

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

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

CIV-2019-404-002653

UNDER Part 19 of the High Court Rules and ss
239AT and 239ADO of the Companies Act
1993

IN THE MATTER OF an application pursuant to s 239AT of the
Companies Act 1993 for orders extending
the covering period by which the
administrators must convene the watershed
meeting for Tamarind Taranaki Limited
(Administrators Appointed)

AND IN THE MATTER OF TAMARIND TARANAKI LIMITED
OF (ADMINISTRATORS APPOINTED)

IN THE MATTER OF AN M W MANSFIELD and J A KARDACHI
APPLICATION BY Applicants

Hearing: (On the papers)

Counsel: J A McMillan and M L Broad for the Applicants
M Harris for two of the Creditors of Tamarind Taranaki Limited
(In administration)

Date of Minute: 5 December 2019

MINUTE OF MOORE J

Solicitors:
Kensington Swan, Auckland
Buddle Findlay, Wellington

[1] By way of without notice originating application dated 4 December 2019 the applicants seek an order under s 239AT(2) of the Companies Act 1993 (“the Act”) to extend the period for convening the watershed meeting from 9 December 2019 to 17 February 2020.

[2] The grounds relied on in bringing the application on a without notice basis are as follows:

- (a) the convening period expires on 9 December 2019;
- (b) orders on notice to creditors would cause undue delay and/or prejudice to the applicants; and
- (c) if the application is granted there is no prejudice to creditors as they retain their right to challenge the orders.

[3] According to the application and counsel’s memorandum in support the purpose of seeking to extend the convening of the watershed meeting is to provide an opportunity to amend certain contracts. The watershed meeting is required to be held by Monday, 16 December 2019 at which time Tamarind Taranaki Limited’s (“Tamarind”) creditors will decide on the future of the company.

[4] By extending the convening period to 17 February 2020 the applicants hope agreements will have been put in place to facilitate continuing production on profitable terms which will allow the administrators time to arrange a sale of the company’s assets or obtain further funding.

[5] If the convening period is not extended, it is the view of the administrators that they will be obliged to report to the creditors with incomplete information and may be required to “take a conservative approach in respect of the prospects of continued production”. They are of the view that as such there would be a higher probability of liquidators being appointed to Tamarind at the end of the current convening period and following the watershed meeting. The administrators consider that liquidation would not be in the best interests of Tamarind, including its present and former employees.

[6] It is claimed that there is a need for a short extension to allow the administrators to receive and consider information which is pertinent to their report to creditors and their advice as to the best way to achieve an improved outcome for the creditors. It is claimed that there are sound and practicable reasons to support the prospect of a better outcome being achieved following an extension of time as more informed decisions will be able to be made.

[7] In support of the application being determined on a without notice basis, the applicants state:

- (a) extending the convening period for a brief period will not prejudice Tamarind's creditors;
- (b) personal service of the applicant on Tamarind's known 117 creditors and seven employees will be time consuming and expensive given the urgency of the application; and
- (c) if the orders sought are granted, then Tamarind, within five working days, will deliver creditors a copy of the application by email or posting notice on Borrelli Walsh's website.

[8] Counsel for Tamarind advises that on 3 December 2019 the administrators and the solicitors received an email from a solicitor claiming to act for DOF Management Australia Pty Limited, one of Tamarind's creditors. A copy of the email was attached. This advised:

"I understand from media reporting of comments by Jason that an application for extension of the convening period is contemplated by the VAs.

If such is to be sought, kindly ensure that it is sought on notice as I anticipate that it would be opposed.

Regards

Scott [Barker]"

[9] On the afternoon of 4 December 2019 an urgent email was received by the Court from the solicitors, Buddle Findlay, acting for two of Tamarind's creditors. This

advised that the applicants had conveyed to Tamarind's solicitors that if an application for an extension of the convening period was to be made, it must be made on notice because it was anticipated it would be opposed. The email claims that the applicants have not satisfied r 17.23(2)(b) of the High Court Rules 2016 which provides that an application may only be made without notice if the applicant has made all reasonable enquiries and taken all reasonable steps to ensure the application and supporting documents contain all material that is relevant to the application, including any defence that might be relied on by any party and any facts that would support the position of any party. For that reason the solicitors claim that the Court should reject the without notice application and require an on notice application to be filed.

[10] I am not prepared to make the orders sought on a without notice basis before hearing from counsel for Tamarind and counsel for the creditors who have given notice of their likely opposition.

[11] I propose to convene a telephone conference at the earliest opportunity for that purpose. I direct the Registry to liaise with the parties for that purpose.



Moore J

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OF (ADMINISTRATORS APPOINTED)

IN THE MATTER OF AN M W MANSFIELD and J A KARDACHI
APPLICATION BY Applicants

Hearing: 5 December 2019

Appearances: J A McMillan and M L Broad for the Applicants
S Barker for DOF Management Australia Pty Limited (Creditor)
J Wass for China Oil Services Limited (Creditor)

Date of Minute: 6 December 2019

MINUTE (NO. 2) OF MOORE J

Solicitors:
Kensington Swan, Auckland
Buddle Findlay, Wellington
Mr Wass, Wellington

Introduction

[1] Tamarind Taranaki Limited (Administrators Appointed) (“Tamarind”) applies by a without notice originating application for orders extending the convening period by which the administrators must convene the watershed meeting for Tamarind.

[2] The application is sought on a without notice basis for three reasons:

- (a) the convening period expires on 9 December 2019;
- (b) orders on notice to creditors would cause undue delay and/or prejudice to the applicants; and
- (c) if the application is granted there is no prejudice to creditors as they retain their right to challenge the orders.

Background and relevant law

[3] The administrators are Mitchell Mansfield of the Cayman Islands and Jason Kardachi of Singapore. Both are directors of the international insolvency firm, Borrelli Walsh. As administrators they are required to convene the watershed meeting by Monday, 9 December 2019. This is by virtue of the operation of s 239AT of the Companies Act 1993 (“the Act”). A watershed meeting must be convened within the convening period, defined as the period of 20 days after the date on which the administrator is appointed and includes any period which may be extended by order of the Court.¹

[4] A watershed meeting must be held within five days after the end of the convening period or extended convening period, as the case may be.²

[5] The general powers of the Court are contained in s 239ADO of the Act which empowers the Court to make any order it thinks appropriate as to how Part 15A of the Act is to operate in relation to a particular company. The Court’s orders may be made

¹ Companies Act 1993, s 239AT.

² Section 239AV.

subject to conditions and the Court may make an order under this section on the application of the administrator.³

[6] In the present circumstances, with the convening period expiring on 9 December 2019, the watershed meeting is required to be held no later than Monday, 16 December 2019 at which time Tamarind's creditors will decide on the future of the company.

What the administrators seek

[7] By extending the convening period to 17 February 2020 the applicants hope certain agreements will have been put in place to facilitate continuing production on profitable terms. This will allow the administrators time to arrange a sale of the company's assets or obtain further funding. If the convening period is not extended, it is the view of the administrators that they will be obliged to report to the creditors with incomplete information and may be required to take a conservative approach in respect of the prospects of continued production.

[8] Their concern is that if the convening period is not extended there is a greater probability that liquidators may be appointed as a consequence of the watershed meeting. The administrators believe that liquidation would not be in the best interests of the creditors of Tamarind. This includes its present and former employees.

[9] The administrators thus claim that a short extension until mid-February 2020 will permit them to receive and consider information which is pertinent to their report to creditors and their advice as to the best way to achieve an improved outcome for the creditors. It is claimed that there are sound and practical reasons to support the prospect of a better outcome being achieved following an extension of time. This is because any decisions as to Tamarind's future made will necessarily be better informed.

³ Section 239ADO(3) and (4)(c).

Objectors

[10] Consistent with their obligations of utmost candour, reflected in r 7.23(2)(b) of the High Court Rules 2016, counsel for the liquidators advise that on 3 December 2019 they received an email from the solicitors acting for DOF Management Australia Pty Limited (“DOF”), one of Tamarind’s creditors. That email asked that any application by the administrators to extend the convening period be made on notice because it was likely to be opposed.

[11] Later on the afternoon of 4 December 2019 the Registry received an email from Buddle Findlay advising that the firm acted for two of Tamarind’s creditors; that they had previously advised the applicants that any extension of the convening period should be made on notice because it was anticipated it would be opposed.

[12] In response, Mr McMillan, for the applicants, submitted that this advice did not change the basis for seeking the granting of the application on a without notice basis. He emphasised that it was not practical to serve each of Tamarind’s known 117 creditors given the urgency of the application. But he did add that, as a matter of courtesy, the administrators would provide a copy of the application once it was made to the following parties:

- (a) the five creditors who are members of the Creditors Committee elected at the first meeting of Tamarind’s creditors;
- (b) DOF Management Australia Pty Limited; and
- (c) COSL Offshore Management AS, a further creditor of Tamarind which has filed a notice of opposition to the s 280 application previously granted.

[13] As Mr McMillan observed, providing a copy of the application to these creditors is not required but in the circumstances, would be done as a matter of courtesy to enable those creditors to engage with the application.

Judicial telephone conference

[14] Having been appraised of the likely opposition to the application and the likelihood that certain creditors wished to be heard I convened a telephone conference with the parties on 5 December 2019. Those appearing for the applicants were Messrs McMillan and Broad. Mr Barker appeared for DOF. Mr Wass, for China Oil Services Limited (“China Oil”), joined the conference shortly after it commenced.

[15] Mr McMillan submitted that having reviewed the caselaw, of the 19 orders made by this Court under s 239AT none was made on notice. He referred me to *Re Webster Holdings (NZ) Ltd* where I discussed the statutory scheme and how the tight time limits necessarily make extension of the convening period routine, adding:⁴

“... Indeed, an extension is likely to provide the best opportunity to maximise returns to unsecured creditors and the prospects of continuity of employment and benefits for employees if a sale of the business as a going concern can be achieved. In the meantime, the administrators are meeting the ongoing obligations owed to landlords and employees from [the] trading of the business and any assets available to creditors are not being diminished.”

[16] Mr McMillan also referred me to the judgment of Heath J in *Re Nylex (New Zealand) Limited*⁵ where he observed that applications of this type will, necessarily, be made without notice.

[17] In response, Mr Barker accepted that applications of this sort are ordinarily made without notice. But he observed that while that may be the usual practice it cannot mean it is the invariable or correct practice, as least in cases such as the present. DOF is a substantial creditor. China Oil’s debt is approximately US\$15 million. The largest creditor is the Crown with a claim of approximately US\$100 million. That debt represents something of the order of 40 per cent of the total debt.

[18] At a watershed meeting the threshold for decisions requires a 75 per cent majority calculated by value and a 50 per cent majority calculated by the number of creditors. It was for this reason, Mr Barker submitted, that the decision really comes down to one of maths.

⁴ *Re Webster Holdings (NZ) Ltd* [2017] NZHC 297 at [19].

⁵ *Re Nylex (New Zealand) Ltd* HC Auckland CIV-2009-404-1217, 11 March 2009 at [13].

[19] Both he and Mr Wass were opposed to the application being dealt with on a without basis notice and orders made to extend the convening period until mid-February 2020. It was their clients' client wish that the issues be confronted at a watershed meeting convened before Christmas.

Discussion

[20] I am prepared to grant the application but not until February 2020. My reasons follow.

[21] First, the situation confronted by the Court in the present case is materially different from that in the cases referred to me by counsel. Here at least two creditors have expressed a strong view that the watershed meeting should take place before Christmas. They point out that this is not an insolvency which is "awash with cash". At the present time Tamarind is unable to carry on its business of pumping oil because it is subject to an Environmental Protection Agency abatement notice. Furthermore, before Tamarind went into voluntary administration it terminated the charter of the vessel into which the oil was pumped. It is for that reason Mr Barker and Mr Wass expressed the view that no real or useful purpose would be served by "kicking the can down the road" until February.

[22] Secondly, and in my view most importantly, whether the company should continue in administration is properly a matter for those most directly affected to decide. And that is the creditors.

[23] In making that observation I do not overlook Mr McMillan's forceful submission that it will be difficult, if not impossible, for the administrators to be in a position to put to the creditors an arrangement option or options. They simply will not have the time to do so. However, I accept Mr Barker's submission that if the requisite majority of creditors at the watershed meeting determine that they do not wish Tamarind to continue in voluntary administration then it will be a matter for them to decide at the watershed meeting. Alternatively they may agree to continued administration.

[24] Thirdly, I do not accept that it will be unduly difficult or expensive to give notice to the 117 creditors. In the context of insolvency matters 117 creditors is not a particularly large number. Furthermore, electronic communication means that the provision of the notice, including the transmission of voluminous documents, can be undertaken at the press of a button. Although Mr McMillan was unable to confirm that the administrators have the email addresses of all creditors, he was able to confirm there were email addresses for most.

[25] I also note that in his memorandum of 4 December 2019 Mr McMillan suggested that notice of the application might also be conveyed by posting notice on Borrelli Walsh's website on the webpage relating to the administration of Tamarind.

[26] Fourthly, I observe that the administrators suggest that if the orders sought were granted, an order should also be made that any person, including Tamarind's creditors, will be able to apply to modify or discharge the orders "on appropriate notice to the administrators". The orders I intend to make will, in a practical sense, have that effect.

[27] For these reasons I am prepared to grant the application but on considerably more limited terms than the applicants seek. That course will provide the creditors with the opportunity before Christmas to determine the future of Tamarind's administration. As I have already observed, that is properly a matter left to them as the most directly affected parties.

Orders

[28] Leave is granted for this application to be made on a without notice basis.

[29] The convening period for the watershed meeting is extended from **Monday, 9 December 2019 to 5:00 pm on Monday, 16 December 2019.**

[30] Within **three working days** of the date of this Minute copies of the application, supporting documents, orders and this Minute be given to creditors of Tamarind by:

- (a) email, where an email address has been provided to Tamarind; or

