

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

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

**CIV-2019-404-002082
[2019] NZHC 2552**

IN THE MATTER of Part 19 of the High Court Rules and
sections 239F and 280 of the Companies Act
1993

IN THE MATTER of KUMFS GROUP LIMITED,
KUMFS BRAND LIMITED,
ZIERA RETAIL NZ LIMITED and
ZIERA SHOES NZ LIMITED

IN THE MATTER of an application by
CONOR JOHN MCELHINNEY and
ANDREW JOHN GRENFELL of Auckland,
insolvency practitioners
Applicants

Hearing: [On the Papers]

Counsel: S A Barker and M Harris for the Applicants

Judgment: 4 October 2019

Reasons: 8 October 2019

JUDGMENT OF EDWARDS J

*This judgment was delivered by me on 8 October 2019 at 3.00 pm
pursuant to r 11.5 of the High Court Rules.*

Deputy Registrar

Solicitors: Buddle Findlay, Barristers and Solicitors, Wellington

[1] The applicants are the appointed administrators of Kumfs Group Ltd, Kumfs Brand Ltd, Ziera Retail NZ Ltd and Ziera Shoes NZ Ltd (the Companies). They applied on a without notice basis for orders:

- (a) dispensing with service;
- (b) extending the convening period in the administration, as defined in s 239AT(2) of the Companies Act 1993 (Act) to 31 January 2020;
- (c) extending the 14-day period under s 239Y of the Act within which they are required to give notice of termination of contracts of employment without incurring personal liability to employees to 31 January 2020; and
- (d) orders incidental to the extensions.

[2] I granted the application on 4 October 2019. My reasons for doing so now follow.

Background

[3] The applicants were appointed administrators by the directors of each of the Companies on 24 September 2019. The appointment is made under Part 15A of the Act.

[4] The Companies form part of a group carrying out the wholesale and retail sale of shoes throughout New Zealand, Australia, the United States and Asia. The Companies have approximately 22 leased retail sites around New Zealand, 140 employees, approximately 130 unsecured creditors, and five secured creditors.

[5] Since their appointment, the administrators have been investigating the Companies' affairs to assess the available options going forwards. They are looking at a potential sale of the businesses. If they are unable to find a buyer, they will need to consider a sale of stock and intellectual property. In the meantime, the administrators have adopted a "trading as usual" strategy.

[6] Investigating these options takes time. Accordingly, the administrators seek extensions to the relevant statutory periods to allow their investigations to continue.

Without notice

[7] The application is commenced on a without notice basis. As explained further below, the relevant time periods are relatively short. Requiring service of the application on any interested parties at this interim stage would cause unnecessary delay. Further, the administrators are of the view that interested parties are unlikely to be prejudiced by the extensions sought, and in fact, it is to their benefit. In any respect, if any parties are so prejudiced, then they will have the right to challenge the orders made on three working days' notice. In those circumstances, I was satisfied that it was appropriate to dispense with service, and I made orders accordingly.

Extension of convening period

[8] The convening period is the period that the administrators have to convene a "watershed meeting" for a company in voluntary administration under s 239AT of the Act.

[9] The administrators must give notice to creditors of the watershed meeting during the convening period. That notice must be accompanied by a number of other documents, including a report from the administrators. That report must address the Companies' affairs and financial circumstances and any other matters material to the creditors' decisions that are to be considered at the meeting. The report must also include a statement of the administrator's opinion on those matters.

[10] The convening period is 20 days following the appointment of administrators. In this case, the convening period expires on 14 October 2019. The watershed meeting must be held within five working days following expiry of the convening period pursuant to s 239AV of the Act. In this case, without the extension, the administrators would have to hold the watershed meeting by 21 October 2019.

[11] The Court may extend the convening period under s 239AT (3) of the Act. This Court has confirmed that the power to extend should be exercised in light of the

purpose of the voluntary administration regime and the duties imposed on administrators.¹ Those objectives are set out in s 239A of the Act and include the administration of a company in a way that maximises the chances of the company continuing in existence, or results in a better return for the company's creditors and shareholders that would result from an immediate liquidation of the company.

[12] In deciding whether to grant an extension, the Court should also take into account the potential for voluntary administration to operate adversely on creditors of the company. This includes barriers to the enforcement of charges over property, and to the taking of possession of property used or occupied by the company.²

[13] The approach requires a balance between the expectation that administration will be a relatively speedy and summary matter on the one hand, and the requirement that undue speed should not be allowed to prejudice actions directed towards maximising the return for creditors and any return for shareholders.³ Factors that may be relevant to the determination were set out by Courtney J in *Re DSE (NZ) Ltd* and I have had regard to those factors in determining the current application.⁴

[14] I am satisfied on the basis of the affidavit evidence filed with the application that due to the size, sale and complexity of the administration, an extension is required to allow the administrators to complete investigations into the options for the businesses and finalise the report to creditors.

[15] This is not a case where creditors' interests will be adversely affected by the extension of time. Rather, extending the convening period will allow a stable environment in which the investigations into the options for the businesses may proceed in an orderly manner. That will allow the administrators to consider the best options for maximising returns to creditors and shareholders, while allowing the businesses to trade. It will also allow a meaningful report to creditors once those investigations have been completed.

¹ *Re Nylex New Zealand Ltd*, HC Auckland CIV 2009-404-1217, 11 March 2009; *Re DSE (NZ) Ltd* [2016] NZHC 36.

² *Re DSE (NZ) Ltd (in rec)* [2016] NZHC 36 at [10].

³ *Re Harrisons Pharmacy Pty Ltd* [2013] FCA 458 at [11].

⁴ *Re DSE (NZ) Ltd* [2016] NZHC 36 at [14].

[16] The length of the extension of time sought in this case is 108 days. Given the scale of the businesses, and the intervening holiday period, I am satisfied that it is the minimum period required to allow the administrators to investigate the Companies' affairs, options for disposal, and to put those options into effect. In that context, it is consistent with the speedy and summary objectives of administration.

[17] The grant of an extension of time to the convening period was made accordingly.

Extension of notice period for termination of a contract of employment

[18] Pursuant to s 239Y(3) of the Act, the applicants will become personally liable in respect of employment agreements entered into by the Companies prior to the applicants' appointment as administrators, if notice of the termination of those agreements is not given within 14 days after the date of their appointment. In this case, that 14-day period expires on 9 October 2019.

[19] The evidence before the Court establishes that the administrators' objective is for the Companies to continue trading in a stable manner in order to achieve a sale or restructure of the business as a going concern. The administrators consider that, if the sale or restructure does not go ahead, then continuing to trade in the interim will also allow maximum value to be recovered for the assets of the Companies in the most efficient way.

[20] A successful sale of all or some of the businesses as a going concern may require a transition of some or all of the employees to enable continued trading. Given the scale of the administration and the nature and geographical spread of the Companies' operations, 14 days is insufficient time to enable the applicants to conduct the necessary due diligence to make informed decisions in relation to the continuation or termination of the employment agreements.

[21] I accept that it is in all parties' best interests that the extension be granted on that basis.

Result

[22] The application for without notice for orders under ss 239AT and 239Y of the Companies Act 1993 was granted. The orders made were as set out in the draft form of orders filed with the Court, subject to one amendment as to the applicable notice period for those wishing to challenge the orders made. Accordingly, I made the following orders:

- (a) service of the application is dispensed with;
- (b) the convening period in the administration of:
 - (i) Kumfs Group Ltd;
 - (ii) Kumfs Brand Ltd;
 - (iii) Ziera Retail NZ Ltd; and
 - (iv) Ziera Shoes NZ Ltd,

(“Companies” or “Group”)

as defined in s 239AT(2) of the Companies Act 1993 (“Act”) is extended to 31 January 2020 (an extension of 108 days) under s 239AT(3) of the Act;

- (c) the period of time in which the applicants are required to give notice of termination of a contract of employment under s 239Y(3) of the Act is extended under s 239Y(4) of the Act to an end date of 31 January 2020, instead of 9 October 2019;
- (d) the administrators may convene a watershed meeting in respect of any of the Companies at any time within the period for which the extension has been granted;

- (e) leave to apply is granted to any person who can demonstrate a sufficient interest to modify or discharge the above orders upon three working days' notice being given to the applicants;
- (f) within seven days of the Court's order, the applicants must:
 - (i) advertise the orders once in *The New Zealand Herald*, *Dominion Post*, *The Press* and *Otago Daily Times*;
 - (ii) post a copy of the orders on McGrathNicol's website;
- (g) the costs of this application is to be paid out of the assets of the Group.

Edwards J