

In the High Court of New Zealand
Christchurch Registry

I Te Kōti Matua O Aotearoa
Ōtautahi Rohe

CIV-2017-409-

Under Part 19 of the High Court Rules and sections 280 and 286 of the Companies Act 1993

In the matter of an application pursuant to section 280 of the Companies Act 1993 for an order that D S Webb and D S Vance not be disqualified from appointment as liquidators of HydroWorks Limited (in interim liquidation)

and in the matter of **HydroWorks Limited (in interim liquidation)** an incorporated company having its registered office at Deloitte, Level 1, 98 Customhouse Quay, Wellington, 6140, New Zealand

In the matter of an application by **David Sean Webb**, of Auckland and **David Stuart Vance**, of Wellington, chartered accountants and insolvency practitioners

Applicants

Originating application without notice for orders as to qualification of liquidators

Date: 28 September 2017

KENSINGTON SWAN

18 Viaduct Harbour Avenue Ph +64 9 379 4196
Private Bag 92101 Fax +64 9 309 4276
Auckland 1142 DX CP22001

Solicitor: J A McMillan/M L Broad
james.mcmillan@kensingtonswan.com/mark.broad@kensingtonswan.com

Originating application without notice for orders as to qualification of liquidators

To: The Registrar of the High Court at Christchurch.

This document notifies you that—

- 1 The applicants, **David Sean Webb** of Auckland and **David Stuart Vance** of Wellington, both chartered accountants and insolvency practitioners, apply for orders that:
 - a this application be permitted to be made by way of an originating application;
 - b notwithstanding sections 280(1)(ca) and 280(1)(cb) of the Companies Act 1993 ('Act'), **David Sean Webb** and **David Stuart Vance** of Deloitte ('**Proposed Liquidators**') may be appointed as joint and several liquidators of HydroWorks Limited (in interim liquidation) ('**HydroWorks**');
 - c a copy of this application and orders of the Court be:
 - i served on all known creditors of HydroWorks at the same time and in the same manner as the liquidators' first report under section 255 of the Act; and
 - ii posted on Deloitte's website for three months from the date of commencement of the liquidation;
 - d the creditors of HydroWorks shall have leave to apply to the Court within 10 working days of receipt of the first liquidators' report to set aside the Proposed Liquidators' appointment as liquidators of HydroWorks;
 - e the affidavit of David Sean Webb and the memorandum of counsel filed in support of this application shall be marked and treated as confidential and shall not be available for search by any person as part of the court record;
 - f members of the public and media may access a copy of the affidavit of David Sean Webb and the memorandum of counsel with information about the professional services provided to Deloitte clients redacted;
 - g creditors or shareholders of HydroWorks may obtain a copy of the affidavit of David Sean Webb and the memorandum of counsel filed in support of this application from the Proposed Liquidators on request, provided that they provide an appropriate undertaking to the Proposed Liquidators that they will keep the information about the professional services provided to Deloitte

clients confidential; and will only use that information for the purpose of assessing whether to apply to the Court to set aside the Proposed Liquidators' appointment;

- h the Proposed Liquidators' solicitor-client costs and disbursements of this application are to be an expense incurred by the Proposed Liquidators in carrying out their duties as liquidators of HydroWorks; and
- i leave is reserved to the Proposed Liquidators to apply further in respect of any ancillary issues arising out of the orders made.

2 The grounds on which each order is sought are as follows:

Application should be made by way of originating application

- a The Proposed Liquidators are currently the interim liquidators of HydroWorks. No objection to the orders sought is anticipated and it is appropriate that applications of this nature be made by way of originating application.
- b The Court has previously permitted applications under section 280 of the Act to be made by way of originating application (see *Re Tubbs* [2014] NZHC 385).
- c It is in the interests of justice, and of the speedy and inexpensive determination of this proceeding, that this application be made by way of an originating application.

Section 280 of the Act precludes Proposed Liquidators' appointment as liquidators of HydroWorks without permission of the Court

- d In the absence of an order from the Court, sections 280(1)(ca) and (cb) of the Act arguably preclude the Proposed Liquidators from being appointed as liquidators of HydroWorks, because within two years immediately before the liquidation would commence:
 - i Deloitte provided professional services to HydroWorks, primarily through the secondment of a Deloitte Christchurch staff member to HydroWorks; and
 - ii Deloitte has arguably had a "continuing business relationship" with some of HydroWorks' secured creditors. Deloitte has provided professional services to:

- A Mace Group Head Office Limited (**'Mace Group Head Office'**);
- B Heartland Bank Limited (**'Heartland Bank'**);
- C Bridon NZ Limited (**'Bridon NZ'**); and
- D Steel and Tube Holdings Limited (**'Steel & Tube'**).

Proposed Liquidators' independence, competence, and integrity not compromised

- e Although the Proposed Liquidators may arguably be precluded from acting as liquidators under section 280, there is no real or apparent conflict of interest as:
 - i Notwithstanding Deloitte's prior (and ongoing instructions), neither of the Proposed Liquidators have had any prior involvement with HydroWorks, prior to being requested to act as interim liquidators of HydroWorks.
 - ii Neither of the Proposed Liquidators, nor Deloitte, have provided any services to Mace Group Head Office, Heartland Bank, Bridon NZ, or Steel & Tube about HydroWorks.
 - iii Neither of the Proposed Liquidators have had any business relationship with Mace Group Head Office, Heartland Bank, Bridon NZ, or Steel & Tube during the last two years. Although Mr Webb has not provided any services to Heartland Bank directly during the last two years he has acted as an investigating accountant on assignments for borrowers of Heartland Bank. The borrowers engaged Mr Webb directly.
 - iv The Proposed Liquidators are already the interim liquidators of HydroWorks, have been in contact with the company's secured creditors, and have not encountered any difficulties with conflicts.
- f The Proposed Liquidators are both:
 - i Well known to this Court as experienced and reputable insolvency practitioners (and have each acted as liquidator on many Court-ordered liquidation appointments).

- ii Chartered Accountants and Restructuring Insolvency & Turnaround Association of New Zealand Incorporated (RITNAZ) accredited insolvency practitioners.

Appropriate to make orders sought

- g The Proposed Liquidators have consented in writing to being appointed liquidators of HydroWorks, subject to this application being granted.
- h The Proposed Liquidators are already the interim liquidators of HydroWorks. Given the work already completed by the Proposed Liquidators and their staff, and as there is no real or perceived conflict of interest, it is sensible, and more cost-effective, for creditors and all stakeholders that the Proposed Liquidators be appointed as the liquidators of HydroWorks.
- i If orders are made, and any creditors do object to the Proposed Liquidators' appointment, then they retain the right to challenge the Proposed Liquidators' appointment in Court.
- j It is in the interests of justice that the application be determined without serving notice of the application on creditors because:
 - i HydroWorks is insolvent;
 - ii HydroWorks is without a company director;
 - iii HydroWorks is already in interim liquidation;
 - iv no creditors have raised any concerns with the Proposed Liquidators in relation to their appointment as interim liquidators of HydroWorks;
 - v the application to put HydroWorks into liquidation (proceeding CIV-2017-407-540) is listed to be called on 5 October 2017;
 - vi personal service of this application on HydroWorks' approximately 250 creditors will be expensive and time consuming, and such costs would be detrimental to all creditors and stakeholders in the liquidation; and
 - vii if the Proposed Liquidators are appointed liquidators of HydroWorks, then there is no prejudice to creditors, as they:
 - A will be served with a copy of this application and the Court's orders at the same time and in the same manner as the liquidators' first report under section 255 of the Act;

- B retain the right to challenge the Proposed Liquidators' appointment as liquidators of HydroWorks in Court; and/or
- C may vote to resolve to make an application to Court for the appointment of liquidators in place of the Proposed Liquidators at a first meeting of creditors should one be called under section 243 of the Act.

3 The application is made in reliance upon:

- a sections 280 and 286 of the Companies Act 1993;
- b rules 7.23, 7.46, 18.7, 19.2, 19.4, 19.5, 19.10, 19.11;
- c *Re Blanchett* HC New Plymouth CIV-2008-443-485, 3 October 2008, *Re Huntleigh Downs Ltd* HC Wellington CIV-2009-485-1498, 11 August 2009, *Re Rapson Holdings* HC Auckland CIV-2010-404-2319, 26 April 2010, *Re Southbury Insurance Ltd (in rec)* [2012] NZHC 1316; *Fisk v Ross Asset Management Ltd (in rec)* [2012] NZHC 3459; *Re Tubbs* [2014] NZHC 385; *Graham v Arena Capital Ltd (in rec)* [2015] NZHC 1719; and *Re Bridgeman* [2016] NZHC 933; and
- d the affidavit of David Sean Webb sworn in support of this application.

4 The application is made without notice to any other party on the following grounds:

- a that requiring the Proposed Liquidators to proceed on notice would cause undue delay or prejudice to the Proposed Liquidators; and
- b the interests of justice require the application to be determined without serving notice of the application.

5 I certify that—

- a the grounds set out in paragraph 4 on which the application relies are made out; and

- b all reasonable inquiries and all reasonable steps have been made or taken to ensure that the application contains all relevant information, including any opposition or defence that might be relied on by any other party, or any facts that would support the position of any other party.

Date: 28 September 2017



J A McMillan
Solicitor for the applicants

Address for service:

This document is filed by **James Alexander McMillan** solicitor the applicants of the firm Kensington Swan, Auckland. The address for service of the applicants is 18 Viaduct Harbour Avenue, Auckland 1010. Documents for service on the applicants may be left at that address for service or may be:

- a posted to the solicitor at c/o Kensington Swan, Private Bag 92101, Auckland 1142; or
- b left for the solicitor at a document exchange for direction to c/o Kensington Swan, DX CP22001, Auckland; or
- c emailed to the solicitor at james.mcmillan@kensingtonswan.com and mark.broad@kensingtonswan.com.