

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV-2019-404**

In the matter of Part 19 of the High Court Rules and Sections 255, 257, 280,  
284(1)(a) and 286 of the Companies Act 1993

And

In the matter of an application concerning **TRENDS PUBLISHING  
INTERNATIONAL LIMITED (IN RECEIVERSHIP)** having its  
registered office at Restructuring Services Limited, 12  
Findlay Street, Ellerslie, Auckland, 1051.

And

In the matter of  
an application by **KARE JOHNSTONE AND ANDREW JOHN GRENFELL** of  
Auckland both Insolvency Practitioners, for an orders under  
sections 255 and 257 of the Companies Act 1993.

Applicants

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**MEMORANDUM OF COUNSEL IN SUPPORT OF ORIGINATING APPLICATION  
WITHOUT NOTICE FOR ORDERS UNDER SECTIONS 255 AND 257 OF THE  
COMPANIES ACT 1993**

**Dated: 30 October 2019**

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## **MAY IT PLEASE THE COURT:**

### **Introduction**

1. This memorandum accompanies:
  - (a) an originating application without notice for:
    - (i) leave to commence proceedings by way of originating application without notice;
    - (ii) orders modifying the requirements under ss 255(2)(c) and (d) and 257(1) of the Companies Act 1993 ("**Act**") and orders modifying the service requirements under s 391 of the Act; and
  - (b) the affidavit of Kare Johnstone in support of the applications.
2. The grounds on which each order is being sought are set out in the application and in the affidavit of Ms Johnstone filed in support of the application.

### **Background**

3. The applicants, Ms Johnstone and Mr Grenfell, are experienced Chartered Accountants and accredited insolvency practitioners. They have been approached to act as liquidators of Trends Publishing International Limited (in receivership) (**Trends**) in the event that an application by Callaghan Innovation to place Trends into liquidation is successful on 1 November 2019 in proceedings CIV 2019-404-1899.
4. The applicants have previously been granted permission by the High Court to act as liquidators of Trends.
5. In the event of their appointment, the applicants would be required to prepare and send to every known creditor, every shareholder and the Registrar:
  - (a) Within 25 working days of their appointment, a first report, a notice and list of creditors (s 255(2)(c)(ii) of the Act);
  - (b) further six-monthly reports on the conduct of the liquidations and their proposals for completing the liquidations (s 255(2)(d)); and
  - (c) as soon as practicable after the conclusion of the liquidations, a final report, statements and a summary of grounds on which the creditor or

shareholder may object to the removal of each company from the register (s 257(1) of the Act),

(together, "**Liquidators' Reports**").

6. The Liquidators' Reports, and other documents and correspondence, cannot be sent by electronic means to shareholders and creditors who are natural persons, unless they notify the liquidators that they wish to receive documents by electronic means (s 391 of the Act).
7. However, the court may, on the application of a liquidator, modify the application of the provisions of s 255(2)(c) and (d) and 257(1) on such terms and conditions as the court thinks fit (ss 255(4)(b) and 257(2) of the Act). Counsel submits that the same modifications could also be made to the service requirements under s 391 of the Act.
8. This is an application:
  - (a) under s 255(4) of the Act for modification of the requirements under s 255(c)(ii) and s 255(d) of the Act;
  - (b) under s 257(2) of the Act for modification of the requirements under s 257(1) of the Act; and
  - (c) modification of the service requirements under s 391 of the Act.

#### **Commencement by originating application without notice**

9. Section 284(1)(a) of the Act enables a liquidator to seek directions from the Court in relation to any matter arising in connection with a liquidation. Under High Court Rule 19.4, an application for directions may be brought by way of originating application. Alternatively, under High Court Rule 19.5, the court may, in the interests of justice, permit any proceeding to be commenced by originating application.
10. Counsel considers that this application should be treated as an application for directions, such that the applicants have a right to commence it by way of originating application under High Court Rule 19.4. However, in the event that this application is not an application for directions, the applicants have also applied to permit the proceeding to be commenced by originating application under High Court Rule 19.5.

11. The applicants also seek to have this matter determined on a without notice basis under Rule 7.46.<sup>1</sup> The Court has on previous occasions permitted applications under s 255(4) of the Act to be made on a without notice basis, including:
- (a) in *Re FCS Loans Limited (in liquidation)*,<sup>2</sup> the liquidators applied for exemption from compliance with s 255(2)(d) of the Act to send the applicants' six-monthly report to every preference shareholder of the company. The Court granted leave for the applicants' application to be without notice; and
  - (b) in *Perpetual Trust Limited v Strategic Finance Limited (in receivership)* the proposed liquidators sought orders without notice modifying the service requirements under s 255(2)(c)(ii) and (d) of the Act.<sup>3</sup> The Court was satisfied that the application was appropriately made without notice.
12. It is submitted that it is appropriate to make this application without notice for the following reasons:
- (a) the applicants have only 25 working days to perform their obligations under s 255 of the Act;
  - (b) personal service of this application on the significant number of shareholders will add a substantial and unnecessary expense to the liquidation (to the detriment of those shareholders);
  - (c) notice will be given to the shareholders and creditors of the Forestlands Entities after the orders are made, with leave to apply to discharge or vary the orders; and in these circumstances
  - (d) it is in the interests of justice that the orders are made without notice.

### **Duty to provide documents to creditors and shareholders**

13. A liquidator's principal duty is set out in s 253 of the Act, which provides:

#### **253 Principal duty of liquidator**

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<sup>2</sup> *Re FCS Loans Limited (in liquidation)* [2013] NZHC 1190.

<sup>3</sup> *Perpetual Trust Limited v Strategic Finance Limited (in receivership)* HC Wellington CIV-2010-485-1085, 27 July 2010.

Subject to section 254, the principal duty of a liquidator of a company is -

- (1) to take possession of, protect, realise, and distribute the assets, or the proceeds of the realisation of the assets, of the company to its creditors in accordance with this Act; and.
- (2) if there are surplus assets remaining, to distribute them, or the proceeds of the realisation of the surplus assets, in accordance with section 313(4) —

in a reasonable and efficient manner.

14. A liquidator's duties also include duties under ss 255 and 257 of the Act, which relevantly provide:

**255 Other duties of liquidator**

...

- (2) Without limiting subsection (1) of this section, a liquidator must,—...
  - (c) Within the applicable period referred to in subsection (3) of this section,—
    - (i) prepare a list of every known creditor of the company with each creditor's address (if known); and
    - (ii) prepare and send to every known creditor, every shareholder, and the Registrar for registration,—
      - (A) a report containing a statement of the company's affairs, proposals for conducting the liquidation, and, if practicable, the estimated date of its completion; and
      - (B) a notice explaining the right of a creditor or shareholder to require the liquidator to call a meeting of creditors under section 314 of this Act; and
      - (C) the list of creditors referred to in subparagraph (i); and
  - (d) Within 20 working days of the end of each period of 6 months following the date of commencement of the liquidation, prepare and send to every known creditor and every shareholder, and send or deliver to the Registrar, a report—
    - (i) On the conduct of the liquidation during the preceding 6 months; and

- (ii) Of any further proposals which the liquidator has for completing the liquidation....

(4) The Court may, on the application of a liquidator,—

- (a) Exempt the liquidator from compliance with the provisions of paragraph (c) or paragraph (d) of subsection (2) of this section; or
- (b) Modify the application of those provisions in relation to the liquidator,—

on such terms and conditions as the Court thinks fit.

## **257 Duties in relation to final report and accounts**

(1) As soon as practicable after completing his or her duties in relation to the liquidation, the liquidator of a company must—

- (a) prepare and send to every creditor whose claim has been admitted and every shareholder—
  - (i) the final report and statement of realisation and distribution in respect of the liquidation; and
  - (ii) a statement that—
    - (A) all known assets have been disclaimed, or realised, or distributed without realisation; and
    - (B) all proceeds of realisation have been distributed; and
    - (C) the company is ready to be removed from the New Zealand register; and
  - (iii) a summary of the applicable grounds on which the creditor or shareholder may object to the removal of the company from the New Zealand register under section 321:
- (b) send or deliver copies of the documents referred to in paragraph (a) to the Registrar for registration.

(2) The court may, on the application of a liquidator,—

- (a) exempt the liquidator from compliance with the provisions of subsection (1); or
- (b) modify the application of those provisions in relation to the liquidator,—

on such terms and conditions as the court thinks fit.

15. Accordingly, the Court has a power under ss 255(4) and 257(2) to either exempt a liquidator from complying with the requirements under s 255(2)(c) and (d) and s 257(1) or to modify those duties.

### **Service requirements under the Act**

16. The reporting obligations in ss 255 and 257 of the Act must be read in conjunction with the service provisions set out in Part 22 of the Act.
17. The Act does not automatically allow service of documents by electronic means on natural persons who are shareholders or creditors, unless consent has been given for such service.<sup>4</sup> Section 391 of the Act deals with sending documents to shareholders and creditors who are natural persons. Section 391 relevantly provides that:

#### **391 Service on documents on shareholders and creditors**

- (1) A notice, statement, report, accounts or other document to be sent to a shareholder or creditor who is a natural person may be—
    - (a) delivered to that person; or
    - (b) posted to that person's address or delivered to a box at a document exchange which that person is using at the time; or
    - (c) sent by facsimile machine to a telephone number used by that person for the transmission of documents by facsimile.
  - (2) A notice, statement, report, accounts, or other document to be sent to a shareholder or creditor that is a company or an overseas company may be sent by any of the methods of serving documents referred to in section 388 or section 390, as the case may be, of this Act.
- ...
- (3A) Despite sections (1) to (3), a shareholder or creditor may notify the company—

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<sup>4</sup> Companies Act 1993, ss 391(1) and (3A).

- (a) that the shareholder or creditor wishes to receive documents by electronic means; and
- (b) of the electronic address to which documents are to be delivered.

18. By contrast, where a shareholder or creditor is a New Zealand company or an overseas company, service by email is accepted.<sup>5</sup>

### Case law

19. In *Re Pumpkin Patch Limited (in receivership and administrators appointed)*, Heath J discussed methods of service on creditors of companies in voluntary administration.<sup>6</sup> In that case, the Court was asked to vary the method of service for documents which the administrators were required to serve on creditors, together with the notice of the watershed meeting of creditors. Heath J stated at [25]:

In my view, the Court's approach to this issue should be guided by the need to achieve an outcome that accords with the overall objectives of the voluntary administration regime. Viewed in that way, the question becomes: what is the best method by which the accompanying documents can be provided to ensure creditors have an adequate opportunity to consider them before the meeting? The purpose of providing the accompanying documents is to enable creditors to consider the content and make an informed decision on the important questions to be debated at such a meeting. That means that, when exercising the discretion, the Court's focus is on the promotion of the interests of creditors and ensuring that the objectives of Part 15A are met.

20. Heath J concluded that it was appropriate for the Court to allow the accompanying documents in that case to be given by the administrators to creditors by electronic means.
21. That case concerned s 239AU of the Act, which required that the administrators "[give] written notice". Unlike ss 255 and 257 (read in conjunction with s 391), s 239AU does not prescribe any particular method by which notice should be sent.<sup>7</sup> It should also be noted that in *Re Gourmet Food Holdings New Zealand Ltd*<sup>8</sup> Katz J declined to make an order departing

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<sup>5</sup> Sections 388 and 390 of the Act respectively.

<sup>6</sup> *Re Pumpkin Patch Limited (in receivership and administrators appointed)* [2016] NZHC 2771.

<sup>7</sup> This was noted by Heath J in *Re Pumpkin Patch Limited (in receivership and administrators appointed)* [2016] NZHC 2771 at [26].

<sup>8</sup> *Re Gourmet Food Holdings New Zealand Ltd* [2012] NZHC 3606.



from the normal practice captured in s 239AU of the Act, although in that case there was a "not particularly large" number of creditors and modest "estimated cost savings".

22. However, the Court has previously exercised its discretion under s 255(4) in a number of cases. In *Re Dominion Finance Holdings Limited (in liquidation)*,<sup>9</sup> the liquidators applied for an exemption from the requirements under s 255(2)(d) to provide six-monthly reports to creditors and shareholders. The Court was satisfied that the cost of supplying the six-monthly reports to the 2,616 creditors and shareholders (estimated to be over \$5,500 per report) was disproportionate to the benefit that shareholders might receive from the report being posted to them. It was noted that the six-monthly reports would, in any event, be available for review and download from the website of the Registrar of Companies.
23. In *Re FCS Loans Limited*,<sup>10</sup> the liquidators obtained an exemption to providing six-monthly reports to the company's preferential shareholders. In that case, there were over 3,000 preferential shareholders and the costs of supplying the six-monthly reports to them was found to be disproportionate to any benefit that those shareholders might receive from the reports. The Court also noted that shareholders wishing to view the six-monthly report could do so by searching either the Companies Office website or the applicants' website, where the documents were available for download.
24. In *Perpetual Trust Limited v Strategic Finance Limited (in receivership)*,<sup>11</sup> the liquidators sought orders under s 255(4) allowing them to post six-monthly reports on their website and on the Companies Office website, rather than send those reports to the 1,367 preferential shareholders. The Court granted the orders, accepting the applicants' submission that, given it was unlikely that preferential shareholders would receive any distribution from the liquidation, the costs of providing the six-monthly reports to shareholders was out of proportion to any benefit that they may derive from receiving them.

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<sup>9</sup> *Re Dominion Finance Holdings Limited (in liquidation)* HC Auckland, CIV 2009-404-6606, 1 October 2009.

<sup>10</sup> *Re FCS Loans Limited (in liquidation)* [2013] NZHC 1190.

<sup>11</sup> *Perpetual Trust Limited v Strategic Finance Limited (in receivership)* HC Wellington, CIV-2010-485-1085, 27 July 2010.

## **Application – modification of reporting obligations**

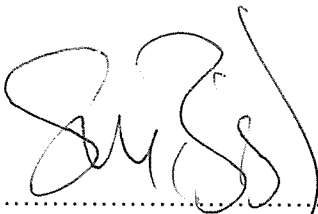
25. The number of Trends' creditors is currently unknown. However, previous proceedings involving Trends indicated that it had, at various times, a number of creditors, including creditors based overseas.
26. Ms Johnstone's evidence is that the cost of providing the Liquidators' Reports could quickly mount up over the course of the liquidation as reports are issued every six months.
27. It would be efficient and cost-effective if the Liquidators' Reports were not sent to Trends shareholders and creditors but, instead, an electronic link to a website where copies of the Liquidators' Reports can be downloaded is emailed to those shareholders and creditors. That would also reduce the risk that the Liquidators' Reports are too large to be received by email.
28. The Liquidators' Reports would also be uploaded to McGrathNicol's website. A copy of the Liquidators' Reports will also be filed with the Registrar for registration in the usual way, for which orders are not required because it is an existing statutory obligation that the applicants are not seeking to modify.
29. In addition, instead of sending documents and correspondence to Trends' shareholders and creditors who are natural persons (for whom the liquidators have email addresses) in accordance with s 391 of the Act, the applicants seek orders allowing that correspondence to be sent by electronic means, in addition to all other methods permitted by the Act.
30. It is submitted that the requirements under ss 255(2)(c) and (d), 257(1) and s 391 of the Act should be modified in the way set out at paragraphs 27 above because:
  - (a) the costs of sending by post the Liquidators' Reports, and any other correspondence, in accordance with s 391 of the Act would be excessive;
  - (b) the liquidations of Trends may be lengthy, in which case multiple reports will need to be issued to shareholders and creditors during the course of the liquidations;
  - (c) the Liquidators' Reports will be sent to the Registrar and will be publicly available for review and download on the applicants' website and on the Companies Office website; and

- (d) providing access to the Liquidators' Reports to those shareholders and creditors for whom the liquidators have an email address by sending a link to a website would be efficient and cost-effective and would avoid the risks referred to in paragraph 27 above, and
  - (e) sending any other correspondence to creditors and shareholders by electronic means (where possible, and otherwise by post) accords with the requirement in s 253 of the Act for the liquidators to undertake their principal duties in a reasonable and efficient manner.
31. The applicants are not seeking an exemption under ss 255(4) and 257(2) of the Act from their reporting obligations. Rather, they seek to modify the requirements to provide for the Liquidators' Reports, and other correspondence, to be provided by alternative means, which is consistent with and advances the objectives of Part 16 of the Act.

**Orders sought**

32. The applicants respectfully seek orders in the form of the draft order filed with this memorandum.
33. Counsel are available to appear at short notice, should that assist the Court in any way.

Dated: 30 October 2018



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**S M Bisley**

Solicitor for the applicants