

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

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

CIV-2020-404-001187

UNDER Part 19 of the High Court Rules and Part 15A of the
Companies Act 1993

IN THE MATTER of WIRECARD NZ LIMITED (Administrators Appointed) a
duly incorporated company having its registered office at
Level 17, AIG Building, 41 Shortland Street, Auckland,
1010, New Zealand

AND

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

Applicants

**ORIGINATING APPLICATION WITHOUT NOTICE FOR ORDERS UNDER SS 239AT
AND 239Y AND 239ADO AND DIRECTIONS UNDER 239ADR OF THE
COMPANIES ACT 1993
Dated 3 SEPTEMBER 2020**

TOMPKINS | WAKE

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**ORIGINATING APPLICATION WITHOUT NOTICE FOR ORDERS UNDER SS 239AT
AND 239Y AND 239ADO AND DIRECTIONS UNDER 239ADR OF THE
COMPANIES ACT 1993**

To: The Registrar, High Court, Auckland

This document notifies you that:

1. The applicants, **CONOR JOHN MCELHINNEY** and **ANDREW JOHN GRENFELL**, of Auckland, accredited insolvency practitioners (the 'Administrators') apply for orders:
 - (a) That service of this application be dispensed with.
 - (b) That the convening period in the administration of Wirecard NZ Ltd ('company') as defined in s 239AT(2) of the Companies Act 1993 ('Act') which was extended to 5 October 2020 pursuant to the judgment of Andrew AJ dated 24 July 2020 and adopted by Bell AJ (the 'Judgment') be further extended to 30 October 2020 (a further extension of 18 working days) under s 239AT(3) of the Act or alternatively under s 239ADO of the Act.
 - (c) That the end of the termination period under s 239Y(3) of the Act which was extended in the Judgment to 12 October 2020 be further extended until 6 November 2020 (a further extension of 18 working days) under s 239Y(4) of the Act.
 - (d) If extensions are granted, then:
 - (i) The Administrators may convene a watershed meeting in respect of the company at any time within the period for which the extension has been granted.
 - (ii) Leave be granted to any person who can demonstrate a sufficient interest to apply to modify or discharge the

above orders, upon appropriate notice being given to the Administrators.

- (iii) Within seven days of the Court's orders the Administrators must:
 - (1) Advertise the orders once in *The New Zealand Herald*;
 - (2) Make available a copy of the orders on McGrathNicol's website; and
 - (3) Provide a copy of the orders to the employees (including a translation of the orders in the applicable language) of the company through ordinary communication channels.

- (e) The watershed meeting of creditors in respect of the voluntary administration of the company required to be held under s 239AT of the Act ('Watershed Meeting') may be conducted by video conference in accordance with clause 1 of Schedule 5 of the Act under s 239ADO or s 239ADR of the Act, and if granted that:
 - (i) Any creditor attending the Watershed Meeting by way of video conference is permitted to vote at the meeting; and
 - (ii) Any documents required to be tabled at the Watershed Meeting may be tabled by emailing a copy to the email address by which the company normally communicates with the creditor or such other email address that the creditor may designate to the Administrators.

- (f) The costs of this application on a solicitor-client basis be paid out of the assets of the company.

(g) Such other orders as the Court deems appropriate.

2. The grounds on which the orders are sought are as follows:

Background

(a) On 13 July 2020 the Administrators were appointed the administrators of the company;

(b) Following an application by the Administrators, on 24 July 2020, Associate Judge Andrew ordered that:

(i) The convening period in the administration of the company as defined in s 239AT(2) of the Act be extended to 5 October 2020; and

(ii) The end of the default 'statutory termination period' under s 239Y(3) of the Act be extended to 12 October 2020 'the extended termination period';

(c) The Administrators seek further, short, extensions of the:

(i) Convening period until 30 October 2020 (a further 18 working days) to allow the sales process to complete; and

(ii) To the end of the extended termination period to 6 November 2020 (a further 18 working days) to enable the company to continue trading with the employees who have been retained by the Administrators until the sale takes place in order to achieve a maximum return for the creditors.

(d) The Administrators seek a direction under s 239ADR or orders under s 239ADO relating to the attendance by creditors of the Watershed Meeting by video conference, due to:

- (i) The implications of Covid-19 and the recent new lockdown in Auckland and the inherent uncertainty surrounding further lockdowns;
- (ii) The fact that certain creditors are based internationally and are unable to fly into New Zealand and attend a physical Watershed Meeting in Auckland; and
- (iii) It is in the interests of the creditors to attend the Watershed Meeting remotely;

Extension of convening period (order (b))

- (e) The convening period is the period in which the Administrators are required to convene the Watershed Meeting for a company in voluntary administration under s 239AT of the Act. The Administrators must give notice to creditors of the Watershed Meeting during the convening period.
- (f) Under the Act, the convening period is for 20 days following the appointment of administrators.
- (g) The Watershed Meeting must be held within five working days following expiry of the convening period pursuant to s 239AV of the Act and the administrators must by that date:
 - (i) Prepare and finalise a report for the company's creditors pursuant to s 239AU(3)(a) of the Act about:
 - (1) The business, property, affairs, and financial circumstances.
 - (2) Any other matters material to the creditors' decisions to be considered at the meeting.

- (ii) Provide creditors with a statement setting out the administrators' opinion, with reasons for that opinion about each of the following matters pursuant to s 239AU(3)(b) of the Act:
 - (1) Whether it would be in the creditors' interests for the company to execute a deed of company arrangement.
 - (2) Whether it would be in the creditors' interests for the administration to end.
 - (3) Whether it would be in the creditors' interests for the company to be placed in liquidation.
 - (4) If a deed of company arrangement is proposed, a statement setting out the details of the proposed deed.

- (h) The Court may, on the administrators' application, extend the convening period under s 239AT(3) of the Act.

- (i) On 20 July 2020, the Administrators applied to extend the convening period to 5 October 2020 on the basis that the Administrators were conducting a sales process of all or part of the company which was unlikely to be completed until well after the end of the statutory 20 working day convening period, and any reporting would have been of limited utility to creditors as it would not have been possible to confirm any sale(s) and advise of relevant terms, the impact on creditors and employees and how the proceeds would be applied.

- (j) Mr Grenfell swore an affidavit on 20 July 2020 in support of the Administrators' first application to extend the time to 5 October 2020 in which Mr Grenfell said the Administrators were working

on the basis of indicative offers being made to the Administrators by 31 July 2020 and final offers by 21 August 2020 with an extra month to allow completion of the sale and a period to enable effective handover to the purchasers.

- (k) In the Judgment dated 24 July 2020, Andrew AJ granted an extension to the convening period to 5 October 2020.
- (l) The Administrators seek a further, short, extension to the convening period under s 239AT(3) of the Act because:
 - (i) Due to the size, geographic reach and complexity of the business as well as the large number of interested parties, the due diligence process and the deadline for final offers was extended to 31 August 2020, causing a knock on effect on the timetable for the remainder of the sales process.
 - (ii) The Administrators have received offers for the purchase of the company's business and assets, which includes offers for the purchase of the business and assets of Wirecard AU. Given the significant extent to which they are intertwined, the Administrators wish to align the timetable for the sale of the businesses and assets of Wirecard NZ and Wirecard AU. The administrators of Wirecard AU have sought and obtained an order from the Supreme Court of Victoria extending the equivalent of the convening period to 30 October 2020.
 - (iii) The prospective purchasers who submitted final bids are all overseas persons and as such will need to notify the Overseas Investment Office of the transaction, and possibly seek approval from the Australian Foreign Investment Review Board. These regulatory processes will take time to complete.

- (iv) The same reasons that were accepted by Andrew AJ in the Judgment in granting the extension to the convening period to 5 October 2020 still exist, with the added reasons of marrying up the timetable with the sale of the business of Wirecard AU and providing for sufficient time for regulatory notifications or approvals;
- (m) The Administrators seek the further, short, extension of the convening period until 30 October 2020 (a further 18 working days) to allow the sales process to complete;

Extension of notice period to terminate employees (order (c))

- (n) Pursuant to s 239Y(3) of the Act, the Administrators will become personally liable in respect of employment agreements entered into by the company prior to the Administrators' appointment if notice of the termination of those agreements is not given the statutory termination period, which is 14 days after the date of their appointment;
- (o) Section 239Y(4) of the Act empowers the Court to grant an extension of the statutory termination period, upon application made by the Administrators;
- (p) Section 239ADO of the Act empowers the Court to make any order that it thinks appropriate about how Part 15A relating to administrations is to operate in relation to a particular company;
- (q) In July 2020, the Administrators sought directions in relation to the employees, materially for the purposes of this application that the statutory termination period be extended until 12 October 2020 because, among other reasons;

- (i) The Administrators were focused on trading the business while going concern sale opportunities were considered and employees necessary to the trading of the business needed to be retained 'the Continuing Employees';
 - (ii) The orders sought hope to minimise the risk of serious disruption or cost to the Continuing Employees; and
 - (iii) In the event of a successful sale of all or some of the business as a going concern, a successful bidder may require a transition of some or all of the Continuing Employees to enable continued trading;
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- (r) The Administrators intended to (and have met) salary and wages entitlements of the Continuing Employees;
 - (s) In the Judgment, Andrew AJ extended the statutory notice period to 12 October 2020 ('extended termination period');
 - (t) The intention of extending the statutory termination period to 12 October 2020 was so that it was after the extension sought for the convening period and the last possible day for the Watershed Meeting;
 - (u) For the same reasons as set out above, a further extension to the extended termination period is needed and also to align the period within which terminations can be given with the extension sought to the convening period;
 - (v) The Administrators seek a further, short, extension to the end of the extended termination period to 6 November 2020 (a further 18 working days).

Convening Watershed Meeting by way of video conference (order (d))

- (w) Section 239ADR(1) of the Act allows the Administrators to apply to the Court for directions in relation to the performance or exercise of any of their powers or functions;
- (x) Section 239ADO of the Act empowers the Court to make any order that it thinks appropriate about how Part 15A relating to administrations is to operate in relation to a particular company;
- (y) Clause 1 of Schedule 5 of the Act provides that creditors' meetings that are similar to the Watershed Meeting may be conducted by way of video conference;
- (z) The Administrators seek a direction under s 239ADR or orders under s 239ADO relating to the attendance by creditors of the Watershed Meeting by video conference, due to:
 - (i) The implications of Covid-19 and the recent new lockdown in Auckland and the inherent uncertainty surrounding further lockdowns;
 - (ii) The fact that certain creditors are based internationally and are unable to fly into New Zealand and attend a physical Watershed Meeting in Auckland; and
 - (iii) It is in the interests of the creditors to attend the Watershed Meeting remotely.
- (aa) The specific orders sought are as follow:
 - (i) The Watershed Meeting may be conducted and/or attended remotely by way of video conference in accordance with cl 1 of Schedule 5 of the Act.

- (ii) Any creditor attending the Watershed Meeting by way of video conference is permitted to vote at the meeting.
- (iii) Any documents required to be tabled at the Watershed Meeting may be tabled by emailing a copy to the email address by which the company normally communicates with the creditor or such other email address that the creditor may designate to the Administrators.

Without notice

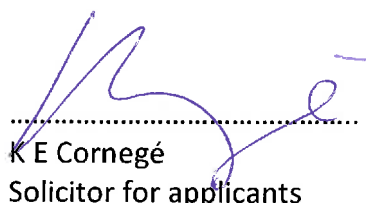
- (bb) It is in the interests of justice, and of the speedy and inexpensive determination of this proceeding, that this originating application be determined on a without notice basis (and also that a copy of the orders is made available on McGrathNicol's website and that such orders are published in the nominated newspaper, within seven days of the date of the orders), because:
 - (i) Personal service of the application on the company's creditors and employees would incur an expense for the company and would cause undue delay;
 - (ii) Creditors and the necessary employees will not suffer any prejudice by the service order sought;
 - (iii) Creditors and employees will have a right to challenge the orders sought by making an application in this Court.

3. The application is made in reliance on:

- (a) The affidavits of Andrew John Grenfell sworn on 20 July 2020 and 3 September 2020;
- (b) Part 15A of the Companies Act 1993, and rr 7.23, 7.32, 7.46 and 19.2 of the High Court Rules;

- (c) The authorities of *Re Weddel NZ Ltd (in rec & liq)* [1998] 1 NZLR 30 (CA); *Re Nylex (New Zealand) Ltd* HC Auckland CIV-2009-404-1217, 11 March 2009; *RE WGL Retail Holdings Ltd* [2011] NZCCLR 22 (HC); *Re Grenfell* [2016] NZHC 36; *Re Gourmet Food Holdings New Zealand Ltd* [2012] NZHC 3606; *Re Postie Plus Group Ltd* [2014] NZHC 1337; *Re Pumpkin Patch Ltd* [2016] NZHC 2771; and *Re McElhinney* [2019] NZHC 2552; and *Re CBCH New Zealand Limited* [2020] NZHC 1146.
4. The application is made without notice to any other party on the following grounds:
- (a) That requiring the Administrators to proceed on notice would cause undue delay or prejudice to the Administrators;
- (b) That the interests of justice require the application to be determined without serving notice of the application.
5. I certify that:
- (a) The grounds set out in paragraph 4 on which the application relies are made out; and
- (b) All reasonable inquiries and all reasonable steps have been made or taken to ensure that the application contains all relevant information, including any opposition or defence that might be relied on by any other party, or any facts that would support the position of any other party.

Dated: 3 September 2020


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K E Cornegé
Solicitor for applicants

Ph: (07) 838 6053

This document is filed by Kate Cornegé, solicitor for the applicants, of the firm of Tompkins Wake.

The address for service of the applicants is at the offices of Tompkins Wake, Westpac House, 430 Victoria Street, Hamilton.

Documents for service on the filing party may be left at that address for service or may be:

- (a) Posted to the solicitor at PO Box 258, Hamilton 3240; or
- (b) Left for the solicitor at a document exchange for direction to DX GP20031, Hamilton; or
- (c) Emailed to the solicitor at kate.cornege@tompkinswake.co.nz.