

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

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

**CIV-2020-404-000543
[2020] NZHC 674**

UNDER Part 19 of the High Court Rules 2016 and
section 239ADO of the Companies Act 1993

IN THE MATTER OF ENCOREFX (NZ) LIMITED

AND of an application by
REES GRAHAM LOGAN,
ADAM PAULS NIKITINS and
STEWART ALEXANDER McCALLUM
Applicants

Hearing: [On the Papers]

Counsel: D T Broadmore and L C Sizer for the Applicants

Judgment: 1 April 2020

JUDGMENT OF EDWARDS J

*This judgment was delivered by me on 1 April 2020 at 5.00 pm
pursuant to r 11.5 of the High Court Rules.*

Deputy Registrar

Solicitors: Buddle Findlay, Auckland

[1] The applicants are the administrators of EncoreFX (NZ) Ltd. They were appointed to that role on 30 March 2020 by resolution of the board of directors.

[2] The applicants seek orders modifying the default statutory requirements under the Companies Act 1993 (Act) that relate to the convening of the first creditors' meeting. They say the current Covid-19 lockdown makes it impossible, impracticable and undesirable to comply with those statutory requirements without the orders sought.

[3] Following a telephone call with counsel for the applicants this morning, I made the orders set out in the annexure to this judgment. My reasons for doing so now follow.

EncoreFX

[4] EncoreFX is a registered financial services provider and a licensed derivatives issuer under the Financial Markets Conduct Act 2013. It is a wholesale and retail trader of foreign currency primarily used by importers and exporters to hedge foreign currency risks.

[5] EncoreFX is part of a global group, with related entities in Australia, Canada and the United States. The Australian entity was also placed into administration on 30 March 2020.

[6] One of the applicants, Mr Logan, has provided an affirmation in support of the application. He deposes to discussions with the sole director of EncoreFX as to the number of customers and creditors. Based on those discussions, Mr Logan understands that EncoreFX has approximately 110 customers, and, of those, approximately 20 to 30 unsecured creditors. There is only one secured creditor. That creditor has a security interest in a motor vehicle owned by EncoreFX.

Statutory regime

[7] Part 15A of the Companies Act 1993 (Act) governs the administration of a company. Under that Part, the applicants are required to take the following steps:

- (a) Call a first creditors' meeting to decide whether to appoint a creditors' committee and to decide whether to replace the applicants as administrators. If it is decided to appoint a creditors' committee, then the members must be appointed;¹
- (b) To give notice to EncoreFX's creditors of the first creditors' meeting and advertise that meeting not less than five working days before the start of the creditors' meeting;²
- (c) To hold the first creditors' meeting within eight working days after the date of appointment (in this case 30 March 2020);³
- (d) To table at the first creditors' meeting an interests' statement;⁴
- (e) To give notice to EncoreFX's creditors of the watershed meeting, together with a copy of the administrator's report and statement. That watershed meeting must be advertised 20 working days after the date of appointment, unless the Court extends the convening period.⁵

[8] The application is made under s 290ADO of the Act which provides that the Court may make any order that it thinks appropriate about how the Part is to operate in relation to a particular company. The overriding principle is that the Court should only exercise this power to ensure that the objectives of Part 15A are maintained in the case of a particular company.⁶ The objectives of Part 15A are:⁷

- (a) To maximise the chances of the company, or as much as possible of its business, continuing in existence; or

¹ Companies Act 1993, s 239AN(1).

² Companies Act 1993, s 239AO(2).

³ Companies Act 1993, s 239AN(2).

⁴ Companies Act 1993, s 239AP.

⁵ Companies Act 1993, ss 239AT(2) and (3), and 239AU(2) of the Act.

⁶ *Heath and Whale on Insolvency* (LexisNexis, online ed (Corporate Rescue Act [17.107])); *Insolvency Law and Practice* (Westlaw, online ed (at [CA 239ADO.01] citing *Australian Memory Pty Ltd v Bryan* (2000) 172 ALR 28 (HCA)).

⁷ Companies Act 1993, s 239A(a).

- (b) If it is not possible for the company or its business to continue in existence, create a better return for the company's creditors and shareholders than one resulting from an immediate liquidation of the company.

Without notice and electronic affidavit

[9] The application is properly made on a without notice basis. Requiring the application to proceed on notice would cause undue delay or prejudice as service of the application would be impracticable given the Covid-19 lockdown. Creditors will not be prejudiced by proceeding on a without notice basis and leave will be reserved to them to apply on notice for variation of the orders.

[10] The application is supported by an affirmation by one of the applicants, Mr Logan. The affirmation has been taken remotely, and it has been filed electronically. In the current circumstances, I grant leave for the affirmation to be received this way.

Method of service

[11] The applicants seek orders permitting the sending of documents and notices required under Part 15A of the Act by posting a copy on EncoreFX's website, and emailing a copy to the email address by which EncoreFX normally communicates with the creditor, or any other email address that the creditor may designate.

[12] In *Re Pumpkin Patch Ltd (in Receivership and Administrators Appointed)*, Heath J considered an application to vary the method of service for documents under Part 15A of the Act.⁸ Heath J stated:

[25] In my view, the Court's approach to this issue should be guided by the need to achieve an outcome that accords with the overall objectives of the voluntary administration regime.⁹ Viewed in that way, the question becomes: what is the best method by which the accompanying documents can be provided to ensure creditors have an adequate opportunity to consider them before the meeting? The purpose of providing the accompanying documents is to enable creditors to consider the content and to make an informed decision on the important questions to be debated at such a meeting.¹⁰ That means that,

⁸ *Re Pumpkin Patch Ltd (in Receivership and Administrators Appointed)* [2016] NZHC 2771.

⁹ See para [11] above.

¹⁰ See paras [12] and [13] above.

when exercising the discretion, the Court's focus is on promotion of the interests of creditors and ensuring that the objectives of Part 15A are met.

[13] In that case, Heath J concluded that it was appropriate for the Court to allow the accompanying documents to be given by the administrators to creditors by electronic means.

[14] The current lockdown makes sending notices or other documents by post more difficult, and there may well be lengthy delays in transmission and receipt – particularly if a recipient's address is one made inaccessible because of the current lockdown.

[15] I accept counsel's submission that postal delivery also raises health and safety issues by potentially increasing the risk of transmission of Covid-19 for all those involved in the delivery service. The orders have an additional benefit in that they will save time and cost which is in the best interests of EncoreFX's creditors.

[16] In the current circumstances, I am satisfied that the orders sought are a practical means of ensuring that all creditors receive notice of the meeting.

Method of meeting and voting

[17] The applicants seek orders that will permit the first creditors' meeting to proceed by way of video or telephone conference. They also seek orders allowing voting to be by electronic means, such as email.

[18] Clause 1 of Schedule 5 of the Act provides that a meeting of creditors may be held by means of audio, or audio and visual communication, and by conducting a postal ballot. That clause does not appear to apply to the conduct of creditors' meetings under Part 15 of the Act.¹¹ The reason for that is not immediately apparent.

[19] Nevertheless, I am satisfied that an order allowing the creditors' meeting to be convened in this way is consistent with the objectives of Part 15 of the Act. Without the orders, it would be impossible to facilitate the first creditors' meeting in a timely

¹¹ Companies Act 1993, s 239AK Conduct of Creditors' Meetings.

way. Meeting by audio or visual link will not only allow the meeting to go ahead, but it will allow effective participation by creditors in that meeting.

[20] The orders also provide for any documents required to be tabled at the first creditors' meeting to be tabled by either posting it to EncoreFX's website, or emailing it to the creditors. Given the electronic context in which the meeting is to be convened and conducted, these orders are also appropriate.

[21] In terms of voting by electronic means (such as email), I am satisfied that this too is an appropriate order to be made. Postal votes are already permitted under cl 7 of schedule 5. Allowing votes to be made electronically is not too dissimilar in the circumstances. Furthermore, given the nature of EncoreFX's business, it is likely that the creditors will have the necessary technology to attend such a meeting.

Result

[22] The application is granted. I make the orders set out as an annexure to this judgment.

Edwards J