IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2014-485-11462
[2015] NZHC 39

IN THE MATTER OF	Part 15 of the Companies Act 1993
IN THE MATTER OF	an application by NEW ZEALAND OIL & GAS LIMITED for approval of an arrangement
	Applicant

On papers

Judgment: 29 January 2015

JUDGMENT OF DOBSON J

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[1] This proceeding comprises an originating application brought under Part 15 of the Companies Act 1993 (the Act) for orders approving a proposed arrangement in respect of the shareholding of the applicant company (NZOG).

[2] The proposed arrangement is to effect a return of surplus capital to shareholders by cancelling one share in every five of the ordinary shares held. For the holders of ordinary shares, they will all maintain exactly the same proportion of shares because the cancellation will apply uniformly to all of them. NZOG also has partly paid shares on issue and they are not included in the arrangements. The evidence is that if the 17 holders of partly paid shares did participate in the proposed return of capital, then the return to them would total approximately $11,500. Because they are not participating, the voting rights of the holders of the partly paid shares will increase to a very modest extent. The effect, however, is fairly described as infinitesimally small.

[3] In November 2014, the Court made interlocutory orders directing the holding of a special meeting of the shareholders of NZOG, and authorising the mode of providing notice of the meeting and notice of these proceedings. The steps authorised by those orders have been undertaken. The outcome of voting at the shareholders' meeting was an overwhelming level of support for the proposed arrangement.[1]

[4] There has been no indication of opposition to the proposed arrangement. For reasons I address briefly below, I am satisfied that it is appropriate to make the final orders sought to approve the proposed arrangement.

[5] Before doing so, it is appropriate to address two aspects of the procedure adopted on behalf of NZOG that have been the subject of comment on behalf of the Takeovers Panel (the Panel). Since July 2014, additional provisions introduced in ss 236A and 236B of the Act apply in relation to any arrangements or amalgamations for which approval is sought under Part 15, where such initiatives relate to a company that is subject to the Takeovers Code (a code company).

[6] In this case, the Panel instructed counsel and three memoranda were filed on its behalf that addressed aspects of the procedure that had been adopted by NZOG. The Panel did not formally seek to be heard, and did not register opposition to the specific proposal. Rather, it raised two issues perceived as having precedential impact in terms of the process that a code company should adopt when pursuing an originating application under Part 15.

Timing of service of the originating application on the Panel

[7] Section 236A provides in part as follows:

> **236A Arrangement or amalgamation involving code company**
>
> (1) If a proposed arrangement or amalgamation affects the voting rights of a code company, the applicant for an order under section 236(1)

[1] Votes on the proposal were received from 63.59 per cent of all ordinary shares and 88.6 per cent of part-paid shares. Of those voting, 99.27 per cent of the votes cast in respect of ordinary shares were in favour, and 92.72 per cent of the votes cast in respect of part-paid shares were in favour.

must, at the same time as filing the application, notify the Takeovers Panel of the application.

(2) The court may not make an order under section 236(1) that affects the voting rights of a code company unless—

(a) the code company's shareholders approve the arrangement or amalgamation in accordance with subsection (4); and

(b) either of the following applies:

(i) the court is satisfied that the shareholders of the code company will not be adversely affected by the use of section 236(1) rather than the takeovers code to effect the change involving the code company; or

(ii) the applicant has filed a statement from the Takeovers Panel indicating that the Takeovers Panel has no objection to an order being made under section 236(1).

(3) The court need not approve a proposed arrangement or amalgamation merely because the Takeovers Panel has no objection to an order being made under section 236(1).

[8] In this case, the originating application and documents in support of it were filed on 19 November 2014, with service of all those papers being effected on the Panel the following day, 20 November 2014. It has been submitted on behalf of the Panel that that sequence did not comply with the requirement in s 236A(1) for the Panel to be notified "at the same time as filing the application".

[9] NZOG does not accept that there was any material non-compliance with this requirement to notify the Panel. It has submitted that the words "at the same time" contemplate a contemporaneous provision of notice to the Panel, but that that does not require the notification to be instantaneous at the time of filing of the papers. I am inclined to agree with NZOG that the requirement to provide notice to the Panel was discharged where it was effected within approximately four business hours of the filing of the originating application.

[10] Section 236A(2)(b)(ii) contemplates dealings between a code company proposing an arrangement or amalgamation and the Panel prior to making such an application. That will occur where the alternative of obtaining confirmation from the Panel that it has no objection to an order under s 236 is pursued. It follows that there

will be circumstances in which the Panel is fully appraised of the terms and effect of a proposed arrangement prior to the filing of papers with the Court.

[11] However, that procedure is not mandatory. The alternative that was adopted here was for NZOG to satisfy the Court that the shareholders of the code company would not be adversely affected by NZOG resorting to the procedure under s 236 rather than adopting procedures under the Takeovers Code. Where this procedure is adopted, an applicant is required to notify the Panel at the same time as the originating application is filed. That is to be interpreted as notification as soon as is reasonably practicable. It is not a requirement for notification at the same instant as the documents are filed. Numerous logistical difficulties would arise if that were the nature of the obligation, without any countervailing justification in terms of the remit of the Panel to protect the interests of all shareholders of code companies.

[12] The position of the Panel is protected if it receives notification contemporaneously and before any consideration of the substantive merits of an originating application occurs. In this case, the interlocutory orders, sought on a without notice basis, were made by the Court the day after the Panel was notified, but there is no suggestion that the Panel's interests were in any way compromised by the terms on which those interlocutory orders were sought and granted.

Test for determining "interest classes" of shareholders

[13] Section 236A of the Act includes a requirement for approval in the case of a code company by 75 per cent majorities of each "interest class" of shareholder. The provisions are in the following terms:

> **236A Arrangement or amalgamation involving code company**
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> …
>
> (4) For the purposes of subsection (2)(a), the code company's shareholders may only approve the arrangement or amalgamation in the following way:
>
> (a) by a resolution approved by a majority of 75% of the votes of the shareholders in each interest class entitled to vote and voting on the question; and

(b) by a resolution approved by a simple majority of the votes of those shareholders entitled to vote.

(5) For the purposes of this section and section 236B,—

affects the voting rights, in respect of an arrangement or amalgamation, means an arrangement or amalgamation that involves a change in the relative percentage of voting rights held or controlled by 1 or more shareholders

interest class may be determined in accordance with the principles set out in Schedule 10

voting right has the meaning set out in section 2(1) of the Takeovers Act 1993.

[14] Schedule 10 to the Act provides:

Interest class: principles

For the purposes of section 236A, an **interest class** may be determined in accordance with the following principles:

(a) shareholders whose rights are so dissimilar that they cannot sensibly consult together about a common interest are in different interest classes:

(b) shareholders whose rights are sufficiently similar that they can consult together about a common interest are in the same interest class:

(c) the issue is similarity and dissimilarity of shareholders' legal rights against the company (not similarity or dissimilarity of any interest not derived from legal rights against the company):

(d) if the rights of different shareholders will be different under a proposed arrangement or amalgamation, then those shareholders are in different interest classes.

[15] In this case, NZOG defined two interest classes of shareholders. These were, in respect of the vast majority, the class of fully paid shares, and the separate class of partly paid shares. The latter were essentially created as an aspect of employee benefits. These classes were defined by reference to the more general definitions of "classes" and "interest groups" in s 116 of the Act. Those definitions are in the following terms:

116 Meaning of classes and interest groups

(1) In this Act, unless the context otherwise requires,—

> **class** means a class of shares having attached to them identical rights, privileges, limitations, and conditions
>
> **interest group**, in relation to any action or proposal affecting rights attached to shares, means a group of shareholders—
>
> (a) whose affected rights are identical; and
>
> (b) whose rights are affected by the action or proposal in the same way; and
>
> (c) subject to subsection (2)(b), who comprise the holders of 1 or more classes of shares in the company.
>
> (2) For the purposes of this Act and the definition of the term interest group,—
>
> (a) 1 or more interest groups may exist in relation to any action or proposal; and
>
> (b) if—
>
> (i) action is taken in relation to some holders of shares in a class and not others; or
>
> (ii) a proposal expressly distinguishes between some holders of shares in a class and other holders of shares of that class,—
>
> holders of shares in the same class may fall into 2 or more interest groups.

[16] Nothing turns on the definition applied to identify interest classes in the present case. There is no realistic prospect that the interest classes adopted by NZOG would be any different, depending on whether the generic definitions from s 116, or the specific criteria in sch 10, were applied.

[17] NZOG justified its reliance on the s 116 definitions because the application of sch 10 is cast in permissive terms. Section 236A(5) provides that "interest class" *may* be determined in accordance with the principles set out in sch 10, and that permissive formula is repeated at the outset of the schedule itself.

[18] Submissions on behalf of the Panel reject that approach and suggest that this is a context in which seemingly permissive language is not to be construed literally, but instead treated as denoting a mandatory form of consideration.[2]

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[2] Citing *Warwick Henderson Gallery Ltd v Weston* [2006] 2 NZLR 145 (CA) at 149.

[19] I incline to the view that the definition in sch 10 should apply when code companies are assessing interest classes for the purposes of an originating application under Part 15. The more general definition in s 116 is prefaced on the basis that those provisions are to apply unless the context otherwise requires, and the essential purpose of sch 10 is to provide guidance on how code companies are to identify interest classes when resorting to the Part 15 procedure. I accept the point made for the Panel that the purpose of introducing a specific schedule would be undermined if references to it in permissive language left applicant companies to adopt another definition of what constitutes an interest class of shareholders.

The merits of the application

[20] The test for approving such proposals is whether an intelligent and honest business person, assessing the proposal from the perspective of a member of the class of shareholders concerned, might reasonably approve of it. Clearly, the fact of very substantial support for a proposal, following a fully informed and adequate procedure, is an indication that the test will be met. The Court of Appeal has suggested that the classic test might be supplemented by a consideration of whether the arrangement is fair and equitable.[3]

[21] The board of NZOG had resolved that the fairest and most efficient way of returning capital to shareholders is to implement the arrangement, and further resolved that the arrangement was in the interests of the company's shareholders and would not disadvantage its creditors.

[22] In all the circumstances, I am satisfied that the test is met. I am also satisfied in terms of s 236A(2)(b)(i) that resort to the Part 15 procedure has not adversely affected the interests of NZOG shareholders.

[23] Accordingly, I make the order sought in the originating application, to approve the arrangement as proposed.

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3 *Weatherston v Waltus Property Investments Ltd* [2001] 2 NZLR 103 (CA) at [35].

[24] No issue as to costs arises. I reserve leave to NZOG to apply for further directions, should that be necessary in the implementation of the arrangement.

Dobson J

Solicitors:
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Izard Weston, Wellington for Takeovers Panel