

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

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

CIV-2022-404-1993

UNDER Part 7 of the High Court Rules 2016 and Part 15A of
the Companies Act 1993

IN THE MATTER OF **RUAPEHU ALPINE LIFTS LIMITED
(ADMINISTRATORS APPOINTED)**

AND of an application by **JOHN HOWARD ROSS FISK**
and **RICHARD JOHN NACEY**, as Administrators of
**RUAPEHU ALPINE LIFTS LIMITED
(ADMINISTRATORS APPOINTED)**

Applicants

**MEMORANDUM OF COUNSEL IN SUPPORT OF WITHOUT NOTICE
INTERLOCUTORY APPLICATION FOR ORDERS RELATING TO VOLUNTARY
ADMINISTRATION**

Dated: 21 November 2022

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MAY IT PLEASE THE COURT:

Introduction

1. Counsel for the applicants, John Fisk and Richard Nacey as administrators (**Administrators**) of Ruapehu Alpine Lifts Ltd (in administration) (**Company**), file this memorandum in support of a without notice interlocutory application. The application is for orders that under s 239ADO of the Companies Act 1993 (**Act**), Part 15A of the Act operates in relation to the Administrators as if s 239ADH of the Act provides that:
 - (a) any liability incurred by the Administrators arising out of or in connection with the Term Loan Facility Deed dated 17 November 2022 (**Facility**) given by ANZ Bank New Zealand Limited (**ANZ**) and Crown Regional Holdings Limited (**CRHL**) is in the nature of debts incurred by the Administrators in the performance and exercise of their functions as joint and several administrators of the Company; and
 - (b) notwithstanding the liabilities in paragraph 1(a) above are debts incurred by the Administrators in the performance and exercise of their functions as joint and several administrators of the Company, the Administrators' personal liability for such debts (whether in contract, tort (including negligence) or otherwise) is limited to the available assets of the Company and any available statutory and equitable indemnities of the Administrators in relation to those assets, except to the extent agreed under the Facility.
2. The orders are necessary to permit the Administrators to drawdown on the Facility to meet the ongoing liabilities of the Company and enable the Administrators to develop a restructuring proposal. Mr Fisk deposes that without the Facility the Company will have insufficient funds to continue trading. Accordingly, orders are respectfully sought as soon as possible.
3. Counsel understand that ANZ and CRHL consent to the orders sought, as will be confirmed by the separate joint memorandum of counsel filed in conjunction with this application.
4. It is submitted that this is an application that the Court may well consider it can decide on the papers. However, counsel for the Administrators, ANZ, and CRHL are available to appear at short notice if that would assist the Court.

Background

The Company and the administration

5. As explained in Mr Nacey's affidavit and the judgment of Gardiner AJ dated 21 October 2022, the Company operates the Whakapapa and Tūroa ski fields on the slopes of Mount Ruapehu in the central North Island. It is a nationally and regionally significant business.
6. The Administrators were appointed to the Company on 11 October 2022. On 16 October 2022, they sought orders:
 - (a) under section 239AT(3) of the Act, extending the period by which the Administrators must convene the watershed meeting for each Company (from 9 November 2022 until 9 May 2023, being a six month extension), with the Administrators being permitted to convene the watershed meeting any time within that period;
 - (b) under section 239Y(4) of the Act, extending the time period within which notice of the termination of a contract of employment was to be given (from 25 October 2022 until 9 May 2023), with wages and salary to be treated as a cost of the administration; and
 - (c) under sections 239ADO and 239ADR of the Act, modifying the service requirements under s 391 of the Act, permitting them to give notices and other documents to creditors and others by electronic means (with retrospective effect, to apply to notices which the Administrators sent by email on 14 October 2022).
7. The Administrators sought the orders referred to at paragraphs 6(a) – 6(b) above because, as Mr Nacey's affidavit of 16 October 2022 outlines, the Administrators wished to continue trading the Company to maximise the possibility of selling the Company as a going-concern, which the Administrators believe will result in the best return for the Company's creditors.
8. On 21 October 2022, Gardiner AJ gave judgment granting the Administrators the above orders.

Current status of the administration

9. Following their appointment, Mr Fisk deposes that the Administrators have taken the key following steps:

- (a) on 21 October 2022, they held the first creditors' meeting;
 - (b) they have met with Ngāti Tūwharetoa, Ngāti Rangi and Uenuku who are tangata whenua on several occasions;
 - (c) they have met and corresponded with central Government (including the Department of Conservation and the Ministry of Business, Innovation, and Employment) and with local government (including the Ruapehu District Council and the Taupō District Council) on several occasions to discuss the future of the Company, restructuring options, and the concessions on which the Company operates the ski fields;
 - (d) they have met and corresponded with staff, life-pass holders, creditors and other interested parties such as the media;
 - (e) they have conducted various analyses of the Company, including reviewing the Company's insurance and health and safety, identifying surplus assets, valuing assets, and in relation to other general trading matters;
 - (f) they have met and corresponded with ANZ and CRHL to obtain funding to enable us to continue the administration and consider restructuring options for the Company;
 - (g) they have also had discussions with various parties who are interested in purchasing the business and in providing funding to support the business in remaining open; and
 - (h) on 4 November 2022, they met with the Creditors' Committee to discuss the potential options available to the Company.
10. As Mr Fisk deposes, as at 11 October 2022, the Company's assets and liabilities may be summarised as follows:
- (a) Total current assets of \$1,911,558;
 - (b) Total current liabilities of \$9,659,498;
 - (c) Total non-current assets of \$54,075,145;
 - (d) Total non-current liabilities of \$49,560,086; and
 - (e) Net assets and total equity of -\$3,232,881.

11. It remains the Administrators' view that continuing to trade the Company will best preserve the possibility of selling the Company as a going-concern, which the Administrators believe will result in the best return for the Company's creditors.

Need for further funding

12. As Mr Fisk deposes, the Company requires further funding to continue trading.
13. To that end, as Mr Fisk's affidavit deposes, ANZ and CRHL (together, **Lenders**), two of the Company's secured creditors, have proposed the Facility to enable the Administrators to continue trading the Company. ANZ has a registered security interest over all of the Company's present and after acquired property, excluding certain property relating to and including the Sky Waka Gondola.¹ CRHL has a subsequently registered security interest over certain assets of the Company.² The Lenders have proposed the Facility in contemplation of the watershed meeting being held on or before 16 December 2022 (**Watershed Meeting**).
14. The Lenders wish to support the Administrators to continue trading the Company so that CRHL can develop a proposal to enable the continued operation of the commercial ski field business and the Sky Waka gondola on Mt Ruapehu currently owned and operated by the Company (**Restructuring Proposal**). If a Restructuring Proposal can be developed, it will be proposed by CRHL in a deed of company arrangement (**DOCA**) at the Watershed Meeting.

The Facility

15. In summary, the key terms of the Facility are that:
 - (a) the Lenders will provide a facility amount of up to \$4.5 million (for CRHL, up to \$2 million, and for ANZ, up to \$2.5 million);³
 - (b) the Facility must only be used:⁴

¹ Affidavit of Richard John Nacey affirmed 16 October 2022 at **RN-1/45-46**.

² Affidavit of Richard John Nacey affirmed 16 October 2022 at **RN-1/25, 41, 99, 132**.

³ Facility, cl 2.1, Affidavit of John Howard Ross Fisk affirmed 18 November 2022 (**Fisk**) at **JF-1/13**.

⁴ Facility, cl 3.1, Fisk at **JF-1/14**.

- (i) to pay the liabilities of the Company incurred by the Administrators or payable by the Company after 11 October 2022;
 - (ii) to pay certain costs and expenses incurred for the purpose the development of the Restructuring Proposal, up to an approved amount; and
 - (iii) to pay the Administrators' remuneration and reasonable out-of-pocket professional (including legal) costs and expenses, in each case, that fall due for payment.
- (c) existing post-administration funding provided by ANZ to the Company forms part of the Facility;⁵
- (d) the Company may make weekly drawdowns of the Facility to meet approved costs,⁶ subject to satisfaction of the conditions precedent to each advance;⁷
- (e) the Facility would be available from the date of satisfaction of the conditions to availability until the first to occur of:⁸
- (i) the date of the Watershed Meeting;
 - (ii) 19 December 2022; or
 - (iii) the date on which ANZ or CRHL terminates the Facility;
- (f) the conditions to availability include that the Administrators have obtained Court orders under s 239ADO of the Act in a form acceptable to the Lenders;⁹
- (g) the Lenders acknowledge and accept that:
- (i) the personal liability of the Administrators, whether in contract, tort (including negligence) or otherwise, in relation to the Facility is limited to available assets of the Company and the statutory and equitable indemnities of the Administrators in relation to those assets, except to the extent agreed under the Facility;¹⁰

⁵ Facility, cl 5.4(b), Fisk at **JF-1/17**.

⁶ Facility, cl 5.2(a)(viii), Fisk at **JF-1/16**.

⁷ Facility, cl 5.3(a), Fisk at **JF-1/16**.

⁸ Facility, cl 1.1 – "Availability Period", Fisk at **JF-1/4**.

⁹ Facility, cl 4.2(a)(iv), Fisk at **JF-1/15**.

¹⁰ Facility, cl 15.3, Fisk at **JF-1/29**.

- (ii) the Administrators may seek Court orders under s 239ADO of the Companies Act on terms acceptable to, and on notice to, the Lenders;¹¹
- (h) all amounts owing to each Lender under the Facility will be secured by the existing security interests over the assets of the Company held by that Lender.¹²

Legal principles

- 16. The issue for the Administrators is that under s 239ADH(1) of the Act the Administrators will be personally liable for the debts arising under the Facility.
- 17. Section 239ADH provides as follows:
 - (1) The administrator is liable for debts that he or she incurs in the performance or exercise, or purported performance or exercise, of any of his or her functions and powers as administrator, for—
 - (a) the purpose of funding the company; or
 - (b) any services rendered; or
 - (c) any goods bought; or
 - (d) any property hired, leased, or occupied.
 - (2) Subsection (1) has effect despite any agreement to the contrary, but without prejudice to the administrator's rights against the company or anyone else.
- 18. The purpose of personal liability on an administrator is to encourage creditors to continue dealing with the company while it is in administration.¹³ It also encourages the administrator to rapidly resolve the company's financial problems.¹⁴ In turn, an administrator has an indemnity to the extent of the Company's property for such a personal liability,¹⁵ which is secured by a statutory lien.¹⁶ Accordingly, if the assets of the Company are insufficient to meet the administrator's personal liability under s 239ADH of the Act, then the administrator would be required to satisfy his or her personal liability from his or her own assets.¹⁷

¹¹ Facility, cl 4.2(a)(iv), Fisk at **JF-1/15**.

¹² Facility, cls 1.4 and 1.5, Fisk at **JF-1/12**.

¹³ *Insolvency Law* (online ed, Thomson Reuters) at [CA 239ADH.02], **Bundle of Authorities (BOA) Tab 7**.

¹⁴ *Insolvency Law* (online ed, Thomson Reuters) at [CA 239ADH.02], **BOA Tab 7**.

¹⁵ Section 239ADL(a), **BOA Tab 1**.

¹⁶ Section 239ADN, **BOA Tab 1**.

¹⁷ Before liquidation, the administrator's indemnity enjoys priority to the claims of all the company's unsecured creditors, and over that element of a secured creditor's security over accounts receivable and inventory which, on a liquidation, is subordinated to preferential claims. In liquidation, the administrator's remuneration and expenses rank first in order of priority as preferential claims, but behind the liquidator's fees and expenses (without any priority over secured accounts receivable and inventory): Section 239ADM; *Heath and Whale on Insolvency* (online ed, LexisNexis) at [17.62].

19. To avoid those consequences, when a company in administration borrows funds from a third-party financier to help fund the company's ongoing trade during administration, administrators may seek orders under s 239ADO of the Act limiting their personal liability. Such orders have been made on a significant number of occasions in Australia and have also been made once previously in New Zealand.

Section 239ADO orders

20. Under s 239ADO, the Court may make “any order that it thinks appropriate about how [Part 15A] is to operate in relation to a particular company”. The overriding principle is that the Court should only exercise the power to ensure that the objectives of Part 15A are maintained in the case of a particular company.¹⁸ Those objectives are outlined in s 239A of the Act:

The objects of this Part are to provide for the business, property, and affairs of an insolvent company, or a company that may in the future become insolvent, 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.
21. In *Re Jackson*, Hinton J made orders under s 239ADO of the Act limiting the administrators' personal liability under an on-demand overdraft provided by ANZ for the purpose of funding the administration to the available assets of the relevant companies (except to the extent agreed otherwise with ANZ).¹⁹ In doing so, her Honour considered that:
- (a) the proposed arrangements were in the interests of creditors generally, because without the funding arrangements there would be no monies to fund the administration;²⁰
 - (b) there was no prejudice to ANZ in granting the orders sought, as ANZ had already agreed that the administrators' liability would not extend beyond the value of the companies' available assets;²¹ and
 - (c) there was no prejudice to any other party.²²

¹⁸ *Re EncoreFX Limited* [2020] NZHC 674 at [8].

¹⁹ *Re Jackson* [2018] NZHC 368, **BOA Tab 3**.

²⁰ At [23].

²¹ At [24].

²² At [26].

22. The approach in *Re Jackson* is consistent with the significant number of Australian cases decided under ss 443A and 447A(1) of the Corporations Act 2001 (Cth) (**Corporations Act**),²³ which are in materially identical terms to ss 239ADH and 239ADO of the Act.
23. Orders limiting administrators' personal liability under s 443A of the Corporations Act have "frequently been made in circumstances where the Court is satisfied that an administrator has entered into a loan agreement or other arrangement to enable the company's business to continue to trade for the benefit of the company's creditors."²⁴ In such circumstances, the "courts have held that it is not to be expected that the voluntary administrators should expose themselves to substantial personal liabilities,"²⁵ and that orders relieving them of such liabilities will "permit them to make commercial decisions about the ongoing operations by focussing on what is in the best interests of creditors 'uninfluenced by concerns of personal liability.'"²⁶
24. The principles governing the grant of such orders, as summarised in the leading Australian case of *Re Unlocked Ltd*, are as follows:²⁷
- (a) the proposed arrangements are in the interests of the company's creditors and consistent with the objectives of Part 5.3A of the Corporations Act [i.e. Part 15A of the Act];
 - (b) typically the arrangements proposed are to enable the company's business to continue to trade for the benefit of the company's creditors;
 - (c) the creditors of the company are not prejudiced or disadvantaged by the types of orders sought and stand to benefit from the administrators entering into the arrangement; and
 - (d) notice has been given to those who may be affected by the order.
25. While the "general rule" in Australia is that it is preferable creditors be advised of such applications, that rule has been departed from where the

²³ *Crutchfield's Voluntary Administration* (online ed, Thomson Reuters) at [30.443A.20], **BOA Tab 8**.

²⁴ *Secatore, in the matter of Fletcher Jones and Staff Pty Ltd (admins apptd)* [2011] FCA 1493 at [23], **BOA Tab 6**.

²⁵ *Re Unlocked Ltd (administrators appointed)* [2018] VSC at [51] (citations omitted), **BOA Tab 5**.

²⁶ *Re Unlocked Ltd (administrators appointed)* [2018] VSC at [52] citing *Secatore, in the matter of Fletcher Jones and Staff Pty Ltd (admins apptd)* [2011] FCA 1493 at [29], **BOA Tab 5**.

²⁷ *Re Unlocked Ltd (administrators appointed)* [2018] VSC at [60]-[64] (citations omitted) citing *Re Mentha (in their capacities as joint and several administrators of the Griffin Coal Mining Company Pty Ltd (admins apptd))* (2010) 82 ACSR 142; [2010] FCA 1469 at [30] (citations omitted) and recently affirmed in *Re Ovato Ltd (Admins Apptd)* [2022] FCA 903 at [15], **BOA Tab 4**.

circumstances indicate a need for urgency and creditors have leave reserved to them to apply to vary the orders.²⁸

Analysis

26. It is respectfully submitted that the applicable principles set out in *Re Jackson* and *Re Unlockd Ltd* are met in this case.
27. First, the Facility is in the interests of the Company's creditors and consistent with the objectives of Part 15A of the Act. It will enable the Company to continue trading and maximise the possibility that it can be sold as a going concern, which is to the benefit of unsecured creditors.
28. Second, the Company's creditors are not prejudiced by the orders sought.
 - (a) The Lenders have consented to the orders and agreed the Facility (which contractually limits the Administrators' liability, despite s 239ADH(2) of the Act).
 - (b) The Company's unsecured creditors are not prejudiced, and will in fact stand potentially to benefit from the orders, because the funding is necessary to maximise the prospect of the Company being sold as a going-concern and the Company is receiving value for the increase in secured indebtedness. Without the orders, the Administrators would be unwilling to assume personal liability for the Facility, which would likely result in the immediate liquidation of the Company. If that were to occur, as Mr Fisk's and Mr Nacey's affidavits depose, that would be the worst outcome for the Company's creditors because it would destroy the value of the Company and reduce the potential returns to unsecured creditors.
29. Last, as much notice as possible has been given to the Company's creditors. ANZ and CRHL, who are most directly affected by the orders, have consented to them. Immediately following this filing, the Administrators will send a copy of the application and supporting documents to the Company's creditors (by email and upload to PwC's website, consistent with the service methods approved by Associate Judge Gardiner), given that an on-notice hearing would be impractical for the Company's 16,000 creditors, and leave is reserved to them to apply to vary the orders. Considering the Administrators need promptly to secure funding to continue trading the

²⁸ *Re Unlockd Ltd (administrators appointed)* [2018] VSC at [69]-[71], **BOA Tab 5**.

Company, it is respectfully submitted that the course adopted by the Administrators is appropriate (consistent with the approach taken in *Re Jackson*).

Without notice

30. Under r 24.61(2), this application may be made by interlocutory application under subpart 2 of Part 7 of the High Court Rules.
31. It is submitted that it is appropriate for the application to be determined on a without notice basis under r 7.46(3)(a) and (e). Requiring the Administrators to proceed with the application on notice would cause undue delay or prejudice to the Administrators, and would not be in the interests of justice, because:
 - (a) personal service of the application, memorandum and affidavit on approximately 16,000 creditors would be impractical;
 - (b) it would be difficult, if not impossible, for the Court to convene a contested hearing (if any objection was received) before the orders are needed;
 - (c) the Company's creditors will not suffer any prejudice if service is dispensed with because:
 - (i) they will be notified of the orders (if granted); and
 - (ii) they will have the right to apply to vary them.
32. It is submitted that it is also appropriate that the orders be notified by advertisement, rather than personal service. That is consistent with the approach taken in other, similar cases. The Court has previously held that it was appropriate to notify creditors and employees by advertising the orders in a daily newspaper and posting the orders on the administrators' website:

*Re Nylex (New Zealand) Limited;*²⁹ *Re WGL Retail Holdings*³⁰ and *Re Gourmet Food Holdings New Zealand Limited.*³¹

Dated: 21 November 2022



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D T Broadmore / L C Sizer

Counsel for the Administrators

²⁹ *Re Nylex (New Zealand) Ltd* HC Auckland CIV 2009-404-1217, 11 March 2009.

³⁰ *Re WGL Retail Holdings Ltd* [2011] NZCCLR 22.

³¹ *Re Gourmet Food Holdings New Zealand Ltd* [2012] NZHC 3606.