

UPDATE TO CREDITORS

FIBER FRESH FEEDS LIMITED (IN RECEIVERSHIP & ADMINISTRATORS APPOINTED)

("the Company")

At the first meeting of creditors on 12 June 2019 the Administrators noted that:

- The second meeting of creditors, where creditors vote on the future of the Companies, was due to be held on or before 28 June; and
- They may apply to the High Court for an extension of the convening period for the second meeting.

This is a procedural matter relating to an update on the Voluntary Administration process and does not relate to current business trading in receivership.

On 25 June 2019 the Administrators filed an application in the Auckland High Court requesting an extension of the convening period to 28 September 2019 and an order in relation to the provision of documents for the second creditors meeting.

On 5 July 2019 the High Court granted the following orders:

1. The Applicants have leave to bring the application without notice;
2. The convening period for the watershed meeting in relation to the Voluntary Administration of the Company is extended by three months from 28 June 2019 until 28 September 2019, pursuant to section 239AT(3) of the Companies Act 1993;
3. Advice of the application and a copy of the orders shall be served on all creditors of the Company by:
 - (a) sending them to creditors by email (where an address has been provided to the Company) or by post to the postal address that has been provided to the Company (if an email address has not been provided to the Company); and
 - (b) posting a copy of the application on Baker Tilly Staples Rodway's website (<https://bakertillysr.nz/creditors>);
4. Leave is reserved for any creditor of the Company to apply on notice to vary or set aside these orders; and
5. Leave is reserved to the Administrators to apply further in respect of any modifications or ancillary issues arising out of the orders made.

The Receivers were supportive of the extension of the convening period.

Attached is a copy of the High Courts Judgement of Associate Judge Smith.

If you have any queries in relation to the extension application, please refer to the contact details below.

Dated: 8 July 2019



Tony Maginness
Joint & Several Administrator

*The address and telephone number to which, during normal business hours, enquiries may be directed by a creditor or member:
Baker Tilly Staples Rodway, PO Box 3899, Auckland 1140. Telephone: (09) 309 0463. Email: kris.mcaish@bakertillysr.nz*

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

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

**CIV-2019-404-1238
[2019] NZHC 1565**

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

IN THE MATTER of FIBER FRESH FEEDS LIMITED (IN
RECEIVERSHIP AND
ADMINISTRATORS APPOINTED)

AND of an application by TONY LEONARD
MAGINNESS and JARED WAIATA
BOOTH
Applicants

Hearing: 28 June 2019

Appearances: M Kearsy and L N Wilson for the Applicant Administrators

Judgment: 5 July 2019

JUDGMENT OF ASSOCIATE JUDGE SMITH

*This judgment was delivered by me on 5 July 2019 at 10.30am,
pursuant to r 11.5 of the High Court Rules*

Registrar/Deputy Registrar

Solicitors / Counsel:
Russell McVeagh, Auckland

Introduction

[1] On 31 May 2019, Mr Maginness and Mr Booth (the administrators) were appointed as joint and several administrators of Fiber Fresh Feeds Ltd (In Receivership and In Administration – "Fiber Fresh") under Part 15A of the Companies Act 1993 (the Act). They were appointed pursuant to s 239I of the Act, under which a company may appoint an administrator if the board of the company resolves that, in its opinion, the company is insolvent or may become insolvent and that an administrator should be appointed. Fiber Fresh was by then already in receivership. On 17 May 2019, the secured creditor Cooperative Rabobank UA (Rabobank) had appointed Brendon Gibson and Natalie Burrett as joint and several receivers and managers, pursuant to a general security agreement dated 21 October 2016.

[2] Because the administrators had had a previous relationship with Rabobank, an application was made to the Court for approval of the administrators' appointment. That approval was given by Muir J by Minute dated 29 May 2019.

[3] Under Part 15A of the Act, administrators are required to call a first meeting of creditors. That meeting was held on 12 June 2019. The administrators are then required to convene a meeting called a "watershed meeting", within "the convening period". The purpose of the watershed meeting is "to decide the future of the company and, in particular, whether the company and the deed administrator should execute a deed of company arrangement".¹ The watershed meeting is intended to be a meeting where substantial decisions are made by the creditors about the future of the company: the creditors may resolve to end the administration, put the company into liquidation, or enter into a deed of company arrangement.²

[4] The convening period is the period of 20 working days after the date on which the administrator is appointed,³ and the watershed meeting is required to be held within five working days after the end of the convening period.⁴ An application may

¹ Companies Act 1993, s 239AS.

² Section 239ABA.

³ Section 239AT(2).

⁴ Section 239AV.

be made to the Court to extend the convening period, and an extension may be granted before or after the convening period has expired.⁵

[5] In this case, the convening period was due to expire on 28 June 2019.

[6] On 25 June 2019, the administrators applied for orders that:

- (a) the [administrators] are granted leave to commence these proceedings without notice;
- (b) the convening period for the watershed meeting in relation to the voluntary administration of [Fiber Fresh] be extended by three months from 28 June 2019 until 28 September 2019, pursuant to section 239AT(3) of [the Act];
- (c) advice of the application and a copy of the orders shall be served on all creditors of [Fiber Fresh] by:
 - (i) sending them to creditors by email (where an address has been provided to [Fiber Fresh]) or by post to the postal address that has been provided to [Fiber Fresh] (if an email address has not been provided to [Fiber Fresh]); and
 - (ii) posting a copy of the application on Baker Tilly Staples Rodway's website;
- (d) leave is reserved for any creditor of [Fiber Fresh] to apply on notice to vary or set aside these orders; and
- (e) leave is reserved to the [administrators] to apply further in respect of any modifications or ancillary issues arising out of the orders made.

[7] I saw counsel in Chambers on 28 June 2019, and, in view of the urgency of the application and the number of creditors who would otherwise have had to be served (160), I granted leave to the administrators to make the application without notice. I sought further submissions from counsel on certain aspects of the application, and directed that a further memorandum be filed by 2 July 2019. I made an interim order extending the convening period to 5.00pm on 5 July 2019.

[8] Having received the further memorandum from counsel, I now give judgment on the application.

⁵ Section 239AT(3) and (4).

Background

[9] Fiber Fresh is a grower and producer of animal feeds. It has been operating for some 35 years, and has subsidiary operations in Australia, Japan, and the Middle East. In New Zealand, it has an office and production and distribution facilities near Reporoa.

[10] The business primarily involves:

- (a) growing and producing high quality stock feed (in particular for the equine market); and
- (b) growing a variety of forage crops on leased land, for livestock grazing.

[11] Fiber Fresh has 43 employees and 160 creditors, and it presently has a significant amount of forage feed on approximately 1,800 ha of leased land in the Reporoa region. That forage feed will need to be managed and realised in an orderly fashion. In addition to the forage crops, Fiber Fresh also holds approximately 900,000 bags of dried feed ready for the market.

[12] In an affidavit filed in support of the application, Mr Jared Booth,⁶ one of the administrators, said that since the appointment of the administrators the receivers have continued to control the assets of Fiber Fresh and trade the company. The receivers are presently managing Fiber Fresh's "wintering" programme, which involves allowing stock to eat the forage crops for a fee, thereby realising value from the crops. There are approximately 6,250 cows (in calf) grazing on the land leased by Fiber Fresh. The receivers are also continuing to sell the dried food product through the company's usual distribution channels.

[13] The receivers are endeavouring to sell Fiber Fresh as a going concern, and that process is said to be ongoing. It is not yet known how long the process will take.

⁶ Mr Booth is an insolvency and restructuring practitioner, and an Associate Director, at Baker Tilly Staples Rodway.

[14] Mr Booth produced a copy of a letter from the receivers, dated 24 June 2019, in which the receivers confirmed that Fiber Fresh's leases were paid up to date at the outset of the receivership. The receivers say that the leases will be critical to potential purchasers if Fiber Fresh is to be sold as a going concern, and they believe they can meet the company's rent obligations for so long as it continues to occupy the leased land.

[15] The receivers confirmed that they were continuing to sell the equine feed product through usual distribution channels. The peak selling season for ruminant product was said to have just commenced.

[16] Based on their past experience, the receivers expressed the view that, whatever strategy for realising the assets of Fiber Fresh was chosen, any orderly realisation of the company's business or assets would not likely be concluded prior to September 2019.

[17] The receivers described the receivership as "a large trading receivership", and referred to the operational benefits of being able to continue occupying the leased land. They also referred to the benefit of the moratorium period which the administration provides, noting that the moratorium currently protects Fiber Fresh from claims or other adverse actions, such as landlords terminating leases or other property owners taking possession of their property. They expressed the view that the loss of the moratorium could be very disruptive to a sale process, particularly as Fiber Fresh's "very operations are predicated and reliant on the lease structure for forage product".

[18] In respect of employees, the receivers noted that an orderly realisation process would provide the opportunity for continued employment of some employees, and would hold open the possibility that some employees could transfer to a purchaser if a sale of the business as a going concern can be achieved.

[19] In his evidence, Mr Booth also said that, due to the short period of the administration to date, he and Mr Maginness have not yet been in a position to accurately report to creditors and make meaningful representations regarding Fiber Fresh's future. An extension of the convening period was said to be necessary to

ensure that the creditors will have sufficient information to make the decisions they will be required to make at the watershed meeting.

[20] Mr Booth said that no deed of company arrangement has so far been proposed, so if the convening period for the watershed meeting is not extended the choices available to creditors will be limited to ending the administration or placing Fiber Fresh into liquidation. In either event the receivers would remain in control of the business and assets of Fiber Fresh, but they would not have the benefit of the moratorium on actions against Fiber Fresh's property. If that were to occur, Fiber Fresh might lose the ability to achieve a return on its investment in the crops, and there might also be animal welfare considerations if the land currently used for grazing is no longer available.

[21] Subject to those limitations, Mr Booth expressed the view that a sale as a going concern represents the best prospect of maximising the return to creditors. The landlords are not immediately prejudiced by the continuation of the moratorium provided by the administration, as they are being paid by the receivers for Fiber Fresh's use of the leased land.

[22] The administrators seek an order that the convening period be extended by three months. That period has been discussed with the receivers, and it reflects their views on the time that will be required to run the sale process and optimise the realisation of the assets. A three month convening period would expire on 28 September 2019.

Discussion and conclusions

[23] I am satisfied this is a proper case to (further) extend the convening period, to the end-date sought by the administrators.

[24] The starting point when considering an extension application under s 239AT is to look at the purpose of the voluntary administration regime, the duties cast upon an administrator (both private and public), and the need to ensure that full information is available to all creditors at the watershed meeting, so that they may make informed decisions about the fate of the enterprises with which they have been dealing. The

Court must also bear in mind the need to restrict the moratorium of creditors' rights to the minimum period necessary to achieve the purposes of the legislation.⁷

[25] In *Re Pumpkin Patch Ltd*, Heath J listed some of the factors that may be relevant on an application to extend the convening period. The factors include the size and scope of the business, the existence of off-shore activities, the number of employees and the nature of their entitlements, and the complexity inherent in enabling administrators to identify the most efficient way to realise assets for the benefit of creditors and to report to them at the watershed meeting.

[26] In this case, the scope of the businesses conducted by Fiber Fresh appears to be reasonably substantial: in addition to the Reporoa-based business, there are off-shore operations in Australia, Japan, and the Middle East. There are over 40 employees, and potential difficulties arising from the needs to maximise the value of the company's crops for creditors and to ensure that the welfare of stock presently grazing on the leased land is properly secured. Both of those potential concerns could crystallise into significant losses if the administration were brought to an immediate end and the moratorium on creditor action lifted.

[27] I think the overriding consideration in this case is the requirement that a proper balance be struck between the expectation that an administration will be relatively speedy, and the need to ensure that undue haste does not prejudice sensible and constructive actions towards one of the fundamental objects of the regime, namely maximising the position for the creditors.⁸ I accept the administrators' submission that the leases are likely to be essential to any successful sale of Fiber Fresh as a going concern, and that keeping the moratorium in place is or may be necessary to preserve the value inherent in the leases. That is what appears to be required to maximise the likely return for creditors, and that extension sought by the administrators should not prejudice the creditors.

⁷ *Re Pumpkin Patch Ltd* [2016] NZHC 2771 at [15]. See also *Re Nylex New Zealand Ltd* CIV-2009-404-1217, HC Auckland, 11 March 2009 at [18] and [19].

⁸ *Nylex New Zealand Ltd* CIV-2009-404-1217, HC Auckland, 11 March 2009 at [22], citing *Re Diamond Press Australia Pty Ltd* [2001] NSWSC 313 at [10].

[28] I raised with Mr Kearsey and Ms Wilson the purpose of the voluntary administration when Fiber Fresh was already in receivership. Counsel referred in response to the objectives of the Part 15A voluntary administration scheme, as set out in s 239A of the Act. The objects are to provide for the business, property, and affairs of the insolvent company to be administered in a way that —

- (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or
- (b) if it is not possible for the company or its business to continue in existence, results in a better return for the company's creditors and shareholders than would result from an immediate liquidation of the company.

[29] Mr Kearsey and Ms Wilson emphasised the disjunctive nature of subparagraphs (a) and (b) of s 239A, noting that maximising the returns from the realisation of the insolvent company's assets is a legitimate, stand-alone purpose of voluntary administration, at least if it is not possible for the company or its business to continue. They noted that it is not uncommon to have concurrent appointments of administrators and receivers; indeed that was the case in *Re Pumpkin Patch Ltd*, where the receivers and Part 15A administrators were appointed on the same day. They further noted that there are no pre-conditions for appointment of administrators (for example that the appointing body (in this case the board of Fiber Fresh) must be satisfied that either of the s 239A objectives can be met), and the administrators do not currently know whether or not a going concern sale could be achieved through a deed of company administration. Counsel confirmed that the administrators have not excluded the possibility of a deed of company arrangement being entered into at some point.

[30] I think those submissions sufficiently deal with the point raised about the concurrent roles of the receivers and administrators. At this stage it seems highly unlikely that Fiber Fresh could continue in business — the receivers are actively trying to sell the business. So the objective at s 239A(b) appears to be the most likely objective the creditors will wish to pursue, and that objective requires that the administration (and the moratorium on creditor action that goes with it) should be extended. It is not necessary in considering the extension application (at least in this

case) to enquire into whether objective (a) in s 239A of the Act might ultimately be achieved.

[31] The extension of three months which has been sought appears to me to be reasonable. It is the period the receivers have said they will need to market the company for sale as a going concern, and it appears that there is unlikely to be any prejudice to creditors if an extension of that duration is granted. The landlords of the land occupied by Fiber Fresh are being paid, and suppliers of goods and/or services will be protected by the administrators' (and/or receivers') obligations to pay for post-appointment trading liabilities they may have incurred. Employees who continue to be employed by Fiber Fresh on fixed term arrangements will also have the benefit of the company continuing to trade. There is no evidence of prejudice to any other creditor.

[32] For the foregoing reasons, I make an order (further) extending the convening period to **28 September 2019**. Leave is reserved for any creditor of Fiber Fresh to apply on notice to vary or set aside these orders, and leave is also reserved to the administrators to apply further in respect of any modifications or ancillary issues arising out of the orders made.

[33] I am satisfied that it is appropriate to provide notice of the administrators' application and the orders made on it in the manner proposed by the administrators. I make orders as sought in terms of paragraph 1(c) of the application.

Associate Judge Smith