On appointment, the Companies had approximately:
 - (i) 17 to 20 construction projects in progress;
 - (ii) 205 employees;
 - (iii) Over 700 unsecured creditors; and
 - (iv) 85 secured creditors, including three GSA holders and over 150 security interests registered on the Personal Property Security Register;
 - (b) The Company acted as agent in respect of a series of projects still under construction under a form of contract known as "PMCM" – standing for Project Management and Construction Management (**PMCM Contract**).
 - (c) On 6 June 2019, the Companies were placed in liquidation and the applicants were appointed liquidators.

PMCM Contracts on foot at commencement of administration

- (d) The contract Clients (also known as **Principals**) and projects for the PMCM Contracts still under construction at the commencement of voluntary administration were as follows:
 - (i) Papanui Properties Limited – Northlink Centre;
 - (ii) Harewood Investments Limited – Mitre 10 expansion;
 - (iii) Resolute Investments 2016 Limited – Carmen Rd development;
 - (iv) NZ Ski Ltd – Coronet Peak Telemix Garage;
 - (v) Presbyterian Support South Canterbury – Crofts Rest Home; and
 - (vi) Du Velle Properties Limited - Mitre 10 Oamaru;

- (vii) Massey University – Marae;
 - (viii) Massey University – School of Music.
- (e) Pursuant to the PMCM Contracts, Arrow acted as agent for the client for the following tasks (clause 2.4):
- (i) Engaging consultants to undertake investigation and design;
 - (ii) Attending to consent and regulatory matters;
 - (iii) Engaging contractors and suppliers;
 - (iv) Verifying payment claims under the Construction Contracts Act 2002 and issuing payment schedules.
- (f) Arrow also acted as agent for "financial transactions" associated with the above tasks pursuant to clause 2.4(g) of the majority of the PMCM Contracts.
- (g) Clause 2 of Appendix C required the Client to pay to Arrow certain sums, which include the value of construction works and services undertaken, the value of consultant services provided, the value of statutory or territorial charges incurred and Arrow's margin.
- (h) As agent of the Clients, Arrow entered into contracts between the Principal and certain Trade Contractors for the provision of goods and services associated with the relevant Client building projects (**Trade Contract Agreements**). The terms of the Trade Contract agreement included:
- (i) Clause 2 provided that Arrow was the Client's (referred to in the Trade Contract Agreements as the Principal) duly authorised agent and construction manager, and that references in the agreement to the Principal having the right to give instructions or approval shall be read as including a corresponding right on the part of Arrow.
 - (ii) Clause 18.5 provided that a Trade Contractor may give written notice of suspension of works if the Principal failed to make payment to the Trade Contractor within five working days of the agreed sum being due;

- (iii) Clause 18.7 provided that payment claims from Trade Contractors shall not be in the form of tax invoices, but rather the Principal's payment schedules shall constitute "buyer generated tax invoices".
- (iv) Clause 18.17 provided that the Principal shall pay its Trade Contractors the scheduled amount not later than 22 working days from the end of the claim month.
- (i) As agent of the Clients, Arrow also entered into contracts with consultants (**Consultants**) on variable terms for the provision of consultancy services associated with the relevant Client building projects.
- (j) For each project, Arrow also purchased consumables (such as building materials) and obtained goods and services from suppliers that were not subject to a Trade Contract Agreement or consultancy agreement (**Purchase Order Suppliers**).
- (k) Purchase Order Suppliers issued periodic invoices to Arrow specific to each project. These invoices were invariably made out to Arrow. Arrow collated the Purchase Order Suppliers' invoices for each project each month. The invoices were also be reflected as accounts payable in Arrow's ledger.
- (l) In practice Arrow adopted the following process each month:
 - (i) Trade Contractors, Consultants and Purchase Order Suppliers issued either monthly payment claims, or tax invoices, or both, direct to Arrow. In some cases, tax invoices were addressed to the Client but sent to Arrow.
 - (ii) As project manager, Arrow reviewed each Trade Contractor's / Consultant's payment claim and made any adjustments necessary within the timeframes provided under the Construction Contracts Act 2002. Invoices from Purchase Order Suppliers were accepted at face value.
 - (iii) Arrow prepared a payment schedule, in the form of a "buyer created tax invoice" for Trade Contractors and Consultants.

- (iv) The payment schedule would be sent back to the Trade Contractor or Consultant and informed the Trade Contractor/Consultant what payment it could expect for that month, and included deductions for retentions where those retentions were to be held by Arrow.
- (v) Arrow issued a monthly tax invoice to the Client. The tax invoice claimed one single figure from the Client, which included Arrow's own entitlements (margin and project management fees).
- (vi) There was not a perfect correlation between:
 - (1) the payment schedules to Trade Contractors and Consultants and the invoices from Purchase Order Suppliers' on the one hand; and
 - (2) the amounts invoiced to Clients on the other.
- (vii) Instead, the sums included in the tax invoice in respect of Trade Contractors and Consultants generally reflected an assessed percentage of completion of work in different trades or professions. Similarly, the tax invoice to the Client in respect of Purchase Order Suppliers reflected an assessed percentage of completion of work for consumables and services.
- (viii) The Client made payment to Arrow in one lump sum into Arrow's main bank account. Client payments received by Arrow were not required to be separated out for each Client or project, nor were they in fact, with the exception of retentions for contracts entered into post 1 April 2017.
- (ix) For contracts entered post 1 April 2017, Arrow deducted any retentions to be held and transferred those retentions to a separate bank account.
- (x) In some PMCM Contracts (notably the Papanui Properties Limited PMCM Contract), the Client deducted and held the retentions itself.
- (xi) Arrow paid amounts due to the Trade Contractors, Consultants and Purchase Order Suppliers and retained (in its main trading bank account) amounts to meet its margin and fees as invoiced

together with amounts paid by Clients but not immediately required to be paid to Trade Contractors, Consultants or Purchase Order Suppliers.

- (m) As at 28 February 2019, Arrow had not made payment to most of the Trade Contractors, Consultants or Trade Contract Suppliers of amounts received from Clients for January 2019 payment claims and invoices.
- (n) If the funds the subject of this application are held on Trust, there are sufficient funds held to meet those obligations, however, Arrow has insufficient assets to meet its liabilities in full.
- (o) The PMCM Contracts do not contain words to the effect that an express trust is created in favour of either the Client or the Trade Contractors, Consultants or Purchase Order Suppliers in respect of payments made to Arrow by Clients.

Pre-1 April 2017

- (p) The form of PMCM Contract had been in use for some time and as at the commencement of administration, the following projects in the PMCM Contract form entered prior to April 2017 still had outstanding retentions to be paid to Trade Contractors:
 - (i) Harewood Investments Limited – Mitre 10 expansion;
 - (ii) The Salvation Army Wellington;
 - (iii) The Salvation Army, Linwood;
 - (iv) Sudima Hotels New Zealand
 - (v) Dunedin Central Post Office Car Park project.
- (q) For PMCM Contracts entered into pre-1 April 2017, Arrow deducted certain retentions in payment schedules issued to Trade Contractors and Consultants but those deductions were not transferred to a separate retentions bank account and were retained in Arrow's main trading bank account, the balance of which changed from day-to-day, and which bank account fluctuated in and out of overdraft between 2016 and 2018.

- 3. This application is made in reliance on the affidavit of Colin Anthony Gower filed herein, and Part 16 of the Companies Act 1993, Part 19 High Court

Rules, *Li v 110 Formosa (NZ) Ltd* [2018] NZHC 3418, *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 (HL) at 708, *Angove's Pty Ltd v Bailey* [2016] 1 WLR 3179, *Walker v Corboy* (1990) 19 NSWLR 382, *Henry v Hammond* [1913] 2 KB 515, *Paragon Finance plc v D B Thakerar & Co* [1999] 1 All ER 400, *Bennett v Ebert Construction Limited (in receivership and liquidation)* [2018] NZHC 2934.

DATED this ^{14th} day of June 2019



K M Paterson / B McKinnon

Solicitor for the applicants

This document is filed by **KELLY-MARIE MARGARET PATERSON**, solicitor for the applicants whose address for service is at the offices of Buddle Findlay, Level 4, 83 Victoria Street, Christchurch.

Documents for service on the abovenamed may be left at that address or may be:

1. Posted to the solicitor at PO Box 322, Christchurch; or
2. Left for the solicitor at a document exchange for direction DX WX11135, Christchurch; or
3. Transmitted to the solicitor by facsimile to 0-3- 379 5659; or
4. Emailed to the solicitor at kelly.paterson@buddlefindlay.com.