

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

NO. CIV-2019-404-

UNDER Part 19 of the High Court Rules and sections 239F and
280 of the Companies Act 1993

IN THE MATTER OF **SUNFRUIT ORCHARDS LIMITED** a duly incorporated
company having its registered office at 3249 Ohaupo
Road, RD2, Hamilton 3282

BETWEEN **ANDREW JOHN MCKAY AND ANDREW JAMES
BTHELL** Insolvency Practitioners of BDO New
Zealand Limited, Level 4, BDO Centre, 4 Graham
Street, Auckland 1010

Applicants

**ORIGINATING APPLICATION WITHOUT NOTICE FOR ORDERS UNDER
SECTION 239F AND 280 OF THE COMPANIES ACT 1993**

Dated: 18 December 2019

 **Simpson Grierson**
Barristers & Solicitors

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To: The Registrar of the High Court at Auckland

This document notifies you that –

1. On 18 December 2019, the applicants, Andrew John McKay and Andrew James Bethell, will apply for orders that:
 - (a) leave is granted that the proceeding be commenced by way of originating application without notice;
 - (b) under High Court Rule 5.1(5), leave is granted to commence the proceeding in the Auckland Registry of the High Court;
 - (c) under ss 239F and 280 of the Companies Act 1993 (**Act**), Andrew John McKay and Andrew James Bethell may be appointed to act as joint and several administrators of Sunfruit Orchards Limited (**Company**);
 - (d) notice of this application and any orders is to be given to each known creditor of the Company at the same time and in the same manner as notice is given to those creditors of the first creditors' meeting under s 239AO;
 - (e) leave is granted to any person who can demonstrate a sufficient interest to apply to modify or discharge these orders within 10 working days of service;
 - (f) the applicants' reasonable solicitor/client costs of this application will be an expense incurred by the applicants in carrying out their duties as administrators of the Company;
 - (g) the Court file in this proceeding shall be marked and treated as confidential and shall not be available for search by any person until administrators are appointed to the Company or by further Order of the Court; and
 - (h) leave is reserved to the applicants 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:
- (a) it is in the interests of justice that this proceeding be commenced by way of originating application without notice;
 - (b) the applicants are qualified to act as administrators of the Company in accordance with ss 239F and 280 of the Act, with two exceptions set out below;
 - (i) the applicants may be restricted from accepting the appointment under ss 239F and 280(1)(ca) of the Act on the basis that the applicants have, within two years immediately before the proposed commencement of the administration, provided "professional services" to the Company;
 - (ii) the applicants may be restricted from accepting the appointment under ss 239F and 280(1)(cb) of the Act on the basis that the applicants or a member of their firm, BDO New Zealand, have within two years immediately before the proposed commencement of the administration had a "continuing business relationship" with Westpac New Zealand Limited (**Westpac**);
 - (c) although the applicants may have a theoretical conflict of interest, there is no real conflict because the applicants are experienced, reputable and impartial insolvency practitioners and will carry out the role of administrators in a professional, effective and independent manner;
 - (d) the appointment of the applicants as administrators of the Company will enable them to conduct the administration of the Company and will ensure the expedient and cost effective administration of the Company;

- (e) the Company's creditors will have an opportunity to seek to remove the applicants as administrators under the proposed orders and at the first creditors' meeting;
 - (f) given the scale of the administration and the number of creditors involved, being approximately 280, including approximately 160 employees, the method of distribution of notice of these orders and the notices of the first and subsequent creditors' meetings is the most cost effective and is in the interests of justice;
 - (g) it is more convenient to commence the proceeding in the Auckland registry of the High Court, in circumstances where the present application is urgent, and because the applicants reside in Auckland;
 - (h) the potential administration of the Companies is commercially sensitive and if the proposed appointments are known by the general public or creditors prior to the appointments taking effect, it could adversely affect the administrations and the business of the Companies, to the detriment of creditors; and
 - (i) appearing in the affidavit of **ANDREW JOHN MCKAY** filed in support of this application.
3. The application is made in reliance on ss 239F and 280 of the Act and Part 19 of the High Court Rules.
4. The application is made without notice to any other party on the following grounds:
- (a) that requiring the applicants to proceed on notice to all of the Company's 280 creditors would cause undue delay or prejudice to the applicants;
 - (b) the Company's creditors will not be prejudiced by not being served with a copy of this application because they will have leave to apply to the Court to modify or discharge the orders and will have the opportunity to challenge the appointment of

the applicants as administrators of the Company at the first creditors' meeting; and

- (c) 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:

18 December 2019

Signature:



J C Caird
Solicitor for applicants

This document is filed by JAMES CAMERON CAIRD solicitor for the applicants of the firm Simpson Grierson.

The address for service of the applicants is at the offices of Simpson Grierson, Level 27, 88 Shortland Street, Auckland.

Documents for service on the applicants may be left at that address for service or may be posted to the solicitor at Private Bag 92518, Auckland, or left for the solicitor at a document exchange for direction to DX CX10092 or transmitted to the solicitor by facsimile to +64-9-307 0331.