

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

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

**CIV-2019-404-000924  
[2019] NZHC 1683**

UNDER Part 15 of the Companies Act 1993

AND

IN THE MATTER OF a scheme of arrangement under Part 15 of  
the Companies Act 1993

AND

IN THE MATTER OF WESTLAND CO-OPERATIVE DAIRY  
COMPANY LIMITED  
Applicant

Hearing: 18 July 2019

Appearances: T G H Smith, S J Leslie and A E Buchly for Applicant  
J C Caird, J C Dickson, and V Anderson for Hongkong Jingang  
Trade Holding Co Ltd

Judgment: 18 July 2019

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**ORAL JUDGMENT OF VENNING J**

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Solicitors: Bell Gully, Wellington  
Simpson Grierson, Wellington

## **Introduction**

[1] Westland Co-operative Dairy Company Limited (Westland) seeks orders from the Court that:

- (a) the scheme of arrangement described in the Scheme Plan attached to the application dated 16 May 2019 is approved and binding upon:
  - (i) Westland;
  - (ii) Hongkong Jingang Trade Holding Co Ltd (Hongkong Jingang);
  - (iii) every person who is a scheme shareholder in terms of the Scheme Plan (as defined); and
- (b) Westland is granted leave to apply for approval of any amendment, modification, or supplement to the Scheme as may be required.

[2] On 26 June 2019 this Court made initial orders for the holding of a shareholders' meeting on 4 July 2019 to enable shareholders to consider, and if they supported it, to approve the Scheme. The initial orders also set out the information to be provided to shareholders in advance of the meeting and the steps any party wishing to oppose the application was to take.

[3] The following filed affidavit evidence in support of the initial orders:

- (a) Peter Hugh Morrison – chairperson of Westland board of directors;
- (b) Michael John Lorimer – a director of Grant Samuels, a provider of corporate advisory services;
- (c) Philip Edward Leightley – a solicitor acting for Westland; and
- (d) Shuang Zhang – the legal director of Inner Mongolia Yili Industrial Group Co Ltd (Yili) which owns the shares in Hongkong Jingang.

[4] In support of the application for final orders further affidavits have been filed by:

- (a) a second affidavit from Mr Morrison;
- (b) Xuguang Zhang of Hongkong Jingang; Ms Zhang is the mergers and acquisitions director in the Strategic Management Department of Yili;
- (c) two affidavits of William Henry Malan of Link Market Services (Link), the scrutineer from the shareholders' meeting;
- (d) two affidavits of Tara Jane Wylie, solicitor at Simpson Grierson, solicitors for Hongkong Jingang; and
- (e) five affidavits of Jack Adam Gordge, a solicitor, as to service and procedure.

#### **Westland and the background to the Scheme**

[5] Westland is a co-operative dairy company that purchases raw milk from its shareholders and manufactures dairy products for sale. It is incorporated in New Zealand under the Companies Act 1993 and the Co-operative Companies Act 1996. Its registered office is at 56 Livingstone Street, Hokitika, New Zealand. Westland's audited financial statements for the year ended 31 July 2018 disclosed net assets of \$123,154,000. From a revenue in excess of \$692,000,000 it earned a profit of \$560,000. It employs 573 individuals and exports approximately 87.5 per cent of its dairy product.

[6] As at 16 May 2019 Westland had over 72,008,605 fully paid ordinary shares in six different classes. The nominal value of each class of share was the consideration payable to the shareholder if the shares were redeemed by Westland. Shares are redeemed in accordance with its constitution, following a shareholder ceasing to supply milk to Westland.

[7] Voting rights are based on the volume of milk solids supplied by the shareholder to Westland in the previous year. Each shareholder receives one vote per 10,000 kg or part thereof, of milk solids supplied, up to a maximum of 10 votes per shareholder or group of shareholders (controlled by the same persons). Voting rights are identical across share classes.

[8] As at 16 May 2019 Westland had 334 shareholders and 413 supplying farms. There were no majority or controlling shareholders. Most of the shareholders have addresses in Canterbury and Westland, although it has shareholders with addresses recorded in the share register from other parts of New Zealand. There are no shareholders with addresses recorded in the share register outside New Zealand. All Westland's directors are non-executive directors.

[9] Westland commenced a strategic review of its situation in late 2017. The strategic review determined that Westland was constrained by its high debt levels which would likely require shareholders to commit to ongoing retentions to enable it to fund its operational needs, service and reduce existing debt and to fund the implementation of its planned five year business strategy. The review also concluded Westland's existing debt levels limited its financial flexibility to pursue growth and added financial risk in relation to its ability to absorb market shocks.

[10] The strategic review process identified and evaluated three options:

- (a) merger or sale;
- (b) introduction of a cornerstone investment;
- (c) status quo.

[11] The Board was concerned that status quo would not enable Westland to receive the same milk supply as in previous years because of the level of Westland's milk pay-out in recent seasons compared to competitors.

[12] Westland approached over 25 parties on a confidential basis to seek indications of interest to participate in either a cornerstone investment or a full acquisition of, or

merger with, Westland. It received a number of indicative non-binding confidential proposals, and prepared a shortlist. Ultimately the Board resolved to progress a final proposal received from Hongkong Jingang, which it then negotiated during March 2019.

[13] On 18 March 2019, Westland and Hongkong Jingang entered into a Scheme Implementation Agreement (SIA), which provided for the parties to have a period to implement the Scheme, during which time Westland agreed not to solicit, initiate, or encourage competing proposals, and during which time Hongkong Jingang would have rights to match any competing proposals. The parties agreed reciprocal break-fee arrangements should either not proceed with the Scheme in certain circumstances subject to agreed exceptions.

### **The Scheme**

[14] The effect of the SIA is to provide for Hongkong Jingang to purchase all the shares in Westland. In exchange for their shares, each Westland shareholder will receive \$3.41 per share. Westland will cease to be a co-operative company. Westland's current shareholders will also be entitled to receive from Westland (guaranteed by Hongkong Jingang) milk supply commitments in accordance with the terms of a Milk Supply Commitment Deed entered into for the benefit of shareholders prior to the date of the initial orders. The Milk Supply Commitment Deed will take effect from the Implementation Date as defined in the SIA. Hongkong Jingang has committed to Westland accepting and collecting milk from each qualifying farm for a period of 10 years from the Implementation Date, on terms and conditions of supply which, taken as a whole, are no less favourable than those set out in the Amended Suppliers' Handbook which is calculated to be no less than the Fonterra Farm Gate Market Price.

[15] The implementation of the Scheme is conditional on:

- (a) Overseas Investment Office consent;
- (b) no regulatory intervention;

- (c) shareholder approval;
- (d) Court approval;
- (e) no target prescribed occurrence occurring.

[16] The implementation of the Scheme is also conditional upon:

- (a) any other conditions imposed by the Court and approved in writing by Westland and Hongkong Jingang; and
- (b) none of the SIA, the Deed Poll, or Milk Supply Commitment Deed being cancelled by the Implementation date.

### **Statutory framework**

[17] The application is made under ss 236 and 237 of the Companies Act 1993 (the Act). As relevant the sections provide:

#### **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.
- (2) Before making an order under subsection (1), the court may, on the application of the company or any shareholder or creditor or other person who appears to the court to be interested, or of its own motion, make any 1 or more of the following orders:
  - (a) an order that notice of the application, together with such information relating to it as the court thinks fit, be given in such form and in such manner and to such persons or classes of persons as the court may specify:
  - (b) an order directing the holding of a meeting or meetings of shareholders or any class of shareholders or creditors or any class of creditors of a company to consider and, if thought fit, to approve, in such manner as the court may specify, the proposed arrangement or amalgamation or compromise and, for that purpose, may determine the shareholders or creditors

that constitute a class of shareholders or creditors of a company:

- (c) an order requiring that a report on the proposed arrangement or amalgamation or compromise be prepared for the court by a person specified by the court and, if the court thinks fit, be supplied to the shareholders or any class of shareholders or creditors or any class of creditors of a company or to any other person who appears to the court to be interested:
- (d) an order as to the payment of the costs incurred in the preparation of any such report:
- (e) an order specifying the persons who shall be entitled to appear and be heard on the application to approve the arrangement or amalgamation or compromise.

...

- (3) An order made under this section has effect on and from the date specified in the order.

...

### **237 Court may make additional orders**

- (1) Without limiting section 236, the court may, for the purpose of giving effect to any arrangement or amalgamation or compromise approved under that section, either by the order approving the arrangement or amalgamation or compromise, or by any subsequent order, provide for, and prescribe terms and conditions relating to,—
  - (a) the transfer or vesting of real or personal property, assets, rights, powers, interests, liabilities, contracts, and engagements:
  - (b) the issue of shares, financial products, or policies of any kind:
  - (c) the continuation of legal proceedings:
  - (d) the liquidation of any company:
  - (e) the provisions to be made for persons who voted against the arrangement or amalgamation or compromise at any meeting called in accordance with any order made under subsection (2)(b) of that section or who appeared before the court in opposition to the application to approve the arrangement or amalgamation or compromise:
  - (f) such other matters that are necessary or desirable to give effect to the arrangement or amalgamation or compromise.

...

[18] As Westland is a code company for the purposes of the Takeovers Act 1993 an order approving the arrangement cannot be made unless Westland shareholders support the arrangement by resolution approved by the requisite majority and either the Court is satisfied the shareholders will not be adversely affected by the use of the Part 15 proceeding instead of the Takeover Code or the Takeovers Panel confirms it has no objection.

[19] The Court has a discretion whether or not to approve a scheme of arrangement under s 236(1) of the Act.

[20] On an application for approval of a Scheme under Part 15 the Court must be satisfied:<sup>1</sup>

- (a) the relevant statutory provisions have been complied with;
- (b) the proposed arrangement has been fairly put to the relevant shareholders who had all information reasonably necessary so that they could make an informed decision;
- (c) the shareholders were fairly represented by those attending the meeting and the statutory majority acted in good faith without coercing any minority in order to promote interests adverse to shareholders; and
- (d) the arrangement might reasonably be approved by a reasonable and intelligent business person acting in their own interests.

[21] In *Weatherston v Waltus Property Investments Ltd* the Court of Appeal also held it was appropriate to consider whether overall the agreement was fair and equitable.<sup>2</sup>

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<sup>1</sup> *Re CM Banks Ltd* [1944] NZLR 248 (SC); and *Re Methven Ltd* [2019] NZHC 608.

<sup>2</sup> *Weatherston v Waltus Property Investments Ltd* [2001] 2 NZLR 103 (CA).

## **Compliance with statutory provisions**

[22] Since the initial orders were made on 29 May 2019 Westland has complied with the requirements under the Initial Orders. In summary:

- (a) all documents filed in the proceedings have been served on the Takeovers Panel;
- (b) Westland has advertised the Scheme Meeting and rights of opposition as directed;
- (c) the Scheme Booklet was distributed to shareholders. The only substantive changes, apart from correcting typing errors, the insertion of dates, and updating shareholder percentages to reflect shareholder surrenders and cancellation, were –
  - (i) additional wording was included to reflect additional consequences of the Scheme not completing and no alternative proposal conferring similar financial benefits for Westland and its shareholders being received. That followed a regular meeting between Westland and its banks on 27 May 2019. The consequences are that retentions would be required to be withheld from milk pay-outs and adjustments would be required to the projected advance payment rate and Westland may be required to undertake significant asset sales; and
  - (ii) the removal of wording stating directors had not received any approaches in the period since 18 March 2019 to reflect an unsolicited email received by Westland purporting to offer an alternative transaction;
- (d) in addition to distributing the Scheme Booklet to shareholders it was made available for inspection and download on the shareholder portal on Westland's website;

- (e) the Scheme Booklet was distributed to directors, auditors and also to shareholders more than 10 working days before the Scheme Meeting as required. In addition copies of the Scheme Booklet were made available at Westland's offices in Hokitika and Rolleston;
- (f) Westland did not receive any requests for the Scheme Booklet from people who became shareholders after the Scheme Booklet record date, (5.00 pm, 7 June 2019) but arranged for its share registrar, Link, to send a copy of the Scheme Booklet to every person who became a shareholder after the Scheme Booklet Record Date up to 4 July 2019. There was one new shareholder as a result of a share transfer from a farm sale. That shareholder was sent the Scheme Booklet and voting pack on 28 June 2019.

[23] Mr Morrison's first affidavit in support was affirmed on 15 May 2019. In his second affidavit sworn on 12 July 2019 he deposes that on 22 May he became aware of an email sent to a Westland staff member seeking to contact one of Westland's independent directors, Keith Smith, on behalf of an entity "New Zealand Gold". The email suggested an alternative to the proposed sale to Hongkong Jingang. The email was passed onto Mr Smith and Hongkong Jingang were notified of the approach. Westland itself did not reply to the email.

[24] The SIA defines a superior proposal as a written bona fide qualifying transaction. Qualifying transaction is itself defined in the SIA. Mr Morrison did not consider the communication from New Zealand Gold met the criteria for a superior proposal. I agree with Mr Morrison's assessment. It is not possible to understand the exact nature of the proposed transaction New Zealand Gold was suggesting from the email which was in very general and non-specific terms. It did not provide any information to suggest that New Zealand Gold was in a position to undertake the necessary qualifying transactions much less one that would be superior to the proposed sale to Hongkong Jingang.

## **Amendment**

[25] In the initial orders the Court reserved leave to Westland to make any such amendments to materials contained in the Scheme Booklet as it may determine in its best interests or the best interests of its shareholders or other affected or properly interested persons.<sup>3</sup>

[26] Westland amended the Scheme Booklet after it became aware of an additional matter that it needed to disclose under cl 12 of Schedule 2 of the Takeovers Code, namely details of an incentive plan for certain of its senior employees, known as the Management Incentive Plan. The Management Incentive Plan applies to six managers, who may receive total aggregate payments of \$1,648,053.20 if the Scheme proceeds. The amounts are to be paid in three instalments, subject to certain conditions being met, with the third instalment falling six months after implementation of the Scheme and also being subject to the relevant senior manager remaining employed by Westland.

[27] Although the Management Incentive Plan was not referred to in the original Scheme Booklet, it received a certain amount of publicity once it became public knowledge. The Takeovers Panel engaged in correspondence with Westland's advisers seeking to clarify why the Management Incentive Plan had not been initially disclosed, either to the Panel or to the Court.

[28] Westland accepted that the Management Incentive Plan should have been initially disclosed to the Takeovers Panel and the Court, but submits that when the error was identified it was remedied and the Takeovers Panel immediately advised. Relevantly, as appears from the correspondence, the Westland Management Incentive Plan was put in place at the time Westland commenced its broad strategic review process. Discussions were had with the relevant senior managers regarding their participation in it and the proposed terms of the Plan commenced early August 2018. The Management Incentive Plan was not put in place specifically in respect of the particular Scheme now before the Court for approval.

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<sup>3</sup> *Re Westland Co-operative Dairy Company Ltd* [2019] NZHC 1196 at [19].

[29] The Takeovers Panel advised Westland's solicitors, Bell Gully, on 2 July 2019 that, having met to consider the matter it had decided, based on the information provided to it, and in light of all the relevant circumstances, that it would not take the failure to initially disclose the Management Incentive Plan any further at that stage. The Panel gave significant weight to the prompt and proactive action taken to correct the incorrect disclosure in the Scheme Booklet once the error was identified. The Panel asked for the opportunity to review the draft affidavits and submissions filed with the Court on this application for final orders.

[30] After receiving those documents the Panel has provided a further letter of 12 July in which it confirms that, based on the information provided, it has no objection to an order being made under s 236(1) of the Companies Act 1993 in respect of the scheme of arrangement. In providing that no objection statement the Panel was satisfied that:

- (a) all material information relating to the Scheme proposal had been disclosed;
- (b) the standard of disclosure of all shareholders has been equivalent to the standard that would be required by the code in a code regulated transaction;
- (c) the interest classes of shareholders had been adequately identified; and
- (d) the other matters referred to in the Panel's Guidance note on schemes of arrangement have been addressed and there were no other reasons for the Panel to object to the proposed Scheme.

[31] For completeness, I record that the Court need not approve the Scheme merely because the Panel has no objection.<sup>4</sup>

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<sup>4</sup> Companies Act 1993, s 236A(3).

## **Other developments**

[32] One shareholder, So Big Dairies Ltd, tendered a late proxy form. The shareholder advised it had not received the relevant voting forms. There was some confusion as to the correct form to be completed. Westland determined it was in the interests of shareholders to waive the proxy deadline and allow that shareholder to vote.

[33] Westland has received correspondence from a solicitor on behalf of a number of former shareholders. They take issue with the fact that a shareholder that issued a 2020 season cessation notice on or before 31 March 2019 and who consequently surrendered their shares will be paid the nominal value of their shares on the Implementation Date but that other former shareholders will remain unsecured creditors and may have to wait up to five years from the surrender date to be paid. As at 31 January 2019 approximately \$11.1 million was said to be owed to the former shareholders who fell into that category.

[34] Mr Morrison confirms that the former shareholders are and will remain unsecured creditors of Westland. The financial statements of Westland record the liability to the former shareholders as a non-current liability. Mr Morrison and the other directors are of the view the Scheme will have no effect on those former shareholders' entitlements. They remain unsecured creditors due to receive their unsecured debt no later than five years after the date of surrender (and cancellation) of their shares.

[35] I note the former shareholders also made a submission to the Overseas Investment Office opposing consent by that Office until this issue was resolved. The Office advised that it had taken into account the former shareholders' views to the extent it was able to but that it was a matter for the former shareholders to look to resolve with Westland Board and, if the transaction went ahead, the new owners. That remains the position.

[36] Finally, as Mr Morrison has disclosed to the Court, three days before the Scheme Meeting, Westland received a request from six shareholders seeking information under s 178 of the Companies Act about the proposals received by

Westland from third parties as part of the initial process following the strategic review. Mr Morrison and other members of the Board did not consider it was in Westland's interests to disclose that information (apart from a conflicts register and information about how the directors voted, which was provided) because the information may have been a breach of the exclusivity obligations under the SIA and could have exposed Westland to a liability to pay a reimbursement fee of \$5,880,000 plus GST. It could also have caused Westland to be in breach of confidentiality obligations to third party participants in the process who had made proposals on a confidential basis.

[37] The Scheme Meeting took place. Mr Malan of Link, the meeting scrutineer, has confirmed that the resolution put to the meeting:

That the Scheme under which all of the shares in Westland are transferred to [Hongkong Jingang] for \$3.41 per Share (the terms of which are described in this Scheme Booklet) is approved

was passed by a majority of 93.79 per cent of the vote of the shareholders entitled to vote and voting, and was passed by a majority of 89.87 per cent of the total number of votes of those shareholders entitled to vote.

[38] Westland has subsequently served written notice of the results of the Scheme Meeting on the Takeovers Panel and Hongkong Jingang as required.

[39] Westland has not been served with any notice of opposition or notice of appearance. No opposition has been filed to the application.

[40] In summary to this point, there has been no adverse regulatory intervention. The shareholders have approved the Scheme, and there has been no target prescribed occurrence. The Overseas Investment Office (OIO) has recently confirmed its approval.

[41] In her first affidavit Ms Wylie confirmed that Hongkong Jingang had no comments on the conditions proposed by the OIO and that it had provided final signed copies of the OIO application and investment plan. All that remained outstanding at the time was for Hongkong Jingang to complete statutory declarations as to good character and to confirm that the OIO application was true and correct.

[42] Subsequently, Ms Wylie has filed a second affidavit. She confirms that on 16 July 2019 the OIO confirmed it had granted consent. The OIO was satisfied the individuals who will control the investment have relevant business experience and acumen and are of good character. The applicant had demonstrated financial commitment to the investment and the OIO was satisfied the residential land in issue is likely to continue to be used for its current purpose.

[43] Mr Zhang has confirmed that Hongkong Jingang has executed the Deed Poll and Milk Supply Commitment Deed.

[44] Returning to the considerations for the Court, the Court is satisfied that:

- (a) the relevant statutory provisions have been complied with;
- (b) the proposed arrangement has been fairly put to the relevant shareholders who had all the information reasonably necessary in order to make an informed decision;
- (c) on the evidence of the conduct of the meeting from Mr Morrison and Mr Malan the shareholders were fairly represented by those attending the meeting. The statutory majority acted in good faith and without coercing any minority in order to promote interests adverse to existing shareholders. There was no suggestion otherwise;
- (d) the arrangement is the type which might reasonably be approved by a reasonable and intelligent business person acting in their own interests.

[45] The takeover purchase price of \$3.41 per share is well above the current valuation range for the shares in Westland as set out in the Independent Advisers' Report which places the value in the range of \$0.88 to \$1.38 per share. There is also the additional advantage to shareholders of the Milk Supply Commitment Deed. The Deed confirms the Scheme has the unanimous support of the Board. The Board's judgment ought to be given weight as well.<sup>5</sup>

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<sup>5</sup> *Re Nuplex Industries Ltd* [2016] NZHC 1677.

[46] Also Westland has a clear need for new capital to become competitive and is not able to raise that capital from shareholders and has a related and clear need to address its low milk pay-out, which has been below the Fonterra FGMP for the last three seasons. If the Scheme is not approved there is no certainty that Hongkong Jingang or another bidder would make another offer for the shares.

[47] Only two questions were raised at the meeting. Neither of those questions, nor the additional matters referred to above, suggest the proposal is unfair. The former shareholders who are unsecured creditors have not been disadvantaged. Their position remains the same as it was prior to the Scheme. Their entitlement to be repaid is based on the provisions of the Co-operative Companies Act 1996 and the constitution of Westland operative when they surrendered their shares.<sup>6</sup> From the effective date of the surrender of their shares they became unsecured creditors. That remains the position. They were and remain unsecured creditors.

[48] There are two further issues for particular consideration which counsel properly drew the Court's attention to: first, the no encumbrance clause in cl 6.1(a) and the warranties as to title clause, cl 6.1(b) of the Scheme Plan. I record counsel's advice that Westland does not seek orders the Scheme be binding on secured creditors of its shareholders, rather it intends the clause to operate by confirming the position at law. I also note similar clauses have been included in approved schemes in New Zealand in the past.<sup>7</sup>

[49] The clause providing warranty as to title has been held an appropriate protection against the risk of a shareholder receiving the scheme consideration without any obligation to reimburse the acquirer for the amount required to discharge the encumbrance over the shares.<sup>8</sup>

[50] The deemed warranty was explicitly highlighted at ss 7.3 and 7.4 of the Scheme Booklet. Again, similar clauses have been applied in the past.<sup>9</sup>

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<sup>6</sup> Co-operative Companies Act 1996, s 22(4).

<sup>7</sup> *Re Methven* [2019] NZHC 608 at [9].

<sup>8</sup> *Re APN News & Media Ltd* (2007) 62 ACSR 400.

<sup>9</sup> *Re Methven*, above n 7, at [9].

[51] Standing back and considering the Scheme overall the Court is satisfied it is generally fair and equitable. The Scheme is not dissimilar to other cases where the provisions of the Companies Act have been used in this way. Overall the proposal appears in the interests of the shareholders in this particular case. For those reasons the Court is satisfied it is appropriate to make the orders sought in the application.

[52] There will be orders as sought in the application dated 16 May 2019 and in accordance with the draft order submitted to the Court this morning.

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Venning J