IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2024-404-003083

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: S D A Gollin and A Simkiss for the Applicant

Minute: 16 December 2024

MINUTE OF ANDERSON J

Solicitors:
MinterEllisonRuddWatts, Auckland

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. The Arrangement is intended to return approximately NZ$45 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:

(a) an originating application for final orders approving the scheme of arrangement between Tower and its shareholders for the return of capital to shareholders (Arrangement); and

(b) an interlocutory application for initial procedural orders regarding arrangements for seeking shareholders' approval for the Arrangement (Interlocutory Application).

[3] These have been filed without notice as is usual practice and consistent with the legislative scheme.

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

(a) covering letter dated 2 December 2024;

(b) memorandum of counsel for the applicant dated 28 November 2024;

(c) affidavit of Michael Peter Stiassny affirmed on 28 November 2024; and

(d) bundle of authorities.

[5] A further memorandum was filed on 16 December 2024 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. I also sighted correspondence from the Reserve Bank confirming receipt.

[6] 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 in light of the matters in the previous paragraph.

[7] 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.

Hearing for Originating Application

[8] The Originating Application for final orders is to be set down for a half day hearing by the Registry on **Thursday, 13 March 2025 at 10 am**.

Application for initial orders under s 236

[9] 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.

[10] By the proposed Arrangement it is intended 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$1.1858 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).

[11] 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, to seek the Court's approval of the Arrangement by way of final orders.

The proposed timing

[12] the indicative timing of the key steps for carrying out the Arrangement are as follows:

Event	Date
Annual Meeting	11 February 2025
Final orders made by High Court	7 March 2025
Record Date	14 March 2025
Payment to shareholders	28 March 2025

[13] If the final Court orders have not been made by 7 March 2025, the Record Date is proposed to be five business days after the date on which the final orders from the High Court sanctioning the Scheme are made. Payment would be made to shareholders within 10 business days after the Record Date.

Jurisdiction

[14] 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.

[15] 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.

[16] The meaning of "arrangement" under s 236 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.

[17] Counsel refer to several recent cases where capital repayments have 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;

(b) *Re Tilt Renewables Ltd* [2020] NZHC 1398;

(c) *Re PGG Wrightson Ltd* [2014] NZHC 405;

(d) *Re Tower Limited [2022] NZHC 328; and*

(e) *Burger Fuel Group Ltd v Mason Trustee Ltd* [2024] NZHC 1352..

[18] 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

[19] 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 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.

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

Summary

[20] Tower's memorandum in support and accompanying affidavit outline in detail the relevant law and factual platform for the orders sought. I conclude that (subject to some very minor changes) the orders are appropriate having regard to the nature of the scheme of arrangement (return of capital) and the position and structure of the company.

[21] The minor changes are as follows:

(a) That the materials to be sent to shareholders are to include this minute;

(b) I amend the timeframe for deemed receipt of the materials sent. The orders sought refer to a period of 48 hours which I consider to be too short, particularly for Australian shareholders who receive the material by ordinary post. I amend the period of deemed receipt to four business days.

[22] The orders I make are annexed to this minute as Schedule A (with minor changes made placed in italics for convenience).

Information to be provided to shareholders

[23] I am satisfied that the interlocutory orders sought in relation to the provision of information to shareholders are appropriate except for the two matters referred to in paragraphs [21](a) and (b) above.

Other interested parties?

[24] The Arrangement will not affect the creditors of Tower because appropriate solvency requirements will be met before and after it is implemented and because 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 27 November 2024 when the decision to proceed with the Arrangement was approved.

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

[25] 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.

Meeting of shareholders

[26] The orders sought directing the holding of a meeting of shareholders to consider and, if thought fit, to approve the proposed Arrangement are appropriate.

Updating the Court on Report to the Court on compliance

[27] Following the meeting, 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*.[2]

No need to determine classes of shareholders

[28] Section 236(2)b) of the Act empowers the Court to "determine the shareholders or creditors that constitute a class of shareholders or creditors of a company" because it may be appropriate to hold meetings of each class of shareholders to consider an arrangement.

[29] 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

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

payment will be capital proceeds for the purposes of calculating any capital gain or loss on the cancellation of shares.

[30] Tower still intends to proceed with the proposed arrangement regardless of whether a Class Ruling is issued. Tower has already obtained a positive IRD ruling on the tax consequences for New Zealand shareholders.

[31] The memorandum filed in support of the application for interlocutory orders addressed the Court on whether Tower's shareholders should be divided into classes for the purposes of the meeting on the Arrangement in those circumstances.

[32] Counsel directed me to case law on class definition focussed on legal rights in relation to the company[3] and to the majority in the Supreme Court decision in *Trends Publishing International Ltd v Advice Wise People Ltd.*[4] This articulated a broader test in relation to Part 14 compromises based not just on the legal rights and interests of creditors. There is a question whether that decision applies to Part 15 arrangements.[5]

[33] Although the tax treatment may differ between Australian and New Zealand shareholders, all Tower shareholders have the same legal rights and interests. Shareholders will be treated equally by the Arrangement in relation to those shares. Shareholders in different jurisdictions may commonly be subject to differing tax rules. That is a matter personal to them. I do not consider it makes a difference that the Tower is registered on both the NZX and ASX. Any differing tax treatment of the returned capital based on the tax location of the shareholder is not a matter "in relation to the company" as contemplated by *Trends*.[6] It is a matter extraneous to it.

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3 *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573 (per Bowen L J at 583); *Re Hellenic and General Trust Limited* [1976] 1 WLR 123 (per Templeman J at 125 to 126); *Re Jax Marine Pty Limited* [1967] 1 NSWR 145 at 148.

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

5 The majority characterises the issue of classification as instrumental, facilitating a process that will produce compromises in accordance with the policy of the Act (at [64]-[65]). That directs the Court to an enquiry of the purpose of the Part 15.

6 At [68].

[34] Accordingly, even on the approach of the majority in *Trends*, Tower has only one class of shares here.[7]

No order is required under s 236A

[35] 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.

[36] 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.

[37] I accept that no order is required under s 236A.

Leave to apply

[38] To respond to any unexpected developments 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.

Key Scheme Condition

[39] A "Key Scheme Condition" is included which ensures that if prior to the implementation of the Arrangement there is a change in circumstance that means that the Board no longer consider it would be prudent for the Arrangement to proceed (including due to non-compliance with solvency and regulatory capital requirements), then it will not be implemented, unless it is amended to comply with the Key Scheme Condition. Should that occur, Tower will update the Court accordingly and make further application as appropriate.

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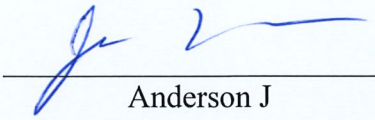
7 That was also the conclusion in *re Tower Limited* [2022] NZHC 328 at [12]

Costs

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



Anderson J

SCHEDULE A

Orders pursuant to s 236 of the Companies Act 1993

[1] I make the interlocutory orders set out below.

Meeting of Tower Shareholders

[2] That Tower shall:

(a) hold an Annual General Meeting of its shareholders (the **Meeting):**

(i) at a venue in Auckland at 10 am NZT on Tuesday 11 February 2025 (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;

(b) at the Meeting put to its shareholders (among other business), a proposed scheme of arrangement (the Arrangement) for their approval by special resolution, as annexed to the accompanying Originating Application for orders approving the Arrangement under Part 15 of the Companies Act 1993 (Act) (the Originating Application); and

(c) except as otherwise provided in these orders, conduct the Meeting in accordance with the constitution of Tower, the provisions of the Act, the NZX Listing Rules and the ASX Listing Rules.

[3] The special resolution shall be approved 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.

[4] Those Tower shareholders whose names appear in the register of shareholders at the close of business on 7 February 2025 are entitled to be represented and vote on

the Arrangement at the Meeting, or at any adjournment(s) or postponement of the Meeting.

[5] 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.

[6] A shareholder is entitled to attend the meeting online or in person. Shareholders will be provided with a virtual meeting link contained in the Notice of Annual General Meeting.

[7] Voting will be conducted by poll in accordance with the NZX Listing Rules and Tower's constitution.

[8] Representatives of Computershare Investor Services Limited (or some such other company Tower deems fit) shall act as scrutineers at the Meeting.

Notice of Meeting and of Originating Application

[9] Tower shall:

(a) give notice of the Meeting and of the Originating Application by sending to each shareholder, not less than 20 business days (as defined in Tower's constitution) before the Meeting, the following documents:

(i) 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;

(ii) a proxy form for use by shareholders at the Meeting;

(iii) a guide on how to log into the Meeting remotely;

(iv) a copy of the Originating Application; and

(v) a copy of the interlocutory orders made by the Court;

(vi) *the minute pursuant to which the interlocutory orders were made.*

(together, the Shareholder Materials).

(b) 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.

(c) The Shareholder Materials will be sent to the following persons:

(i) those shareholders whose names appear in the register of shareholders at 5 pm (NZT) on the fourth business day before the Shareholder Materials are sent; and

(ii) the directors and auditors of Tower.

(d) 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.

(e) 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).

(f) The Shareholder Materials will be made publicly available for inspection and download on Tower's website not less than 20 business days (as defined in Tower's constitution) before the Meeting.

[10] In accordance with its continuous disclosure obligations, Tower will disclose the Shareholder Materials as described at paragraph [9](a) above, on NZX's and ASX's market announcement platforms.

[11] The Shareholder Materials shall be deemed to have been received by those to whom they were ordered to be sent *four (4) business days* after being sent as described in paragraph [9](d)or [9](e).

[12] Tower shall be granted leave to send the Shareholder Materials to shareholders outside New Zealand in the manner referred to in paragraph [9](d) or [9](e).

[13] 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):

(a) the accidental failure or omission by Tower to give the Shareholder Materials to the persons specified in paragraph [9](c)or

(b) the non-receipt of the Shareholder Materials by those persons.

Powers of Amendment and Adjournment

[14] 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. The Arrangement as so amended will be the Arrangement to be submitted to the shareholders at the Meeting for approval. Where possible any such amendments will be made before Tower distributes the Shareholder Materials as detailed in paragraph [9] above and:

(a) If the Arrangement or Shareholder Materials are amended before the Shareholder Materials are distributed, Tower will distribute amended Shareholder Materials as detailed in paragraph [9] above or as directed by the Court; but

(b) If any material amendment to a document contained in the Shareholder Materials is made after the Shareholder Materials are distributed, to the extent reasonably practicable. Tower will notify shareholders of amendments by lodging notice on NZX's and ASX's market announcement platforms and the Tower website, or other means the Court considers fit to ensure timely notification.

[15] 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.

[16] Subject to the terms of these orders, the Meeting will otherwise be conducted in accordance with the provisions of the Act, the NZX Main Board Listing Rules, the ASX Listing Rules and Tower's constitution, as applicable.

Shareholder opposition

[17] Any shareholder who opposes the Originating Application may, no later than five (5) working days (as defined in the High Court Rules 2016) after the Meeting, file a notice of intention to appear in this proceeding advising that they oppose the application.

[18] Within five (5) working days (as defined in the High Court Rules 2016) 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

[19] 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.

[20] Tower will, prior to the Court's consideration of the Originating Application, file with this Court affidavit(s) verifying compliance with any initial orders granted by the Court and the actions taken and the resolutions passed by the shareholders at the Meeting, and serve the same documents *together with any amendments referred to in Order [14](b)* on any person who has filed a notice of opposition or a notice of intention to appear.

Other

[21] 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.

[22] The implementation of the Arrangement is subject to the Board of Directors of Tower, at its sole discretion, remaining satisfied that Tower is complying with solvency and regulatory capital requirements, including under its capital management process requirements, and that it remains prudent to undertake the Arrangement, in each case, up to 8 am on the day the Arrangement is given effect being the day on which shares are to be cancelled under the Arrangement, expected to be in March 2025 (Key Scheme Condition).

[23] If the shareholders do not vote to approve the Arrangement, or if the Key Scheme Condition is not satisfied (and the Arrangement is not amended so that the Key Scheme Condition is satisfied) Tower will likely discontinue the Originating Application.

[24] Dispensing with formal service of this interlocutory application (and any order made pursuant to it) on any person.

Hearing for Originating Application

[25] I direct that the Originating Application for final orders is to be set down for a half day hearing by the Registry on **Thursday, 13 March 2025 at 10 am**.