

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

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

**CIV 2021-404-941
[2021] NZHC 1861**

UNDER Part 15 of the Companies Act 1993

IN THE MATTER OF An application for orders approving a
scheme of arrangement under Part 15 of the
Companies Act 1993

BETWEEN TILT RENEWABLES LIMITED
Applicant

Hearing: On the papers

Appearances: M Eastwick-Field and J W Upson for the Applicant
R F Wallis and L C Bercovitch for Mercury NZ Ltd and Mercury
Wind Ltd
D J Cooper and N W Starrenburg for Pisa Obligor Co 1 Pty
Limited

Judgment: 22 July 2021

JUDGMENT OF CAMPBELL J

*This judgment was delivered by me on 22 July 2021 at 3:00 pm pursuant to Rule 11.5
of the High Court Rules*

Registrar/Deputy Registrar

Introduction

[1] Tilt Renewables Ltd (Tilt) applies for orders under s 236 of the Companies Act 1993 (the Act) approving a scheme of arrangement.

[2] The scheme would implement a transaction under which Mercury Wind Ltd (Mercury Wind), a subsidiary of Mercury NZ Ltd (Mercury), would acquire Tilt's New Zealand subsidiaries, and Pisa Obligor Co 1 Pty Ltd (PowAR) would then acquire 100 per cent of the shares in Tilt.

[3] Section 236 contemplates a two-stage process. The first stage is for the Court to make initial orders for the procedure to be followed to obtain approval for the scheme. Once that procedure has been followed, the second stage is for the Court to make substantive (final) orders that approve and give effect to the proposed scheme.

[4] I made initial orders on 3 June 2021. Tilt now seeks final orders to approve and give effect to the scheme. It has filed further affidavits in support.

[5] In accordance with the initial orders, a special meeting of Tilt's shareholders was held on 14 July 2021. At that meeting, the resolution to approve the proposed scheme was put separately to two interest classes of Tilt shareholders. The first interest class consisted solely of Mercury. Mercury cast all its votes in favour of the resolution. The second interest class consisted of the remaining Tilt shareholders. 99.93 per cent of the votes of the remaining shareholders entitled to vote and who voted were cast in favour of the resolution. The total votes cast in favour of the resolution represented 91.79 per cent of the total number of votes of those shareholders entitled to vote.

[6] The Takeovers Panel has indicated it has no objection to the Court approving the scheme.

[7] The initial orders required that any person who wished to oppose or be heard on the application file and serve a notice of opposition, or notice of appearance, by 5 pm on 19 July 2021. No notices have been filed.

[8] Counsel for Mercury Wind, Mercury and PowAR have filed memoranda in support of Tilt’s application for final orders.

[9] Given the overwhelming shareholder support, the Takeovers Panel having no objection, and the lack of any opposition, I have decided the application can be determined on the papers, without the need to hear further from counsel at the hearing scheduled for 23 July 2021.

Law

[10] Section 236(1) of the Act provides this Court with jurisdiction to approve a scheme of arrangement, subject to such terms and conditions as the Court thinks fit. Section 237(1) provides the Court with power to make additional orders giving effect to any arrangement approved under s 236(1).

[11] Section 235 defines “arrangement” in a non-exhaustive fashion. An acquisition of 100 per cent of a company’s shares by a third party is an “arrangement”.¹ An arrangement can also include an acquisition of the applicant’s assets (or some of them) by a third party.²

[12] To approve a scheme of arrangement under s 236 the Court must be satisfied that:³

- (a) There has been compliance with the statutory provisions as to meetings, resolutions, the initial Court orders and similar procedural requirements.
- (b) The arrangement has been fairly put to the classes concerned, and that if a circular or booklet has been sent out to those classes, it gives all the information reasonably necessary to enable the recipients to judge and vote upon the proposals.

¹ *Re Fliway Group Ltd* [2017] NZHC 3216 at [5].

² *Re Trustpower Ltd* [2016] NZHC 2499 is an example.

³ *Re CM Banks Ltd* [1944] NZLR 248 (SC) at 253; *Re Milne and Choyce Ltd* [1953] NZLR 724 (CA) at 754.

- (c) The classes were fairly represented by those who attended the meeting and the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the classes whom they purport to represent.
- (d) The arrangement is such that an intelligent and honest person of business, a member of the classes concerned, and acting in respect of her or his interest, might reasonably approve it.
- (e) The arrangement is fair and reasonable to all of the classes concerned.

[13] In exercising its discretion whether to approve a scheme of arrangement, the Court may consider whether the company's creditors will be relevantly (that is, adversely) affected by the arrangement.⁴

[14] Tilt is listed on the NZX and the ASX, and is therefore a "code company" in terms of the Act.⁵ The proposed arrangement will affect the voting rights of Tilt.⁶ In these circumstances s 236A provides that the Court may not approve the scheme of arrangement under s 236 unless:

- (a) Tilt's shareholders approve the arrangement by a resolution approved by a majority of 75 per cent of the votes of shareholders (in each interest class) entitled to vote and voting on the question, and by a simple majority of those shareholders entitled to vote; and
- (b) The Court is satisfied that the shareholders of the company will not be adversely affected by the use of s 236 rather than the takeovers code to effect the change of voting rights, or the applicant has filed a statement

⁴ *Greymouth Petroleum Mining Co Ltd v Fletcher Challenge Ltd* [2001] 2 NZLR 786 (HC) at [25]-[27].

⁵ Companies Act 1993, s 2(1), incorporating the definition of "code company" in s 2(1) of the Takeovers Act 1993.

⁶ See the definition of "affects the voting rights" in s 236A(5) of the Companies Act 1993.

from the Takeovers Panel indicating that the Panel has no objection to the order being made under s 236.⁷

Decision

[15] Tilt has filed several affidavits evidencing compliance with the requirements of the Act and with the initial orders. I am satisfied that Tilt has complied. In particular, Tilt distributed the scheme meeting materials to shareholders and other interested parties in advance of the meeting of shareholders. Those materials were in substantially the same form as the version that I approved in the initial orders.

[16] The arrangement was fairly put to the interest classes that voted on the resolution. The materials distributed to shareholders gave all the information reasonably necessary to enable the shareholders to judge and vote upon the proposed arrangement. I am also satisfied from the affidavits of Bruce Harker (Chair of Tilt's board of directors) and Stephen Symons (Tilt's Chief Financial Officer and Company Secretary) that the few questions from shareholders in advance of or at the shareholders' meeting were answered clearly and appropriately.

[17] The interest classes were fairly represented by those who attended the meeting. Only a tiny minority voted against the resolution. There is no suggestion of coercion. None of the minority has taken steps to oppose the scheme.

[18] The arrangement is one that "an intelligent and honest person of business", acting in respect of her or his interest, might reasonably approve. The consideration that each shareholder will receive is more than double the closing price of Tilt's shares on 4 December 2020 (which was the last trading day prior to Tilt's majority shareholder announcing a strategic review of its shareholding – a review that eventually led to this scheme). The consideration is a 25 per cent premium on the closing price on 12 March 2021 (being the last trading day before the scheme was announced to the market). The consideration is above the share value range assessed by the independent adviser. It is no surprise that the scheme received overwhelming

⁷ Section 236A(3) makes clear that, even if the Panel provides such a statement, the Court need not approve the arrangement.

support from shareholders (a factor that must be given considerable weight in a takeover scheme). I also take into account the judgement of Tilt's non-conflicted directors, who unanimously support the scheme.

[19] For much the same reasons, I am satisfied the arrangement is fair and reasonable to all of the classes concerned.

[20] Tilt's affidavits also address the effect of the scheme on Tilt's creditors. Tilt will remain solvent, by a comfortable margin, after the scheme is implemented. I am satisfied creditors will not be adversely affected.

[21] As to the additional requirements in s 236A that arise from Tilt being a code company, these have been satisfied. The resolution received support well in excess of the requisite thresholds. Tilt has received a statement from the Takeovers Panel, dated 21 July 2021, indicating the Panel has no objection to the Court approving the scheme under s 236.

[22] For all these reasons, I am satisfied it is appropriate to exercise my discretion to approve the scheme of arrangement.

Result

[23] I approve the scheme of arrangement described in the Scheme Plan (Scheme) located at Schedule 1 to Tilt's amended originating application, dated 2 June 2021, for orders approving a scheme of arrangement.

[24] I order that the Scheme is binding with immediate effect upon:

- (a) Tilt Renewables Ltd;
- (b) Pisa Obligor Co 1 Pty Ltd;
- (c) Mercury NZ Limited;
- (d) Mercury Wind Limited;

- (e) Every person who is a Shareholder (as defined in the Scheme Plan) as at the Record Date (also defined in the Scheme Plan); and
- (f) Such other persons as necessary to give effect to the Scheme.

[25] Tilt is granted leave to apply to the Court for approval of any amendment, modification or supplement to the Scheme.

Campbell J