

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKĀURAU ROHE**

CIV-2021-404-2299

UNDER Part 15 of the Companies Act 1993
IN THE MATTER of an application by TOWER LIMITED for
approval of an arrangement
Applicant

Hearing: On the papers
Counsel: SDA Gollin and A Simkiss for the Applicant
Minute: 10 December 2021

MINUTE OF ASSOCIATE JUDGE SUSOCK

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Case Officer:
Samy Saminathan

Introduction

[1] The applicant, Tower Limited, wishes to implement a scheme of arrangement between Tower and its shareholders under Part 15 of the Companies Act 1993 (“Arrangement”). The Arrangement is intended to return approximately NZ\$30.4 million of capital to shareholders by way of a pro rata cancellation of one share in every 10 ordinary shares.

[2] Two applications have been filed on a without notice basis:

- (a) an originating application for final orders approving a scheme of arrangement under Part 15 of the Companies Act for the return of capital to shareholders (“Originating Application”); and
- (b) an interlocutory application for initial procedural orders relating to the process for seeking shareholders’ approval for the Arrangement (“Interlocutory Application”).

[3] Further documents were filed in support of the applications as follows:

- (a) covering letter dated 30 November 2021;
- (b) memorandum of counsel for the applicant dated 30 November 2021;
- (c) affidavit of Michael Peter Stiassny affirmed on 30 November 2021;
- (d) certificate concerning administration of oath or declaration signed by Jessica Fay Needham; and
- (e) bundle of authorities.

[4] A further memorandum was filed on 9 December 2021 confirming that copies of the applications together with the supporting documents had been sent to the Reserve Bank as required for all applications under Parts 14 to 16 of the Companies Act by s 157 of the Insurance (Prudential Supervision) Act 2010.

[5] Section 157 requires not only the Applicant but also the Registrar of the High Court to take reasonable steps to ensure that copies of any applications are sent to the Reserve Bank. No further steps need to be taken by the Registrar to satisfy s 157 now that the memorandum has been filed attaching copies of the correspondence with the Reserve Bank confirming receipt.

[6] The remainder of this Minute relates to the application for initial procedural orders only and the setting down of the Originating Application for final orders for a hearing.

Application for initial orders

[7] The interlocutory orders sought are procedural. The Court's approval is sought for the steps needed to facilitate consideration of and voting on the Arrangement. It is only if those steps are followed and the required majority vote in favour of the Arrangement and further conditions are satisfied as discussed below that Tower will then seek final orders under Part 15 of the Companies Act.

[8] In summary, it is proposed under the Arrangement that:

- (a) One in every 10 ordinary shares, together with all rights attaching to those shares, will be cancelled.
- (b) Tower will pay to each shareholder NZ\$0.72 for each share registered in the name of the shareholder.
- (c) Fractions of a share will be rounded up or down to the nearest whole number (with 0.5 rounded down).

[9] Tower is proposing to effect the Arrangement under Part 15 of the Companies Act. In particular, Tower intends:

- (a) first that Tower's shareholders will be asked to vote on whether they support the Arrangement; and

- (b) if the required 75 per cent vote yes and IRD approval is obtained, to file further evidence and submissions and to seek the Court's approval of the Arrangement by way of final orders.

Jurisdiction

[10] Part 15 provides for schemes of arrangement with the sections governing eligibility being ss 235 and 236(1). An "arrangement" is defined in s 235 for the purposes of Part 15 as:

Arrangement includes a reorganisation of the share capital of a company by the consolidation of shares of different classes, or by the division of shares into shares of different classes, or by both those methods.

[11] Section 236(1) of the Companies Act provides:

236 Approval of arrangements, amalgamations, and compromises

- (1) Notwithstanding the provisions of this Act or the constitution of a company, the Court may, on the application of a company or any shareholder or creditor of a company, order that an arrangement or amalgamation or compromise shall be binding on the company and on such other persons or classes of persons as the Court may specify and any such order may be made on such terms and conditions as the Court thinks fit.

[12] The meaning of "arrangement" under Part 15 was considered by the Court of Appeal in *Suspended Ceilings (Wellington Ltd) v CIR*:¹

That word has been described in *Re International Harvester Co of Australia Pty Ltd* [1953] VLR 669 per Lowe ACJ as a word "of very wide import" and one not restricted in its meaning by its association with "compromise". It was given a wider meaning than "compromise" in the *Guardian Assurance Company* [1917] 1 CH 431 (CA). As AT Lawrence J at p 450, there is no ground for limiting the meaning in the section and empowering the court to approve an arrangement, and any risk is sufficiently guarded against by the fact that the sanction of the court must be obtained.

[13] Counsel for Tower submit that the term "arrangement" therefore should be given a wide construction so that the Arrangement falls comfortably within the meaning of s 235. Counsel refer to several recent cases where capital repayments have

¹ *Suspended Ceilings (Wellington Ltd) v CIR* [1995] 3 NZLR 143 (CA) at 148.

been made to shareholders through Part 15 schemes of arrangement. Several of these have been by cancellation of one of a number of shares including:

- (a) *Re Auckland International Airport* [2014] NZHC 405; and
- (b) *Re Tilt Renewables Ltd* [2020] NZHC 1398.

[14] I am satisfied that the proposed Arrangement properly falls within the definition in s 235 and there is jurisdiction to make the orders sought under Part 15 of the Companies Act.

Consideration of initial orders sought

[15] Section 236(2) of the Act sets out the Court's jurisdiction to make initial orders in respect of proposed schemes. The purpose of these orders is to ensure there is a process by which all interested or affected parties are consulted before the Court makes its decision on the proposed scheme and that those parties are provided with sufficient information to enable them to properly consider, and to decide whether to support or oppose, the arrangement. The orders available pursuant to s 236(2) concern:

- (a) the providing of information to interested parties;
- (b) scheduling and conduct of the meeting of shareholders which will consider the arrangement;
- (c) a report on the proposed arrangement for the Court and whether that report ought to be supplied to shareholders or any other person who appears to the Court to be interested;
- (d) relating to costs incurred in the preparation of the report referred to in (c); and
- (e) the persons who shall be entitled to appear and be heard on the application to approve the arrangement.

[16] Below I discuss the interlocutory orders sought by the Applicant in relation to each of the categories above.

Information to be provided to shareholders

[17] I am satisfied that the interlocutory orders sought in relation to the provision of information to shareholders are appropriate except:

- (a) a copy of this Minute is to be included in the materials sent to shareholders; and
- (b) the time period by which the materials sent to shareholders by ordinary post are deemed to be received is extended.

[18] NZ Post's website records that it aims to deliver 95 per cent of mail sent by ordinary post within three working days. It is unclear whether this has been adjusted for the recent Covid-19 delays. These, together with the time of year that the shareholder materials are being sent, make it appropriate in my view to adjust the time period for deemed receipt from the 48 hours proposed to five working days.

Meeting of shareholders

[19] The orders sought directing the holding of a meeting of shareholders to consider and, if thought fit, to approve the proposed Arrangement appear to be appropriate and so I make these orders below as well.

[20] I record that I accept that there is no need for the Court to determine separate classes of shareholders or creditors for the purposes of the proposed Arrangement. Tower has only one class of shares (ordinary shares) with the same rights and shareholders will be treated equally by the Arrangement in relation to those shares.

[21] The memorandum filed in support of the application for interlocutory orders refers to the Supreme Court decision in *Trends Publishing International Ltd v Advice Wise People Ltd*² where the majority articulated a broader test for determining classes of creditors in relation to creditor compromises under Part 14 of the Companies Act based not just on the legal rights and interests of creditors.

² *Trends Publishing International Ltd v Advice Wise People Ltd*, [2018] NZSC 62, [2018] 1 NZLR 903 (SC).

[22] The evidence filed in support of the application records that approximately 24 per cent of Tower's shareholders had a registered address in Australia. A class ruling is being sought from the Australian Tax Office on behalf of those shareholders to confirm that no part of the payment received will be treated as a dividend and that the payment will be capital proceeds for the purposes of calculating any capital gain or loss on the cancellation of shares.

[23] Tower still intends to proceed with the proposed arrangement regardless of whether a Class Ruling is issued.

[24] I agree with the submission it is not appropriate for the tax treatment of the Arrangement by different jurisdictions to potentially create separate classes of shareholders with any differing tax treatment not being a matter "in relation to the company" as required by *Trends*.³

[25] In regard to the creditors, I record that Mr Stiassny states in his affidavit that the Arrangement will not affect the creditors of Tower because appropriate solvency requirements will be met before and after it is implemented and that an affidavit will be filed to confirm this prior to the seeking of the final orders. In the meantime, the directors have given a solvency certificate as at 24 November 2021 when the decision to proceed with the Arrangement was approved.

Report to the Court on proposed Arrangement

[26] Following the meeting, if the necessary approvals are obtained including from the IRD, Tower will file with the Court an affidavit(s) verifying the actions taken and the resolutions passed by the shareholders at the meeting. This process will provide the Court with the opportunity to satisfy itself that the Arrangement has the necessary support of the shareholders when considering whether to approve it on the basis of the principles set out in *Re Auckland International Airport*.⁴

³ At [68].

⁴ *Re Auckland International Airport* [2014] NZHC 405 as summarised in *PGG Wrightson Ltd* [2019] NZHC 1780 at [12].

Orders specifying persons who shall be entitled to appear and be heard on the substantive application

[27] The orders proposed include a process for any shareholder who wishes to oppose the Originating Application for final orders approving the Arrangement to file a notice of intention to appear no later than five working days after the meeting and a notice of opposition and evidence in support within a further five working days of filing such notice.

No order is required under s 236A

[28] Section 236A of the Companies Act places obligations on code companies (as defined in s 2A of the Takeovers Act 1993) proposing to undertake a scheme of arrangement. Tower is a code company and so s 236A must be considered.

[29] The section provides that where the proposed arrangement “affects the voting rights of a code company” then certain steps must be taken. Tower submits that there will be no change to the relative voting rights of the shareholders if the Arrangement is approved and implemented, subject to insignificant impacts of rounding. The Takeovers Panel Executive has confirmed by letter that it does not disagree with Tower’s view in this regard with a copy of the letter confirming their position attached to the affidavit of Mr Stiassny filed in support of this application.

[30] On this basis, I accept that no order is required under s 236A.

Leave to apply

[31] An order granting leave to apply at short notice to vary the initial orders or apply for further orders as may be appropriate is included to respond to any unexpected developments.

Orders

[32] I order that:

- (a) the Originating Application for final orders is to be set down for a half day hearing by the Registry on a date on or around 23 February 2022 in consultation with counsel;

Meeting of shareholders

- (b) Tower shall hold an Annual General Meeting of its shareholders (“Meeting”):
 - (i) at a venue in Auckland at 10:00am NZT on Wednesday, 2 February 2022 (or on a date to be determined by Tower and in accordance with Tower’s constitution); and
 - (ii) livestream the Meeting via an online web platform which shareholders can access using a computer, laptop, tablet or smartphone;
- (c) at the Meeting put to its shareholders (among other business), a proposed scheme of arrangement (Arrangement), as annexed to the accompanying Originating Application for orders approving the Arrangement under Part 15 of the Companies Act 1993 (“Originating Application”), for their approval by special resolution before consideration by the Court;
- (d) except as otherwise provided in these orders, conduct the Meeting in accordance with the constitution of Tower, the provisions of the Companies Act, the NZX Listing Rules and the ASX Listing Rules;
- (e) the special resolution shall be approved for the purposes of preparing a report for the Court if it is passed by a majority of 75 per cent of the votes of those shareholders entitled to vote and voting on the resolution;
- (f) those Tower shareholders whose names appear in the register of shareholders at the close of business two days prior to the Meeting are

entitled to be represented and vote on the Arrangement at the Meeting, or at any adjournment(s) or postponement;

- (g) a shareholder who is entitled to vote at the Meeting but who is unable to attend may appoint a Proxy to attend the Meeting to act generally and vote on their behalf;
- (h) a shareholder is entitled to attend the meeting online or in person with shareholders to be provided with a virtual meeting link in the Notice of Annual Meeting;
- (i) voting will be conducted by poll in accordance with the NZX Listing Rules and Tower's constitution;
- (j) representatives of Computershare Investor Service Limited (or such other company as Tower deems fit) shall act as scrutineers at the Meeting;

Information to shareholders - Notice of Meeting and of Originating Application

- (k) Tower shall:
 - (i) give notice of the Meeting and of the Originating Application by sending to each shareholder, not less than 20 working days before the Meeting, the following documents:
 - (1) a Notice of Annual Meeting, including the resolution proposing the Arrangement that the shareholders will be asked to vote on at the Meeting, together with Explanatory Notes;
 - (2) a proxy form for use by shareholders at the Meeting;
 - (3) a guide on how to log into the Meeting remotely; and
 - (4) a copy of the Originating Application; and

(5) a copy of this Minute;

(together, the Shareholder Materials)

- (ii) the Shareholder Materials are to be in substantially the same form as those annexed to the affidavit of Michael Peter Stiassny affirmed in support of the Originating Application, together with such amendments as are necessary or desirable (including amendments required by NZX or by any other regulatory body), provided that such amendments are not inconsistent with the terms of these interlocutory orders;
- (iii) the Shareholder Materials will be sent to the following persons:
 - (1) those shareholders whose names appear in the register of shareholders at 5:00pm (NZT) on the fourth business day before the Shareholder Materials are sent; and
 - (2) the directors and auditors of Tower;
- (iv) the Shareholder Materials will be sent by ordinary post in hardcopy format to the physical addresses recorded for the shareholder(s) unless the shareholder(s) has elected to receive shareholder materials electronically;
- (v) if a shareholder has elected to receive materials electronically, electronic copies of the Shareholder Materials will be sent to the email address recorded for that shareholder(s);
- (vi) the Shareholder Materials will be made publicly available for inspection and download on Tower's website not less than 20 working days before the Meeting;

- (l) in accordance with its continuous disclosure obligations, Tower will disclose the Shareholder Materials as described at paragraph 32(k)(i) above, on NZX's and ASX's market announcement platform;
- (m) the Shareholder Materials shall be deemed to have been received by those to whom they were ordered to be sent five working days after being sent as described in paragraph 32(k)(iv);
- (n) Tower is granted leave to send the Shareholder Materials to shareholders outside New Zealand in the manner referred to in paragraph 32(k)(iv);
- (o) the following will not constitute a breach of the orders nor invalidate any resolution passed at the Meeting (but if any such failure or omission is brought to the attention of Tower, then it will use its best endeavours to rectify it by the method and in the time most reasonably practicable in the circumstances):
 - (1) the accidental failure or omission by Tower to give the Shareholder Materials to the persons specified in paragraph 32(k)(iii); or
 - (2) the non-receipt of the Shareholder Materials by those persons;

Powers of Amendment and Adjournment

- (p) Tower is permitted to make such amendments, revisions or supplements to the Arrangement or the Shareholder Materials as Tower may determine are in the best interests of Tower and its shareholders and the Arrangement as so amended will be the Arrangement to be submitted to the shareholders at the Meeting for approval;
- (q) where possible any amendments as referred to in (p) above will be made before Tower distributes the Shareholder Materials as detailed in paragraph 32(k) above and:

- (1) if the Arrangement or Shareholder Materials are amended before the Shareholder Materials are distributed, Tower will distribute amended Shareholder Materials as detailed in paragraph 32(k) above; but
 - (2) if any material amendment to a document contained in the Shareholder Materials is made after the Shareholder Materials are distributed, Tower will notify shareholders of amendments by lodging notices on NZX's and ASX's market announcement platforms and the Tower website;
- (r) the Chairperson of the Meeting is permitted to adjourn or postpone the meeting, without first needing to convene the meeting or to obtain any vote of the Tower shareholders regarding the adjournment or postponement;
- (s) subject to the terms of these orders, the Meeting will be conducted in accordance with the provisions of the Companies Act, the NZX Main Board Listing Rules, the ASX Listing Rules and Tower's constitution;

Shareholder opposition

- (t) Any shareholder who opposes the Originating Application may, no later than five (5) working days after the Meeting, file a notice of intention to appear in this proceeding advising that they oppose the application;
- (u) within five (5) working days of filing such notice, any shareholder opposing the Originating Application must file a notice of opposition and affidavit evidence in support of that opposition (“Opposition Documents”) and serve the Opposition Documents on Tower at Tower's address for service;

Reporting the outcome of the Meeting

- (v) Tower shall notify the outcome of the Meeting by lodging the results on NZX's and ASX's market announcement platforms as soon as practicable after voting at the Meeting is complete and the results are advised to the Chair of the Meeting;

Report to the Court

- (w) Tower will, prior to the Court's consideration of the Originating Application, file with this Court an affidavit(s) verifying:
 - (i) compliance with these initial orders granted by the Court;
 - (ii) annexing copies if amendments have been made as referred to in paragraph 32(p) above;
 - (iii) the actions taken and the resolutions passed by the shareholders at the Meeting;
 - (iv) confirming necessary approvals from IRD or any other party;

and serve the same documents on any person who has filed a notice of opposition or a notice of intention to appear;


Other

- (x) Tower is granted leave to apply at short notice to vary these interlocutory orders, and to apply for such further interlocutory orders as may be necessary or appropriate;
- (y) the Arrangement remains subject to approval by the Commissioner of Inland Revenue by 9 February 2022;
- (z) if the shareholders do not vote to approve the Arrangement, or if approval from Inland Revenue is not granted, it is recorded that Tower will likely discontinue the Originating Application;

- (aa) dispensing with formal service of the interlocutory application (and the orders made pursuant to it) on any person.

Costs

[33] No order for costs was sought on the interlocutory application. Costs are therefore reserved to be determined with the Originating Application for final orders.



Associate Judge Sussock