13 August 2020

Circular to creditors

Dear Sir/Madam

DECMIL CONSTRUCTION NZ LIMITED (in Liquidation) (Decmil NZ)

I refer to my appointment as Liquidator of Decmil NZ on 15 April 2020 and my correspondence to creditors dated 4 August 2020 regarding my application to Court for directions regarding Decmil NZ's bank account.

I am writing to you to provide further clarification on my Court application.

Funds in Decmil NZ bank account

As set out in my first report, Decmil NZ's bank account had approximately $3.3m at the commencement of the liquidation.

As part of my investigations, I have assessed whether the funds are retention monies. As Mr Grant and others have stated in the public domain, I am able to make determinations or decisions in relation to matters pertaining to the liquidation, but these are subject to challenge under the provisions of the Companies Act 1993. As a consequence of the importance of this decision and the likelihood it would be challenged regardless, I have sought directions from the Court (as foreshadowed at the Information Gathering Session).

The assessment requires an examination of whether the funds were handled correctly by Decmil NZ before the funds can be categorised as a trust. The first issue (how the funds were handled) is a factual inquiry; the second issue (has a trust been created?) is a legal question, determined against the facts. I reviewed the manner in which the funds were handled and I also sought legal advice obtained from Queens Counsel (QC) in New Zealand. That legal advice stated that a trust had not been properly constituted and meant that the bank account, legally, cannot be used for retention claims. In the face of this information, I do not have discretion to determine otherwise. I cannot go against that senior advice and use the bank account for retention claims. My Court application recognises the sensitivity of this issue and seeks to resolve it conclusively. The factual matters which underpin my conclusion are set out in my affidavit in support of the application.

A copy of my Court application can be downloaded from my firm's website by following the link below:

https://www.aviorconsulting.com.au/wp-content/uploads/2020/04/10.-Decmil-Construciton-NZ-Limited-Circular-re-Court-Application.pdf

If the Court agrees that the trust has not been established and the funds are not for retention claims, then the directors of Decmil NZ have likely breached their duties in this area, and the retention creditors through Decmil NZ likely have a claim against them because of that. Once the Court's decision is handed down, and if appropriate, I will pursue this recovery for the benefit of retention creditors.

Meeting of certain creditors

The Court ordered that upon request I am to convene meetings for the two classes of creditors (retention creditors and non-retention creditors) for the purposes of coordinating their response. I have not received any requests for such meetings, however, I am aware of a meeting of certain creditors being organised by Damien Grant of Waterstone Insolvency.

Mr Grant in his capacity as liquidator of Stanley Construction (Auckland) Limited (in Liquidation) (**Stanley**) considers Stanley to be a retention creditor. Decmil NZ has a counter claim against Stanley as a result of Stanley's liquidation, which significantly exceeds any claims Stanley may have had. Stanley is therefore a debtor of Decmil NZ, not a creditor. Stanley was advised of this in September 2019, almost one year ago and shortly after Stanley was placed into liquidation. Mr Grant's representation to other creditors that Stanley is a retention creditor of Decmil NZ is therefore misleading. Stanley is not a retention creditor.

I also take note of yet another instance where Mr Grant, via his in-house counsel, has sought to inflame the situation by informing the creditor group they contacted that my view that the bank account was not retention money held on trust was "stunning". As a self-proclaimed insolvency practitioner, I would have expected Mr Grant, in attempting to reach an informed view on this matter, to have considered the reasons behind my conclusion. At best, it would be apparent that the issue is not at all straight forward and to communicate (and agitate) creditors in this way benefits no one. I have described Mr Grant as a self-proclaimed practitioner because we are told that it is wide-spread industry knowledge in New Zealand that Mr Grant's application to practise has been dismissed by the governing body. Unless that decision is reversed, Mr Grant will not be allowed to practise in the insolvency area.

In light of Stanley not being a retention creditor and Mr Grant's inability to practise corporate insolvency, my question for creditors is why is he interested in Decmil NZ's retention claims?

If you have queries about my application or any other matter concerning the liquidation, my team below will be happy to speak with you:

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Yours faithfully
For the Company

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