IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2020-404-608
[2020] NZHC 1398

UNDER	Part 15 of the Companies Act 1993
IN THE MATTER OF	TILT RENEWABLES LIMITED Applicant

Hearing: On the papers

Counsel: M Eastwick-Field and H M Bain for the Applicant

Judgment: 19 June 2020

JUDGMENT OF MUIR J

This judgment was delivered by me on Friday 19 June 2020 at 4 pm
Pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date:……

Solicitors:
Russell McVeagh, Auckland

Introduction

[1] Tilt Renewables Limited (TLT) seeks orders sanctioning a pro-rata return of surplus capital by way of Scheme of Arrangement (the Scheme) under Part 15 of the Companies Act 1993 (the Act).

[2] I am satisfied that such orders are appropriate. My reasons follow.

Background

[3] TLT is a developer, owner and manager of renewable energy generation assets in Australia and New Zealand. It is listed on the NZX and ASX and has approximately 8,100 shareholders (predominantly in New Zealand) and net assets as at 30 September 2019 of approximately $642,000,000. It has two substantial shareholders, Infratil Limited (via a subsidiary) (Infratil) and Mercury New Zealand Limited, who together hold approximately 86 per cent of the shares on issue.

[4] The Scheme provides for the return of approximately $260,000,000 to its shareholders which is surplus to any of TLT's current and reasonably foreseeable requirements. The proposed mechanism is cancellation of one share for every five shares in the company with a cash payment of NZD2.91 for each cancelled share. The scheme has the support of the full Board (including independent directors). Prior consideration was given to other acquisition opportunities which might be explored with the surplus capital. Such assessment was made having regard to TLT's core competencies. The conclusion was that the potential acquisitions were not likely to add shareholder value – "value" rather than "scale" being the Board's animating concern.

[5] On 5 May 2020 I made Initial Orders under s 236(2) of the Act relating to notification of the Scheme, conduct of the shareholders' meeting, exercise of rights of opposition and related matters. The shareholders' meeting has now taken place. The Scheme has received overwhelming support, including by the minority shareholders.

The relevant test

[6] Section 236(1) of the Act provides that the approval of any scheme of arrangement by the Court is discretionary. The four-part test which the Court applies has long historical roots dating back to the 1944 decision in *Re CM Banks Ltd*.[1] In the recent decision of *Re PGG Wrightston Ltd,*[2] Lester AJ summarised the test as follows:

> (i) whether there has been, and there will be, compliance with the relevant statutory provisions, including as to the conduct of the Special Meeting and the opportunity given to interested parties to be informed of the Scheme and take steps to oppose it;
>
> (ii) whether the Scheme has been fairly put to the class or classes concerned, including whether the information provided to shareholders fully and fairly explained what was proposed, its intended effect, the reason why it was proposed and the reasons why independent directors recommended it;
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> (iii) whether the classes were fairly represented by those who attended the meeting, and acted bona fide and without coercion;
>
> (iv) whether the arrangement is such that an intelligent and honest person of business might reasonably approve it, including whether the proposal is "fair and equitable".

[7] I will consider each of these criteria in turn.

First factor – Satisfaction of relevant statutory requirements

[8] I am satisfied that TLT has complied with all of the applicable statutory requirements under Part 15 of the Act in that:

> (a) the Scheme Meeting was held in accordance with the Act, the NZX Main Board Listing Rules and the constitution of the company; and
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> (b) it has complied with all respects with the Initial Orders granted by me.

[9] I note in this respect the check list attached to counsel's memorandum of 16 June 2016 and the cross-references to the most recent affidavits filed in support of

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1 *CM Banks Ltd* [1944] NZLR 248 (SC).
2 *Re PGG Wrightson Ltd* [2019] NZHC 1780 at [12].

the application.[3] I also note provision by the Directors of a solvency certificate confirming that, in their opinion, the company will satisfy the solvency test immediately after payment to each shareholder of the $2.91 intended to be paid in respect of each share cancelled.

[10] TLT is a "Code Company" for the purposes of the Takeovers Code, but s 236A of the Act[4] only applies if the proposed arrangement affects voting rights.

[11] In correspondence, and in a memorandum filed with this Court on 17 June 2017, the Takeovers Panel has confirmed that in its view:

(a) section 236A does not apply; and

(b) it is therefore unnecessary for it to issue a "no objection" statement.

[12] The correspondence also included the observation that, if the Court adopted any contrary view, the Panel's position would be that:

(i) the Scheme represents an Immaterial Change of Voting Control Scheme for the purpose of the Panel's Guidance Note on Schemes of Arrangement; and

(ii) the usual disclosure requirements did not apply (meaning for example that TLT was not required to obtain a report from an independent advisor).

[13] TLT likewise submits that the Scheme does not invoke s 236A. It notes the close similarity to the arrangements endorsed in *Re Kirkcaldie & Stains Limited*[5] in which a scheme contemplated a pro-rata return of capital to shareholders by

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3 Second affidavit of Dr B J Harker dated 15 June 2020, affidavit of Charles Christie dated 15 June 2020, affidavit of Stephen Symons dated 15 June 2020, affidavit of Fayez Shahbaz dated 16 June 2020.

4 Which requires that in respect of Code Companies there be (i) approval by 75% of votes of the shareholders in each interest class and a simple majority of those entitled to vote, (ii) provision of a no objection statement from the Takeovers Panel or judicial satisfaction that the shareholders will not be adversely affected by the use of s 236(1) rather than the Takeovers Code to effect the change involving the Code Company.

5 *Re Kirkcaldie & Stains Limited* [2016] NZHC 112.

cancellation of four in every five shares with fractions of shares rounded down to the nearest whole share.

[14] In that case there were approximately 10,000,000 shares on issue held by approximately 1,000 shareholders. The Court stated:[6]

> I note for completeness that Kirkcaldie is a "Code Company", to which s 236A of the Act would apply if the arrangement affected the voting rights in Kirkcaldie. However, that will not occur under the proposed arrangement because the percentage of voting rights held or controlled by one or more shareholders will remain the same.

[15] In my Minute dated 4 May 2020, making Initial Orders under s 236(2) of the Act, I expressed the view that because the Scheme contemplated a pro-rata return of capital without affecting the relative voting rights of shareholders, s 236A did not apply. I reached that conclusion despite the fact that rounding (of one share only) would, in some cases, be necessary.[7] As TLT's Chairman Dr Harker confirmed in his affidavit in support of Initial Orders, the percentage change in relevant voting rights is nil, even when the percentage is recorded to eight decimal points. In that context the rounding adjustments are irrelevant. It is not even necessary to invoke the de minimis principle. For completeness I note, however, that in its application for Initial Orders, TLT proposed that it comply with the higher threshold (75%), for passing a resolution set out in s 236A(4). It has done so by a very substantial margin.

Second factor – the Scheme has been fairly put to shareholders

[16] The Initial Orders provided for TLT to take a number of steps to ensure that interested parties (in particular shareholders) were informed of the Scheme and had an opportunity to oppose it.

[17] On 13 May 2020 the Scheme Meeting Materials were sent to all shareholders listed on the TLT share register as at 7 pm (NZT) on Monday 11 May 2020 (being two working days before the date the Scheme Meeting materials were sent to shareholders). Persons who became shareholders after this date but before 7 pm

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6 *Re Kirkcaldie & Stains Limited* [2016] NZHC 112 at [48].

7 Fractions between 0.1 and 0.4 have been rounded down, fractions between 0.5 and 0.9 rounded up.

(NZT) on 8 June 2020 were also provided with a copy of the shareholder materials, as were directors, auditors and financiers, as required by the Initial Orders.[8]

[18] The Scheme Meeting materials and Final Orders Application were, in further compliance with the Initial Orders, also:

(a) lodged on the NZX and ASC Market Announcement Platforms; and

(b) made available for download from TLT's website.

[19] In addition, the sealed Initial Orders were also made available for inspection and download on the website.

[20] In my Minute of 4 May 2020, I confirmed that:

> I consider the information [in the Draft Scheme Meeting Materials] adequately explains the proposed Scheme and its rationale.

[21] The version of the Scheme Meeting Materials provided to shareholders was in substantially the same form as the materials annexed to Dr Harker's first affidavit. Certain minor and, in my view, inconsequential amendments were made as authorised by the powers reserved in para [15] of the Initial Orders.

[22] I note also that the Draft Scheme Materials submitted with the application for Initial Orders were provided to both the NZX and the Takeovers Panel and that:

(a) The NZX issued a no objection letter on 7 May 2020.

(b) The Takeovers Panel concluded, for the reasons previously explained that a "no objection" statement was unnecessary.

[23] The Scheme Meeting itself was held at 2.30 pm on 10 June 2020 via the virtual meeting platform Lumi, as authorised by TLT's constitution and the Initial Orders.

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[8] Although not required by the Initial Orders TLT also provided a copy of its Originating Application Approving Scheme in its original form. It has since been the subject of minor and immaterial amendments.

[24] The meeting was addressed by Dr Harker, who provided an overview of the Scheme and answered a number of questions as set out in his affidavit dated 15 June 2020. These included questions relating to whether the return of capital would be treated as taxable (not so in respect of long term shareholders and nonactive traders), why the shares needed to be reduced (cancellation was a useful and efficient mechanism for returning capital), what searches had been conducted for potential acquisition opportunities (answered by reference to the company's focus on enhancing shareholder value rather than increasing scale by acquisitions), how the value of $2.91 per share cancelled had been calculated (a function of the total value of the capital proposed to be returned and the ratio of shares to be cancelled) and whether TLT had come under pressure from Infratil to distribute capital to shareholders (not the case).

[25] Consistent with my Initial Orders, the resolution was put to the shareholders for approval as a single class.

[26] The following table sets out the results of the vote:

Total votes in favour of Resolution	434,980,454
Total votes against the Resolution	245,838
Total votes to abstain	919,192
Total votes in favour of the Resolution, as a percentage of total votes of shareholders entitled to vote and voting (including votes to abstain)	99.73%
Total votes in favour of the Resolution, as a percentage of total votes of shareholders entitled to vote and voting (excluding votes to abstain)	99.94%
Total votes cast, as a percentage of total votes of shareholders entitled to vote	92.75%
Total votes in favour of the Resolution (excluding votes by TLT's two major shareholders), as a percentage of total votes cast (excluding votes by TLT's two major shareholders)	96.54%

[27] These results comfortably meet the 75% threshold required by the Initial Orders.

Third factor – the class of shareholders was fairly represented by those who attended the meeting

[28] This Court has previously recognised that, in the case of pro-rata returns of capital to one class of shareholders, there are unlikely to be issues in respect of this requirement. So, for example:

(a) In *Re Auckland International Airport Ltd* Winkelmann J stated:[9]

> There is only one class of shareholder, so there is no risk of one class oppressing another.

(b) In *Re New Zealand Oil and Gas Ltd*[10] Simon France J recognised that the nature of the arrangement, being a return of capital "lessen[ed] any concerns" under this factor.

(c) In *Re PGG Wrightson Ltd*[11] Lester AJ held that because there was only one voting class of shareholder, with each shareholder possessing identical rights, no issue of shareholder oppression arose.

[29] In this case no notice of appearance or notice of opposition has been filed in respect of the Final Orders Application, nor any other challenge made to the result of the Scheme Meeting.

[30] The Scheme was overwhelmingly supported by the votes of the shareholders who voted on the Resolution (99.73%). Apart even from the position of TLT's two major shareholders, the resolution was still strongly supported (96.54% in favour).

[31] Moreover, the Resolution was supported by an overall majority of shareholders. The total number of votes cast represented 92.75% of those shareholders entitled to vote, and of that 92.75%, 99.73% of the votes were cast in favour of the Scheme.

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9 *Re Auckland International Airport Ltd* [2014] NZHC 405 at [15].
10 *Re New Zealand Oil and Gas Ltd* [2017] NZHC 809 at [14].
11 *Re PGG Wrightson Ltd* [2019] NZHC 1780 at [15].

Fourth factor – The Scheme is such that an intelligent and honest person of business acting in respect of his or her interest might reasonably approve, and is generally fair and equitable.

[32] In my Minute dated 4 May 2020 I noted that while I was not at that stage required to determine whether or not the Final Orders Application would be sanctioned, some preliminary assessment was necessary in terms of whether the Scheme was one which "sensible business people might consider … of benefit to the applicant shareholders".[12] That was for the obvious reason that, if the Court was unlikely to grant the Final Orders, there was no point in making Initial Orders. In that context I remarked that schemes involving the return of surplus capital to shareholders are not complex, that there have in the last several years been numerous examples of successful applications to do so and that in my view the proposal was "clearly one which sensible people of business might entertain".[13] Having now reviewed the further evidence filed in support of Final Orders, I adhere to that provisional view. I do so for the following reasons.

The return of capital is reasonable in the current circumstances of the business

[33] The reasons for the Scheme were addressed in Dr Harker's first affidavit and in the Scheme Meeting Materials distributed to shareholders. In summary:

(a) TLT currently has some $535,000,000 of unrestricted cash following the sale of its asset Snowtown 2 windfarm;

(b) after considering a range of factors, including the funding needs of TLT's near term projects, unplanned opportunities for investment, and TLT's need for working capital and liquidity buffers, the Board concluded that approximately $260,000,000 of the company's unrestricted cash was surplus in the sense that no efficient use is currently available; and

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12 *Re Sonodyne International Ltd* [1994] 15 ACSR 494 (VSC) at [499], *Re El Pollo New Zealand Ltd* [1990] 1 NZLR 356 at [358], *Re Radius Properties Ltd* [2017] NZHC 473, [2017] NZCCLR 10, at [14].

13 Minute dated 4 May 2020 at [28].

(c) after considering various options to effect the return of capital, TLT concluded that a scheme of arrangement was the preferred option because it provided certainty, is tax efficient, can be effected relatively swiftly and treats all shareholders equally.

The Scheme has the unanimous support of the Board

[34] The Scheme has the unanimous support of TLT's Board which includes independent directors. The Board has extensive business experience and has concluded the Scheme is in the best interests of its shareholders. As Katz J noted in *Re Nuplex Industries Ltd*[14] "the Board's judgment obviously must be given significant weight".

The Scheme has the overwhelming support of participating shareholders

[35] In *Nuplex Industries Ltd* Katz J also held that if the Scheme is approved by the requisite threshold set out in s 236A(4) of the Act, such support ought to be given due weight as shareholders are the persons best placed to determine what is in their own best interests. Although s 236A(4) does not apply to this particular Scheme, the same voting threshold was used and the results of the vote comfortably satisfy that threshold.

[36] Likewise in *Re Tenon Ltd*[15] Lang J held that the pro-rata return of capital in that case was clearly one that an intelligent and honest person of business might reasonably approve and this was "reflected in the view that shareholders have expressed collectively through the voting process".

[37] To similar effect in *Re PGG Wrightson Ltd*[16], Lester AJ noted that the "overwhelming approval" of the relevant resolution was "some confirmation that the proposal was objectively reasonable".

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14 *Re Nuplex Industries Ltd* [2016] NZHC 1677 at [25].
15 *Re Tenon Ltd* [2016] NZHC 2947 at [23].
16 *Re PGG Wrightson Ltd* [2019] NZHC 1780.

[38] I regard as also relevant the fact that the questions raised by shareholders at the shareholders meeting were adequately and appropriately addressed by the Chairman, as they were in *Re Heartland Bank Limited*.[17]

[39] Although as noted, no notice of appearance or notice of opposition has been filed in respect of the application for Final Orders, two items of correspondence were received by the company which raised objections. The first was from a Gisborne shareholder who stated "My shares will not be cancelled and together with all the rights attaching to these shares will always and permanently remain to my self"(sic).

[40] The correspondence does not disclose grounds of opposition beyond protestation of a cancellation. Because the Scheme involves a pro-rata return of capital and the relative voting and distribution rights of shareholders will not be affected, the protest is not, in my view, compelling.

[41] The second appears as an addendum to a proxy form in favour of the Chairman of the meeting and directing a vote against the Scheme. At the bottom of the form appears the statement:

> At NZ$2.91 per share the price is too low and is below market value. For us to agree to this the price will need to be $3.25/share or greater.

[42] As Dr Harker explains in para 2.5(d) of his affidavit dated 15 June 2020, calculation of the $2.91 per share value reflected the total value of capital proposed to be returned and the ratio of shares to be cancelled. As he further notes, the ratio was not significant in terms of value to shareholders, with one in five selected for ease of calculation.

[43] It will be obvious also that although TLT may currently be trading at a premium to $2.91,[18] that reflects the entitlement to the pro-rata return of $260,000,000 of capital to shareholders on the Register at the record date. A claimed entitlement to current market price and to the proposed return of capital is likely to fall into the "cake and eat it" category.

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17 *Re Heartland Bank Limited* [2018] NZHC 2725 at [21].

18 Its share price as at 2.30 pm on 19 June 2020 is $3.53.

[44] Nothing in these correspondences therefore dissuades me from the view that this Scheme is one which sensible business people might consider is a benefit to the TLT shareholders.

No party is materially prejudiced

[45] As part of its assessment of whether the Scheme is overall regarded as fair and equitable, the Court has on previous occasions considered whether approval of the Scheme is likely to prejudice any third party.[19] In this case there are no third parties who will be materially adversely affected or prejudiced by this Scheme. TLT is demonstrably solvent and Dr Harker deposes there is no reason to believe that the Scheme is likely to materially prejudice any creditor of the company.

[46] With respect to the Initial Orders, I proposed, and TLT accepted, that notification of the Scheme occur to its syndicate of bankers. No concerns have been raised by them.

[47] In respect of the shareholders, the Scheme is, for the reasons I have already set out, fair and equitable – in short, shareholders' voting and distribution rights will be unaffected following its implementation.

Result

[48] I make orders in terms of the application in accordance with the Draft filed on 15 June 2020 with the addition of the words (after "affidavit of Fayez Abdul Aziz Shahbaz affirmed 16 June 2020"), "and the Memorandum on behalf of the Takeovers Panel dated 17 June 2020", and deletion of the words "and **AFTER HEARING** from M Eastwick- Field, J Windmeyer and H M Bain, counsel on behalf of the applicant". In the latter case I do so for the reason that the application has been considered on the papers in accordance with counsel's request.[20]

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19 *Re Nuplex Industries Ltd* [2016] NZHC 1677 at [26], *Re Tenon Ltd* [2016] NZHC 2947 at [18], *Re Fliway Group Ltd* [2017] NZHC 3216 at [25], *Re Tenon Ltd* [2017] NZHC 674 at [16], *Re PGG Wrightson Ltd* [2019] NZHC 1780 at [24].

20 Minute of Muir J, dated 17 June 2020, approving that course. A prominent notice was, however, placed on the Court noticeboard on the day scheduled for determination of the application advising any person attending Court in relation to the matter to make contact at the Court counter with identified personnel. No such contact was made.

[49] I note that the orders include a grant of leave to apply to the Court for approval of any amendment, modification or supplement to the Scheme. That reservation is made out of an abundance of caution. There are no current proposals in that respect.

Muir J