IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2023-404-002579
[2024] NZHC 1352

UNDER	High Court Rules 2016, Part 19
IN THE MATTER OF	A scheme of arrangement under the Companies Act 1993, Part 15
BETWEEN	BURGER FUEL GROUP LIMITED Applicant
AND	MASON TRUSTEE LIMITED First Respondent
	NEW ZEALAND SHAREHOLDERS' ASSOCIATION INCORPORATED Second Respondent
	BRIAN KELLY LIMITED, PLATEAU GROUP LIMITED, BRAD WILLIAM MCFARLANE, ALISTAIR ROSS ARMSTRONG and LE VAN WANG TRINH Third Respondents
	TAKEOVERS PANEL Interested Party

Hearing:	8 May 2024
Appearances:	S M Hunter KC and C S Morrison for Applicant G P Blanchard KC and L Scott for First Respondent L C Bercovitch for Second Respondent J P Nolen for Third Respondent J S Cooper KC and R Wright for Takeovers Panel, Interested Party
Judgment:	27 May 2024
Reissued:	19 June 2024

JUDGMENT OF ANDREW J

Introduction

[1] The applicant, Burger Fuel Group Limited (Burger Fuel), is listed publicly on the NZX. It is a code company for the purposes of the Takeovers Act 1993. Burger Fuel holds surplus cash, currently over $9 million, which is unrestricted capital. It has held this surplus cash for a number of years. On 27 October 2023, the board of Burger Fuel resolved to pursue a scheme of arrangement that would allow for a pro-rata return to shareholders of $4.077 million of surplus capital (the Scheme).

[2] In these proceedings, Burger Fuel seeks orders under s 236(1) of the Companies Act 1993 (the Act) approving the Scheme. The approval would make the Scheme binding upon Burger Fuel and its shareholders, and all such other necessary persons.

[3] On 30 October 2023, Lang J made initial orders under s 236(2) of the Acts for steps to be taken in advance of the hearing of Burger Fuel's application (the initial orders).

[4] The first respondent, Mason Trustee Limited (MTL), is the trustee of the Mason Family Trust, a beneficial owner of shares in Burger Fuel. The shares registered in the names of Christopher Simon Mason and Christopher John Mills are held on trust for MTL as trustee of the Mason Family Trust.

[5] MTL opposes the application. It says there has been a failure of compliance by Burger Fuel with the initial orders, that the Scheme was not fairly put to the shareholders (incomplete information), and that the classes of shareholders were not fairly represented at the special meeting. In the circumstances, it says that it is simply not possible to say whether the Scheme is reasonable, fair and equitable. In particular, it says there has been a failure by the board of Burger Fuel to investigate alternative uses of the company's excess cash and to properly disclose those investigations to the shareholders.

[6] The second respondent, the New Zealand Shareholders' Association Incorporated (NZSA) does not oppose Burger Fuel's application. However, it has filed

submissions addressing concerns about the nature of information provided to shareholders about the Scheme. NZSA submits that it is important for the Court to take these concerns into account in considering whether to grant the orders.

[7] The third respondents, minority shareholders, support and adopt the submissions of MTL.[1]

[8] The Takeovers Panel (the Panel) was granted leave to intervene in the proceeding on the issue of the interpretation of s 236A of the Act and its application to the Scheme. The Panel's submissions address the issue of the *de minimis* exception that it says should apply to s 236A.

Factual background

Background to the Scheme

[9] Mr Chris Mason is the founder of Burger Fuel.

[10] Burger Fuel is an operator and franchisor of gourmet burgers and other fast-casual restaurant. In 2014, it raised new capital to help fund plans to expand into the USA. The capital was raised by the issue of shares to a company affiliated to the Subway® Corporation of USA. Following the death of the founder of Subway® in September 2015, the expansion plans were ultimately terminated. Burger Fuel subsequently re-purchased the shares at a significant discount, resulting in a net capital surplus of $3,675,910.

[11] Over the past decade, Burger Fuel has grown to become a profitable business in New Zealand and overseas. It has delivered profits every year since 2019. It says that COVID-19 caused significant disruptions to the hospitality and fast-food sector, but despite that, it has emerged well following those disruptions.

Burger Fuel's shares and shareholders

[12] Burger Fuel has only one class of shares (ordinary shares). At the time of the application, Burger Fuel had issued 50,336,863 ordinary shares, which were held by around 2,344 shareholders.

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[1] Mr Nolen, counsel for the third respondents, briefly appeared at the commencement of the hearing and was then granted leave to withdraw from attendance or any further participation at the hearing.

[13] Approximately 88.2 per cent of Burger Fuel's shares are held by 20 shareholders, and the remaining 2,324 shareholders hold less than 12 per cent of the shares issued. The three largest shareholders are:

(a) Mason Roberts Holdings Limited (MRHL) holding 33,376,335 shares (66.31 per cent). Joseph Roberts (Mr Roberts), a director and the CEO of Burger Fuel, is the sole shareholder and director of MRHL.

(b) E & P Foundation Trustee Limited holding 2,572,138 shares (5.1 per cent).

(c) Mr Christopher Mason and Mr Christopher Mills holding (now) 2,516,844 shares (5 per cent) on trust for MTL as trustee of the Mason Family Trust.

The Scheme

[14] As at 31 March 2023, Burger Fuel held cash of $8,202,024. It says that over previous years Burger Fuel's shareholders had asked the board to return unrestricted capital to shareholders.

[15] On 27 October 2023, the board met to consider Burger Fuel's options in respect of the cash that was over and above the cash it says was needed for Burger Fuel's working capital requirements for the foreseeable future.

[16] The board concluded that approximately $4.077 million of Burger Fuel's current cash was surplus and should be returned to Burger Fuel's shareholders in the most tax-efficient way. The board also concluded that a scheme of arrangement under the Act was the best means of returning the surplus to shareholders given:

(a) The surplus cash was capital rather than profit;

(b) Returning the cash as capital would be the most tax-efficient means of returning the surplus to shareholders;

(c) Burger Fuel does not hold sufficient retained earnings to propose that dividends be paid to shareholders;

(d) The tax advantages that would be enjoyed by the shareholders outweighed any disadvantages of a scheme of arrangement; and

(e) Shareholders' voting rights would not be affected beyond a de minimis amount, in that the maximum anticipated percentage change in any shareholder's voting control would be 0.0000310 per cent.

[17] Mr Roberts opted not to be counted in the quorum or vote on the Scheme at a board level.

[18] On 27 October 2023, the other four directors of Burger Fuel unanimously agreed on the Scheme to allow for a pro-rata return of $4.077 million of capital to shareholders without affecting the relative voting rights.

[19] On the morning of 27 October 2023, before the Scheme was announced, Burger Fuel's share price was $0.27 per share (Burger Fuel says this was broadly consistent with its volume-weighted average share price for the previous 30, 60, 90, 120 days and 12 months from 16 October 2023). Accordingly, at that time, Burger Fuel's market capitalisation was 13.591 million.

[20] The terms of the Scheme, for which approval is sought, are:

(a) 30 per cent of each shareholder's shares will be cancelled. If multiplying the number of shares owned by shareholders by 30 per cent does not result in a whole number, the resulting number will be rounded up or down to the nearest whole number of shares (with 0.5 rounded up); and

(b) Each shareholder will receive $0.27 per cancelled share, the total of which will equal $4.077 million. The price per share is said to be consistent with Burger Fuel's volume-weighted average share price for the 30 days to 12 months prior to 16 October 2023, which saw minor fluctuations between $0.268 and $0.269.

Shareholding voting on the Scheme

[21] On 27 October 2023, Burger Fuel published an announcement of the proposed Scheme on the NZX Market Announcement Platform (NZX Platform).

[22] In making the initial orders on 30 October 2023, Lang J allocated a hearing date for Burger Fuel's application of 5 February 2024. On the same day, Burger Fuel published an announcement on the NZX Platform, as required with the initial orders.

[23] The Court's minute making the initial orders simply recorded:

> I am satisfied that it is appropriate to make orders as sought in the interlocutory application dated 27 October 2023. I make orders accordingly.

[24] On 31 October 2023, a copy of the sealed initial orders was registered on the Companies Register in accordance with s 236(4) of the Act.

[25] On 9 November 2023, Burger Fuel obtained NZX Regulation Limited's approval for its notice of special shareholder meeting to be held on 14 December 2023 (Scheme Meeting).

[26] On 15 November 2023, Burger Fuel provided its shareholders and its directors with the following materials (together, the Shareholder Materials) in respect of the Scheme:

(a) Notice of special shareholders' meeting with the resolution proposing the Scheme, together with an explanatory note for the Scheme;

(b) A proxy/voting form;

(c) A virtual meeting guide;

(d) The originating application;

(e) The Court's minute making the initial orders; and

(f) At the same time, Burger Fuel also provided Computershare Investor Service Limited's investor centre guide and meeting platform guide.

[27] On 15 November 2023, the Shareholder Materials were published on the NZX Platform, and on Burger Fuel's public investor relations webpage.

[28] On 23 November 2023, the NZSA published its proxy voting intention statement regarding the Scheme (PVI). In the PVI the NZSA stated that it would vote undirected proxies in favour of the Scheme.

[29] On 1 December 2023, a copy of the Shareholder Materials was provided to Burger Fuel's auditors, Baker Tilly.

Correspondence with Mr Mason

[30] By email to Mr Roberts on 27 November 2023, Mr Mason raised various concerns about the governance of Burger Fuel and its share price. He suggested that Mr Roberts was intent on privatising the company. He stated that:

> The company is waving the white flag, driving down share price and market cap at the expense of shareholder value and the ultimate potential of the Burger Fuel Group …

[31] He also stated that he was prepared to entertain an offer for his Burger Fuel Group stock of 53 cents a share.

[32] Mr Roberts responded by email 5 December 2023 refuting the allegations. He referred to issues raised at the AGM and the difficulty of achieving growth in the current New Zealand market.

[33] By letter dated 13 December 2023, Mr Mason's solicitors wrote to Burger Fuel, setting out Mr Mason's grounds of opposition to the Scheme and confirming their instructions to file a notice of opposition. The letter repeated Mr Mason's willingness to settle by selling his shares in the company for 53 cents a share. The letter also repeated the concern about privatisation and contended that the Shareholder Materials did not contain sufficient information demonstrating a detailed evaluation and analysis of payment of the surplus cash through a scheme or a dividend.

Scheme Meeting

[34] On 14 December 2023, Burger Fuel held the Scheme Meeting to seek approval of the Scheme by special resolution. Mr Mason, on behalf of MTL, attended through Computershare's virtual platform.

[35] On the morning of the Scheme Meeting Mr Mason emailed a list of questions regarding the Scheme to the board.

Voting

[36] The Scheme was approved by a majority of Burger Fuel's shareholders. 41,380,540 shares were voted (approximately 82.21 per cent of the total shares). Of the shares voted:

(a) 92.92 per cent (38,450,239 shares), being 76.39 per cent of the total shares on issue, were voted in favour of the Scheme;

(b) 7.08 per cent (2,929,542 shares), being 5.82 per cent of the total shares on issue, were voted against the Scheme;

(c) A very small number, less than one-hundredth of a per cent (759 shares) abstained from the vote.

[37] Undirected proxies (2,000 shares held by four shareholders) were voted by NZSA against the Scheme. As for shares with instructions (130,057 shares) the NZSA voted those proxy shares in favour of the Scheme as directed.

[38] On 14 December 2023, a copy of the Scheme Meeting voting results were published on the NZX Platform.

[39] By 11 April 2024, Burger Fuel's surplus capital had increased to approximately $9.077m. Burger Fuel does not have any material debt.

Procedural history

[40] MTL filed its notice of opposition on 17 January 2024.[2] In accompanying memorandum, counsel for MTL sought an adjournment of the fixture scheduled for 5 February 2024 noting that a one-hour hearing allocated would be insufficient. On 23 January 2024, counsel filed a joint memorandum seeking an adjournment of the 5 February 2024 fixture to a later date.

[41] By minute dated 5 January 2024, Johnstone J vacated the 5 February 2024 fixture and re-scheduled a full-day fixture for 8 May 2024. His Honour directed that Burger Fuel was to announce the new fixture date on the NZX Platform, together with

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[2] In accordance with the sealed orders of Lang J, notices of opposition or appearance were to be filed no later than eight working days before the hearing, then scheduled for 5 February 2024.

an amended timetable for the filing and service of documents in contemplation of that fixture. Those amended timetable directions superseded Lang J's initial orders. The directions provided that any shareholder wishing to be heard on Burger Fuel's application had to file a notice of appearance or a notice of opposition no later than "45 working days before the 8 May fixture".

Relevant legal principles

[42] The provisions relating to schemes of arrangement are set out in Part 15 of the Act. Section 236A(1) of the Act provides the Court with a discretion to approve a scheme of arrangement as follows:

> **Arrangement or amalgamation involving code company**
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> (a) If a proposed arrangement or amalgamation affects the voting rights of a code company, the applicant for an order under section 236(1) must, at the same time as filing the application, notify the Takeovers Panel of the application.

[43] "Arrangements" is defined in s 235 for the purposes of Part 15 as:

> **Approval of arrangements, amalgamations, and compromises by court**
>
> **Interpretation**
>
> In this Part, unless the context otherwise requires,–
>
> **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.

[44] Returns of capital through the cancellation of shares on a pro-rata basis in consideration for cash payment of every share cancelled have been held to constitute arrangements for the purposes of s 236; the Court has approved a number of such schemes.[3]

[45] The four-step test to be applied by the Court in determining whether to exercise the s 236A(1) discretion is well-established, summarised in *Re Auckland International Airport* by Winkelmann J as follows:[4]

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3 See *Re Auckland International Airport* [2014] NZHC 405 at [8]; *Re Fonterra Co-operative Group Ltd* [2023] NZHC 2118; *Re Tilt Renewables Ltd* [2020] NZHC 1398; *Re Tower Limited* [2022] NZHC 328.

4 *Re Auckland International Airport*, above n 3, at [8]–[9]; see *Re PGG Wrightson Ltd*, [2019] NZHC 1780, at [12], as applied, for example, *Re Tilt Renewables Ltd*, above n 3, at [6].

[8] The principles to be applied to an application for sanction of arrangement under part 15 of the Act are as stated in the decision of Smith J in *Re CM Banks Ltd*,[5] now as supplemented by *Weatherston v Waltus Property Investment[s] Ltd*.[6] In *[Re] CM Banks Ltd*, Smith J formulated a four-step test as follows:[7]

(a) that there has been compliance with the statutory provisions as to meetings, resolutions, the application to the Court, and the like;

(b) that the arrangement has been fairly put before the class or classes concerned, and that if a circular or circulars have been sent out, the circular gave all the information reasonably necessary to allow the recipients to judge and vote upon the proposals;

(c) that the class was fairly represented by those who attended the meeting, and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and(

d) that the arrangement is such that an intelligent and honest person of business, a member of the class concerned and acting in respect of his or her interests, might reasonably approve.

[9] In *Weatherston v Waltus Property Investment[s] Ltd* the Court of Appeal held that it was appropriate to supplement the test of an intelligent and honest business person by consideration of whether the arrangement is fair and equitable, because it was implicit in the test of the intelligent and honest business person that the arrangement was also fair and equitable.

Analysis and decision

[46] I need to address two key issues:

(a) Was the Scheme fairly put to the shareholders and, in particular, did Burger Fuel provide sufficient information to shareholders concerning the rationale for returning the capital?

(b) If there was a general failure of process, should I nevertheless approve the Scheme because the arrangement is fair and equitable?

[47] The particular grounds of opposition advanced by MTL and the third respondents are in the main complaints about process. The NZSA in its submissions, raised concerns about the nature of the information provided to shareholders in this

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5 *Re CM Banks Ltd* [1944] NZLR 248 (SC).
6 *Weatherston v Waltus Property Investments Ltd* [2001] 2 NZLR 103 (CA).
7 *Re CM Banks Ltd*, above n 5, at [253].

case. MTL says that these process errors mean that it is simply not possible to say whether the Scheme is reasonable, fair and equitable.

[48] In addressing those process complaints, it is the role of the Court to consider whether the special meeting has been convened and conducted in accordance with the order of the Court, whether the agreement of the meeting was founded on sufficient information which recipients had time to consider, and whether the information was misleading or deceptive.[8] I shall address the process concerns under what I regard as the more general and significant issue of whether the Scheme was fairly put to the shareholders. I do not address all of the complaints in detail; there are a significant number and not all are material.

[49] The more substantive grounds of opposition, including an allegation that Mr Roberts and MRHL intend to make the company private and the claim that some dividend should be considered, I will address in relation to the second main issue – namely, whether the Scheme is fair and equitable.

Issue (a) – Was the Scheme fairly put?

(i) Failure of compliance

[50] MTL submits that Burger Fuel did not comply with paragraph 3(c)(v) of the initial orders dated 30 October 2023 which provides:

> Burger Fuel shall send the following information to each person who is, under paragraph 1(d) of these orders, to receive notice of the meeting of shareholders described in these orders (Scheme meeting):
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> …
>
> (v) A copy of the court's minute making these interim orders.

[51] Burger Fuel provided a copy of the Court's minute to shareholders but that did not include the detailed orders (which were not recorded in the actual minute of Lang J).

[52] Burger Fuel disputes the claim of non-compliance. It says that it complied with Court order [3](c)(v) by providing shareholders with a copy of the Court's minute. Burger Fuel further submits that the initial orders were on the Companies

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8 John Heard *The Laws of Australia* Business Organisations (online ed) at [4.5.800].

Office website from 31 October 2023 as required by s 236(4) of the Act, and were later placed on Burger Fuel's website. It also says that the orders were superseded by the orders of Johnstone J in January 2024 and, in any event, did not contain any information that was relevant to how shareholders would vote.

[53] The Shareholder Materials[9] did not explain how shareholders could oppose the Scheme in court, and a copy of the initial orders was not included in the materials provided to shareholders via the NZX website. The purpose of the initial orders was, of course, and in particular the order at [3](c)(v), to ensure that shareholders were informed of the Scheme and what steps they would need to take to oppose it.[10]

[54] In my view, simply providing the minute of Lang J did not achieve this purpose. The minute of Lang J simply says:

> I am satisfied that it is appropriate to make orders as sought in the interlocutory application dated 27 October 2023.

[55] The minute does not include the content or detail of those orders. Without the further context of the interlocutory application or the sealed orders, the minute did not inform shareholders of what steps they would need to take to oppose the Scheme. Having regard to the purpose of the initial orders, it was not enough, in my view, for Burger Fuel Group to rely on technical compliance with the requirements to send a copy of the Court's minute.

[56] I agree with the submission of MTL that on a purposive interpretation of [3](c)(v) that in order to comply with Lang J's orders, Burger Fuel also needed to provide to shareholders a copy of the interlocutory application and/or the sealed orders.

[57] The publishing of the initial orders on the Companies Office Website did not, in my view, constitute "sending" the initial orders to the shareholders. Moreover, it is unreasonable to expect a shareholder to find that information on the Companies Office website (in circumstances where all information relevant to shareholders is announced by the NZX website).

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9 See [23] above.
10 *Re Nuplex Industries* [2016] NZHC 1677 at [15] per Katz J.

[58] MTL's solicitors wrote to Burger Fuel's solicitors on 19 January 2024 requesting that Burger Fuel publish a NZX announcement that linked the initial orders and placed a copy of the initial orders on the company's website post. Burger Fuel's solicitors declined to post the initial orders on the NZX website, but did at that time post a copy on the company website.

[59] The process adopted by Burger Fuel can be contrasted with the Sky TV scheme of arrangement. The materials provided to Sky TV shareholders included a link to the company's website, which had copies of the application to the Court and the interim orders. Specifically, the notice of special meeting sent to Sky TV shareholders said:

> Copies of the court documents filed in relation to the scheme and the initial court orders are available on the following website: https://www.sky.co.nz/investor-centre/investor-information.

[60] I find that a similar process should have been adopted here.

[61] There is substantial merit to the submission of Burger Fuel that any deficiency was remedied by the amended timetable orders and directions made by Johnstone J on 25 January 2024. Johnstone J ordered that Burger Fuel was to announce on the NZX Platform the amended timetable for the hearing, including, importantly, how shareholders could oppose the application.

[62] In the circumstances, I find that this failure of compliance is not of a disqualifying kind.

[63] I agree that it would have been helpful if the amended orders and directions of 25 January 2024 had specified the actual dates for the filing of documents in opposition, rather than referring to lawyers code of "working days". That would have been possible given the allocation of a new hearing date. Again, however, there is no evidence that this has caused any real prejudice.

(ii) Adequacy of information provided to shareholders

[64] Shareholder materials for a scheme must enable shareholders to make a properly informed judgment as to whether to support or oppose the proposal.[11] The

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[11] *Fraser v NREMA Holdings Ltd* (1995) 15 ACSR 590; *Re HIH Casualty & General Insurance* [2006] NSWSC 485, (2006) 200 FLR 243 at [81].

material should provide enough information so that shareholders have the material to enable them to make a decision, yet not so much information that they cannot "see the wood for the trees".[12]

[65] The courts are concerned about disclosure of matters which have the capacity to influence a shareholder's decision or judgment.[13] The cases emphasise "full and fair" disclosure tempered by the need to present information in a practical realistic way having regard to the nature and complexity of the scheme.[14]

[66] MTL contends that in contrast to other companies carrying out similar arrangements, Burger Fuel did not consult with shareholders on the proposed return of capital. It submits that the Scheme was presented as a fait accompli. It complains that there was very little commentary in the shareholder materials regarding the rationale for the Scheme and the comparative risks and benefits of a capital return scheme compared to other alternatives. At the heart of this complaint is the contention that the board of Burger Fuel failed to investigate alternative uses of the excess cash and to properly disclose those investigations to the shareholders.

[67] Burger Fuel submits that the prospect of returning cash to shareholders was addressed at the September 2023 AGM. The company proposes returning capital raised for a project in the USA that did not proceed and which it does not need. It says this was clearly set out in the shareholder materials. Furthermore, not all of the surplus capital is being returned, with some $5m being retained. Burger Fuels notes that the NZSA had understood that the board has no alternative use for capital.

[68] Mr Shields, the expert witness for Burger Fuel and a corporate finance partner at KPMG, states that it is a fundamental principle of "corporate finance" that if no value-adding opportunities exist, surplus capital should be returned to shareholders. The absence of value-adding opportunities is thus central to understanding and explaining the Scheme.

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12 *Fraser v NREMA Holdings Ltd*, above n 11; see also *Re Crusader Ltd* (1995) 17 ACSR 336.
13 *Re HIH Casualty & General Insurance*, above n 11, at [81].
14 *Fraser v NREMA Holdings Ltd*, above n 11, at [603]–[604]; see also *Re Crusader Ltd*, above n 12, at [344].

[69] I reject the Burger Fuel submission that the shareholder materials "comprehensively" explained the reasons for the Scheme. Disclosure of the board's rationale for the Scheme was limited and notices of meetings for the PGG Wrightson Ltd and Sky TV capital returns contained a much more fulsome explanation on the rationale for the return of capital. I agree with the submission of the NZSA that the focus of the shareholder materials was on the method for returning capital, rather than the reason for the return at the outset.

[70] I acknowledge that the Chair's letter and notice of meeting stated that the company had been through an extensive exercise to determine the best use of its excess cash, and that the board did not believe that any suitable opportunities existed at the time or were likely in the short to medium term for the full amount of the cash currently held within the company. However, beyond these relatively general assertions, little detail was provided to assist the recipient understand why the board did not anticipate any suitable opportunities to use the capital.

[71] It was essential, in my view, for the shareholders to have adequate information about the issue of the absence of value-adding opportunities in advance of the Scheme Meeting. The purpose of the Scheme Meeting has been described as follows:[15]

> The purpose of the scheme meeting is to give target members a reasonable opportunity to ventilate their views in relation to the scheme, ask unscripted questions of their directors, and debate the merits of the proposed scheme of arrangement, such that the attention of those present at the meeting can be drawn to matters which those speaking may consider have been overlooked.

[72] That purpose can only be achieved by the provision of adequate information in advance.

[73] I accept that at the Scheme Meeting the chairman explained that Burger Fuel had received a letter from lawyers acting for MTL and that MTL opposed the Scheme. The chairman also advised that the solicitors for MTL had instructions to file a notice of opposition to the application. I also accept that Mr Mason was present at the meeting, albeit he participated remotely. In my view, he did have the opportunity, should he have taken it, to have sought further information and ventilated his concerns.

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15 Tony Damian and Andrew Rich *Schemes, Takeovers and Himalayan Peaks: The Use of Schemes of Arrangement* (4th ed, Herbert Smith Freehills, Sydney, 2021) at 256.

Having said that, the evidence suggests that the board had little enthusiasm for a robust discussion about the important issue of alternative value-adding opportunities. Burger Fuel's initial refusal to provide Mr Mason with cellphone numbers and email addresses of its shareholders provides some support for that finding. The details were not provided to Mr Mason until after the FMA had determined there was no basis for withholding the information sought. The file note of the Q & A session at the special meeting and the reference to the "need to curb questions" also provides support for this finding. I also note that the questions received from Mr Mason on the morning of the Scheme Meeting were not specifically addressed at the meeting itself.

[74] I do not accept that the Scheme was a fait accompli. It was clearly considered at board level and in advance of the proceedings being filed. However, in viewing the evidence overall, I conclude that the information put to shareholders was inadequate in that it failed to provide sufficient information on the critical issue of alternative value-adding opportunities (or reasons why none are available). A more transparent and fulsome approach enabling participants at the Scheme Meeting to better understand what was proposed may have gone some considerable way to alleviate the concerns that still remain. I note also that the obligation of the company to make all material information available to shareholders is not discharged by inviting members "to raise any point of doubt or difficulty at the proposed meeting".[16] If there were issues about disclosure of commercially sensitive information, that could have been accommodated.

[75] I conclude that the Scheme was not fairly put to shareholders. I address the consequences of this finding below; the critical issue is whether this is a disqualifying factor.

(iii) Conflict of interest and misleading information

[76] I reject MTL's contention that Mr Roberts had a conflict of interest. He appropriately did not vote in relation to the Scheme at the board level but did vote on behalf MRHL at the special meeting. Mr Roberts was treated the same as everyone else. His status as a major shareholder was well known and was addressed. In the circumstances here, I do not see any conflict of interest.

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16 Heard, above n 8, at [4.5.5.630] citing *Re Metropolitan Fuel Pty Ltd* [1962] VR 675 at 678.

[77] The claim that the initial announcement and the reference to approximately 8 cents per share is misleading is very much overstated and of no consequence. The notice referred to pro-rata cancellation. The post-court notice three days later referred to 27 cents per share. There is no evidence before me suggesting that any shareholder has been prejudiced by the initial announcement.

[78] The contention that 27 cents per share is not "fair value" is, as Mr Hunter submitted, nonsensical. MTL appears to have resiled from it. Each shareholder is receiving its proportional share of $4.077 million and will retain the same proportional shareholding.

(iv) Classes of shareholders

[79] MTL contends that the shareholders associated with Mr Roberts should have been put in their own class for voting purposes. This is because "the proposed scheme would significantly assist Mr Roberts in taking BFG private". I address below the issue of "going private". However, I find there is no real merit to this claim about classes. All shareholders are treated the same under the Scheme, unlike the creditors in *Trends Publishing International Ltd v Advicewise People Ltd*,[17] which MTL relies on. The Scheme does not effect any change in control.

[80] I note also that s 116(1) of the Act defines class:

> **Meaning of classes and interest groups**
>
> (a) In this Act, unless the context otherwise requires,–
>
> **class** means a class of shares having attached to them identical rights, privileges, limitations, and conditions
>
> …

(v) The impact of the Scheme on voting rights

[81] The NZSA submitted that "at a minimum" shareholders should have been advised that Burger Fuel had taken the view that s 236A of the Act did not apply. Section 236A provides that additional procedural requirements apply where a proposed scheme of arrangement or amalgamation "affects the voting rights of a code company". Section 236A(5) states that "affects the voting rights", in respect of a

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[17] *Trends Publishing International Ltd v Advicewise People Ltd* [2018] NZCCLR 7.

scheme, means "an arrangement or amalgamation that involves a change in the relative percentage of voting rights held or controlled by 1 or more shareholders".

[82] At the hearing this issue largely fell away. All parties agree that the Scheme involves no material change to voting rights and should either be treated as non-existent[18] or, for reasons contended by the Takeovers Panel, a *de minimus* exception should apply. I am grateful for the very helpful and comprehensive submissions presented by the Takeovers Panel on that issue. In the circumstances, it is not necessary for me to rule on it, although I acknowledge the compelling reasons advanced as to why a *de minimus* exception should apply.

Issue (b) – Is the Scheme fair and equitable?

[83] MTL's opposition to the Scheme has been an evolving one. To some extent that is understandable given the complaint about a lack of information. It also seems likely, as Mr Hunter KC submitted, that the opposing shareholders, at Mr Mason's instigation, have taken an opportunity to try and "shake up" Burger Fuel and change its board and management.

[84] Initially, MTL's primary objection was that Burger Fuel should pay a dividend instead of returning capital.[19] I note that Mr Mason's own expert, Mr McKay, states that a dividend is not a sensible position for Burger Fuel. I have already referred at [67] above to the position of Mr Shields who agrees with Mr McKay on that issue. In his most recent affidavit Mr Mason acknowledges that to pay a dividend of $4.08 million, whilst possible, may not be good practice from a corporate finance perspective.

[85] In that affidavit Mr Mason sets out his current position as follows:

> … Rather, I think that a small dividend (to use existing imputation credits efficiently) in conjunction with an indication to the market of a dividend policy and an innovative strategy to allocate some existing funds in the short to mid-term, to generate long term returns, would drive shareholder value.

[86] In that same affidavit, Mr Mason articulates his reasons as to why he says the Scheme is not in the bona fide interests of shareholders as a whole. He contends that

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18 *Re Tilt Renewables Ltd*, above n 3.

19 In MTL's solicitor's letter of 13 December 2022, setting out grounds of opposition to the Scheme, MTL (Mr Chris Mason) offered again to purchase Mr Roberts' shares at 0.53 cents a share.

this is because it furthers what he believes to be the ulterior motive of Mr Roberts to privatise the company.

[87] I find that there is an absence of any truly probative evidence to support the claim that Mr Roberts has plans to make Burger Fuel private or that he somehow has some ulterior motive in supporting the Scheme. In any event, the law protects minority shareholders from any unfairness in a takeover process. Yes, MRHL will receive a substantial amount of cash, but that is simply a consequence of its large shareholding. I also note the expert evidence of Mr Shields, corporate finance partner at KPMG, that the Scheme would not make it easier, or cheaper, for the majority shareholder to personally acquire the shares and de-list. The issue of going private and de-listing is not, in my view, of any real relevance to the critical question of whether the Scheme is fair and equitable.

[88] The concerns and findings about process that I have identified above, and in particular my finding that Burger Fuel did not provide adequate information to shareholders, is obviously a relevant factor in determining whether the Scheme is fair and equitable and whether I should grant the orders sought. However, it is but one of a number of factors I need to consider.

[89] On the evidence before me, I accept that there are genuine and sound commercial reasons for proceeding with the Scheme. In its evidence, Burger Fuel has squarely addressed the issue of an absence of viable alternative value-adding opportunities and provided expert evidence in support of its position. A more fulsome and detailed account has now been provided. As Anderson J held in *Greymouth Petroleum Mining Co Ltd v Fletcher Challenge*:[20]

> The Court was to consider an application for approval of an arrangement under s 236 with a fair and sensible appreciation of commercial considerations. It should not be influenced by fanciful and speculative anxieties.

[90] I reject the principal contention of MTL (supported by the third respondent) that it is simply not possible to say whether the Scheme is reasonable, fair and equitable. There have been process failings, as I have identified, but ultimately they are not of a disqualifying kind. The consequences of the process failures in this case

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[20] *Greymouth Petroleum Mining Co Ltd v Fletcher Challenge* [2001] 2 NZLR 786 at [15].

should not be overstated. While MTL and NZSA have raised important issues about process and principle, ultimately the prejudice arising has been of a limited kind.

[91] As Mr Hunter submitted, having had the opportunity to debate the issues (including the exchange of evidence by expert witnesses), the respondents have failed to put forward any viable counter-narrative. The assessment of the directors is that they have the necessary capacity for future investment and growth with the significant capital that is being retained. As Mr Hunter emphasised, only $4.08 million of the $9 million surplus is being returned. There is no probative evidence or legitimate basis for the Court to conclude that the directors' assessment is wrong. I note also that the NZSA does not oppose the application.

[92] The Scheme was supported by 92.92 per cent of those voting (where the requirement is 75 per cent) and 76.39 per cent of total shares (there is a 50 per cent requirement). Excluding MTL's shares, 97.73 per cent voted in favour. Only 12 shareholders voted against. It is unlikely that had more fulsome information been available in the shareholder materials that the shareholders would have voted differently. Burger Fuel has no material debt and it retains surplus cash. All these factors support a finding that I should approve the Scheme.

[93] I have given consideration to whether I should order a "further process" be undertaken before making a final decision of whether or not to approve the Scheme. That approach has been adopted in Australia.[21] However, in this case I see no utility in that approach, particularly given the complete absence of any plausible or viable counter-narrative.

[94] My decision to approve the Scheme is not an indication that the courts do not regard these process issues as important. For good reason, the Court will always insist about a level of disclosure that enables a shareholder to make a properly informed decision. These obligations must be taken seriously. Ordinarily, process failures of the kind I have identified would likely result in a decision to refuse approval or give rise to an order requiring further steps to be taken. However, the Court retains a discretion and it is necessary to ask whether the process failures are material and/or have caused any prejudice.

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[21] Damian and Rich, above n 15; see also *Re Missouri NZURI Copper Ltd (No 4)* [2020] WASC 10.

Result

[95] I grant the application and make an order approving the Scheme under s 236(1) of the Act.

[96] As to costs, I accept and adopt the submissions of Mr Blanchard KC. The objections raised in this case were not technical and baseless. They were of substance and, in my view, properly and justifiably advanced, even though the respondents were ultimately unsuccessful.

[97] Where a person affected by a scheme appears on the hearing of the application to object to that approval, the question of whether that objector's costs should be paid by the company or the objector should pay the company's costs of the application, will not be determined by reference to whether the application is successful, but rather to whether the objections were properly and justifiably advanced even though they ultimately failed.[22]

[98] Accordingly, I order that Burger Fuel is to pay costs to the first respondent, MTL, and on a 2B basis plus disbursements. I also order that Burger Fuel is to pay costs to the third respondent in the total sum of $4,890 (being 2B costs plus disbursements). There is no order for costs in favour of Burger Fuel.

[99] I note that the NZSA does not seek costs. I make no order for costs in relation to NZSA.

[100] There is no order for costs in relation to the Takeovers Panel.

Andrew J

This judgment was delivered by Justice Andrew on 27 May 2024 at 4.00 pm and re-issued on 19 June 2024 pursuant to r 11.5 of the High Court Rules 2016

Registrar / Deputy Registrar

Date ……

[22] Heard, above n 8, at [4.5.800], citing *Re Arrowfield Group Ltd* 17 ACSR 649 (NSWSC); *Re Matine Ltd* (1998) 28 ACSR 492 (NSWSC); *Re Phosphate Resources Ltd* (2005) 56 ACSR 169, [2005] FCA 1705.