MEDIA RELEASE
2 JUNE 2020

METLIFECARE TO SEEK SHAREHOLDER APPROVAL FOR LITIGATION

Metlifecare Limited (NZX: MET, ASX: MEQ) notes today's decision of the High Court of New Zealand, which clarifies that the dispute regarding the validity of the notice to terminate the Scheme Implementation Agreement (**SIA**) entered with Asia Pacific Village Group Limited (**APVG**) should be resolved before Metlifecare shareholders vote on the scheme plan. APVG is an entity owned by EQT Infrastructure IV fund and managed by EQT Fund Management S.à.r.l..

The High Court decision, which is attached to this release, means that Metlifecare will defer a meeting of its shareholders to vote on the scheme plan.

Metlifecare confirms that it will instead hold a meeting of shareholders in mid-July 2020 to seek endorsement of the Board's intention to continue legal action on behalf of shareholders challenging the validity of APVG's notice to terminate the SIA, signed on 29 December 2019.

Metlifecare filed a Statement of Claim in the High Court on 15 May 2020, seeking orders to compel APVG and EQT Infrastructure IV fund to fulfil their contractual obligations under the SIA and an Equity Commitment Letter.

The High Court has set an expedited court timetable for the dispute, with the trial scheduled to commence in Auckland on 23 November 2020.

Metlifecare Chair Kim Ellis said: "The necessary legal action to compel APVG and EQT to fulfil their contractual obligations under the SIA has already secured the public support of a significant proportion of our biggest investors. At next month's meeting, the Board of Metlifecare will also be seeking formal endorsement of shareholders to continue pursuing litigation options to enforce the SIA and implement the Scheme."

Metlifecare anticipates dispatching the Notice of Meeting and associated materials to shareholders in the week commencing 8 June 2020, with the meeting to be held in mid-July, 2020.

Metlifecare shareholders do not need to take any action at this time. The Notice of Meeting will contain instructions for attendance and voting at the shareholder meeting, including the lodgement of proxies.

This announcement is authorised for release to the market by the Board of Metlifecare Limited.

Ends

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About Metlifecare

Metlifecare is a leading New Zealand owner and operator of retirement villages, providing rewarding lifestyles and outstanding care to more than 5,600 New Zealanders. Established in 1984, it currently owns and operates a portfolio of 25 villages in areas with strong local economies, supportive demographics and high median house prices, located predominantly in New Zealand's upper North Island.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2020-404-629
[2020] NZHC 1184

BETWEEN	METLIFECARE LIMITED Applicant
AND	ASIA PACIFIC VILLAGE GROUP LIMITED Respondent

Hearing: 28 May 2020

Appearances: S M Hunter QC and M D Arthur for Applicant
A R Galbraith QC and M D O'Brien QC for Respondent

Judgment: 2 June 2020

JUDGMENT OF LANG J
[on application for directions as to service and initial orders under Part 15 of the Companies Act 1993]

This judgment was delivered by me on 2 June 2020 at 3.30 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Solicitors:
Bell Gully, Auckland
Counsel:
A R Galbraith QC, Auckland
M O'Brien QC, Auckland

[1] The applicant, Metlifecare Limited (Metlifecare), is a publicly listed company. It has filed an application under Part 15 of the Companies Act 1993 (the Act) seeking approval of a scheme of arrangement. The scheme involves the respondent, Asia Pacific Village Group Limited (Asia Pacific), acquiring all the shares in Metlifecare for the sum of $7 per share.

[2] Metlifecare now seeks directions as to service and initial orders under s 236(2) of the Act. Ordinarily this would be a straightforward matter that would be determined on the papers and without the need for a hearing. The position is complicated in the present case by the fact that Asia Pacific has purported to terminate the scheme implementation agreement (SIA) on which the scheme of arrangement is based.

Background

[3] Asia Pacific is a company incorporated in New Zealand for the purpose of acquiring the shares in Metlifecare. It was incorporated after its owners had undertaken a due diligence enquiry into Metlifecare's financial position. The parties entered into the SIA on 29 December 2019 and no issues appear to have arisen until New Zealand encountered the COVID-19 pandemic in March 2020.

[4] The SIA permitted Asia Pacific to terminate the agreement by notice in writing if a Material Adverse Change (as defined) or a Prescribed Occurrence (as defined) occurred before the arrangement was implemented. On 28 April 2020 Asia Pacific served Metlifecare with a notice terminating the SIA. Asia Pacific relied on two grounds to terminate the agreement. First, it alleged that the emergence and spread of the COVID-19 virus in New Zealand constituted a Material Adverse Change under the SIA because it had reduced, or was reasonably likely to reduce, Metlifecare's consolidated net tangible assets and underlying net profit. Secondly, it alleged several acts by Metlifecare constituted Prescribed Occurrences under the SIA.

[5] Metlifecare does not accept Asia Pacific has validly terminated the SIA. It has affirmed the SIA and is now attempting to follow the procedure for approval of the scheme as initially agreed by the parties. On 15 May 2020 Metlifecare also filed a proceeding in this Court seeking a declaration that the SIA remains in force and an order requiring Asia Pacific and those standing behind it to perform the obligations

imposed on Asia Pacific under the SIA (the termination litigation). The validity of the termination of the SIA by Asia Pacific will therefore be determined in the termination litigation.

[6] Metlifecare accepts the scheme of arrangement cannot be implemented until the validity of the termination of the SIA has been finally determined. It contends, however, that this should not prevent it from holding a meeting of shareholders now so that it can put the scheme to them and obtain their approval of it. At the same time Metlifecare will seek the shareholders' approval to continue the termination litigation.

[7] Asia Pacific contends the initial meeting is inappropriate and premature. It argues that Metlifecare should not commence the procedure under Part 15 of the Act until the Court has determined the validity of the termination of the SIA. It therefore opposes any orders or directions being made at this stage.

[8] The dispute between the parties regarding the termination of the SIA means the Takeovers Panel has not issued a so-called "letter of intention" as it often does when an application for initial orders is filed. Instead it has provided Metlifecare with a letter confirming the Panel's view that, if the Court considers it appropriate to grant the application for initial orders at this point, the disclosure material Metlifecare proposes to provide to shareholders is of an adequate standard. The Takeovers Panel adds a rider to this. It says the sufficiency of the disclosure material will need to be reassessed once the termination litigation has been determined and prior to any application for final orders.

The arguments in greater detail

Metlifecare

[9] Mr Hunter for Metlifecare points out that initial orders have traditionally been regarded as procedural in nature.[1] Their primary purpose is to ensure that appropriate information about the proposed scheme of arrangement is provided to shareholders before they vote on the merits of the scheme.[2] Although the approval of initial orders

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1 *Re Heartland Bank Ltd* [2018] NZHC 2725 at [3].
2 *Re Trustpower Ltd* [2016] NZHC 2499 at [2].

does not reflect an indication that the Court considers the scheme to be worthy of final sanction,[3] Mr Hunter submits that the Court should only decline an application for initial orders where it is beyond doubt that final orders are inappropriate.

[10] Metlifecare acknowledges that the validity of the termination will impact on whether final orders should be made if shareholders approve the scheme. It therefore accepts the scheme cannot be implemented until that issue has been determined. Mr Hunter submits, however, that the termination dispute is not the type of "knockout blow" that should dissuade the Court from making initial orders. He says Metlifecare's shareholders should be given the opportunity to decide at this point whether they wish to proceed with the scheme in light of Asia Pacific's purported termination of the SIA.

[11] Metlifecare also says the material it proposes to send to shareholders will provide them with appropriate disclosure regarding the events that have occurred and the steps that will need to be taken before the scheme can be finally implemented. This is contained in the Notice of Meeting and a Scheme Booklet, both of which will be sent to shareholders prior to the meeting. Mr Hunter points out that shareholders have also had access to the announcements that both Metlifecare and Asia Pacific have already made to the market regarding the issues that have arisen in relation to the SIA.

[12] Mr Hunter also emphasises that, although Asia Pacific has been given input into the initial orders Metlifecare seeks, the issues to be determined at the meeting are appropriately matters for Metlifecare and its shareholders to consider. He says it is important for shareholders to be given the opportunity as soon as possible to decide whether they wish to proceed with the scheme even though it will necessarily require complex and costly litigation before it can be implemented. If that does not occur Metlifecare runs the risk of committing company resources to expensive litigation that may not have the support of its shareholders.

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3 *Dominion Income Property Fund Ltd v Takeovers Panel* (2006) 3 NZCCLR 946 (CA) at [22].

Asia Pacific

[13] On Asia Pacific's behalf Mr Galbraith points out that the present application appears to be unprecedented. Neither counsel has found any other case in which an applicant has sought initial orders under Part 15 (or its overseas equivalent) in circumstances where one party to a scheme for which approval is sought has purported to terminate it.

[14] Asia Pacific also disputes Metlifecare's categorisation of the Court's role at this stage of the process under Part 15. Mr Galbraith submits the authorities show the Court has a broad discretion whether to make initial orders. He says the circumstances of the present case are such that the Court should exercise its discretion against making the orders Metlifecare seeks until the termination litigation has been finally determined.

[15] Mr Galbraith contends there is no utility in the Court making initial orders at this stage because nothing definitive can occur unless and until the termination litigation has been finally determined in Metlifecare's favour. Mr Galbraith points out that it is likely to be many months, if not years, before that occurs. It is therefore pointless to make orders that are likely to become stale, and superseded by time and events, by the time the termination litigation has been resolved.

[16] Asia Pacific is also concerned the market will interpret the making of initial orders as the Court giving its endorsement to both the scheme and the litigation. Mr Galbraith points out that the announcements Metlifecare has already made to the market about the present proceeding and the termination litigation have resulted in Metlifecare's share price spiking in circumstances where there is no other obvious reason for that occurring.

[17] Asia Pacific also challenges Metlifecare's assertion that it is important for its shareholders to decide whether the termination litigation should proceed. Mr Galbraith points out that Metlifecare has already commenced the termination litigation without reference to its shareholders. He also points out that the material to be provided to shareholders prior to the meeting says nothing about the likely costs, risks and chances of success for Metlifecare in continuing with it. Shareholders

therefore do not have an informed basis on which to make any decision regarding the continuation of the litigation.

[18] Finally, Mr Galbraith points out that if Metlifecare wishes to obtain support for the termination litigation from its shareholders it is not necessary for it to hold a meeting under Part 15 of the Act for that purpose. Metlifecare can put that issue to its shareholders for their approval by a variety of alternative means.

Decision

[19] Section 236 of the Act relevantly provides:

> **236 Approval of arrangements, amalgamations, and compromises**
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> (1) Notwithstanding the provisions of this Act or the constitution of a company, the court may, on the application of a company or any shareholder or creditor of a company, order that an arrangement or amalgamation or compromise shall be binding on the company and on such other persons or classes of persons as the court may specify and any such order may be made on such terms and conditions as the court thinks fit.
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> (2) Before making an order under subsection (1), the court may, on the application of the company or any shareholder or creditor or other person who appears to the court to be interested, or of its own motion, make any 1 or more of the following orders:
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> (a) an order that notice of the application, together with such information relating to it as the court thinks fit, be given in such form and in such manner and to such persons or classes of persons as the court may specify:
>
> (b) an order directing the holding of a meeting or meetings of shareholders or any class of shareholders or creditors or any class of creditors of a company to consider and, if thought fit, to approve, in such manner as the court may specify, the proposed arrangement or amalgamation or compromise and, for that purpose, may determine the shareholders or creditors that constitute a class of shareholders or creditors of a company:
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> (c) an order requiring that a report on the proposed arrangement or amalgamation or compromise be prepared for the court by a person specified by the court and, if the court thinks fit, be supplied to the shareholders or any class of shareholders or creditors or any class of creditors of a company or to any other person who appears to the court to be interested:
>
> (d) an order as to the payment of the costs incurred in the preparation of any such report:

(e) an order specifying the persons who shall be entitled to appear and be heard on the application to approve the arrangement or amalgamation or compromise.

…

[20] These provisions contemplate an applicant seeking approval for a scheme under Part 15 of the Act in two stages. First, the applicant seeks initial orders from the Court under s 236(2). At this stage the applicant sets out the procedure it proposes to follow in calling a meeting of shareholders to consider and, if appropriate, approve the arrangement. If the required majority of shareholders at the meeting approve the arrangement the applicant applies for final orders under s 236(1) so the scheme can be implemented.

[21] I do not accept the Court has a narrow role at the initial stage of the process. Often it will not be necessary for a formal judgment to be issued on an application for initial orders because many such applications are straightforward and uncontroversial. Importantly, however, s 236(2) does not require the Court to make a direction that a meeting of shareholders be convened to consider and, if appropriate, approve a scheme of arrangement. Rather, the court "may" take that step. This confirms the discretionary nature of the power to make such a direction.

[22] In practice, the circumstances in which the Court will decline to make initial orders under s 236(2) are likely to be rare. All parties to such transactions are normally willing participants, and those advising them are well versed in the requirements that must be satisfied. The Court nevertheless has a supervisory jurisdiction in relation to proposed transactions of this type and must ensure the requirements of the Act are met.

[23] I consider that a fundamental requirement of the Part 15 regime is the existence of an arrangement to which any orders made under s 236 can apply. This is not normally an issue where the arrangement in question involves one party acquiring the shares in another. Such an arrangement is readily identifiable and the parties are invariably committed to it. The problem here is that, although the arrangement is readily identifiable, one of the parties has purported to withdraw from it.

[24] In considering whether to make initial orders the Court cannot embark on any consideration of the strength of Metlifecare's claim in the termination litigation. That must be left to be determined in the termination litigation. It follows that, as matters currently stand, one party contends the arrangement remains in existence and the other party denies that it is. The arrangement for which orders are sought may therefore still be in existence or it may not. I consider this uncertainty to be fatal to the present application because the Court cannot be satisfied an arrangement remains in existence to which orders under s 236(2) could apply.

[25] Mr Hunter endeavoured to counter this argument by pointing out that the implementation of the arrangement remains contingent on several matters other than the sanction of the Court. These include, for example, the need to obtain consent to the transaction under the Overseas Investment Act 2005. He submits the fact that the implementation of the SIA is similarly contingent on Metlifecare succeeding in the termination litigation is therefore not fatal to the present application.

[26] I do not accept this submission because I consider a comparison between the need to obtain regulatory consents and the need to obtain a determination as to whether the SIA has been validly cancelled is inapt. The former proceeds on the basis that both parties remain in agreement that they wish the arrangement to continue whilst the latter does not.

[27] In case I am wrong on this point I will go on to consider whether I should nevertheless exercise my discretion in Metlifecare's favour. Several factors are relevant to this.

[28] The first and most obvious point relates again to the present uncertainty surrounding the validity of the termination. That factor weighs heavily against making initial orders at this point.

[29] Secondly, a question arises as to whether there is any utility in holding a shareholders meeting directed under s 236(2) in June or July 2020 when it will be many months before the validity of the termination is finally determined. The termination litigation has been given a tentative trial date of 23 November 2020. That

cannot be regarded as a firm date at this stage because Metlifecare has also named the two companies who stand behind Asia Pacific as defendants. They are based in Europe and have not yet been served with the proceeding. It is therefore not known whether those defendants will raise interlocutory issues that may protract the current pre-trial timetable.

[30] The trial will take at least three weeks because it will involve complex accounting and economic evidence. It would therefore be overly optimistic for the parties to expect any judgment to be available before the end of January 2021. As a result, and assuming for present purposes the judgment was in Metlifecare's favour and Asia Pacific did not appeal, Metlifecare will not be able to seek final orders before February or March 2021 at the earliest. This would be at least eight or nine months from the date of the initial orders and the shareholders meeting. A delay of that length between a shareholders meeting and final orders is very unusual. An application for final orders is usually made very shortly after the shareholders have approved a scheme of arrangement.

[31] On the other hand, I accept that Metlifecare's shareholders are likely to be content to endure both delay and uncertainty if they consider there is a prospect of Asia Pacific being held to the terms of the SIA. The only likely change of circumstances that might affect the shareholders' view of Asia Pacific's offer would be a new bid from another party. If that should occur the SIA contains a mechanism by which Metlifecare can accept the new offer if Asia Pacific choose not to match it. To that extent the issue of delay is relatively neutral.

[32] This still leaves the question, however, of why Metlifecare would want to hold the shareholders meeting now when the final outcome of the termination litigation is so far away. The answer to that question is not because Metlifecare wishes to determine whether its shareholders support the scheme of arrangement. It must already know shareholders are likely to support the scheme because it provides them with a substantial premium over the price at which the company's shares are currently trading at. Rather, Metlifecare wishes to know whether its shareholders support the continuation of the termination litigation. That issue is likely to be the primary focus of any shareholders meeting held at this point.

[33] This raises the issue of whether the Court has the power under s 236(2) to direct a meeting where the principal topic likely to be discussed is the continuation of the termination litigation. Section 236(2)(b) only permits the Court to direct a meeting of shareholders "to consider and, if thought fit, to approve, in such manner as the court may specify the proposed arrangement". I accept Mr Galbraith's submission that the issue of whether or not Metlifecare should continue with the termination litigation is not a purpose for which the Court may direct a meeting to be held under s 236(2).

[34] I also accept Mr Galbraith's submission that, if Metlifecare considers it important to gauge whether the shareholders support the continuation of the termination litigation, it would be a relatively simple matter for it to obtain such confirmation through some means other than a meeting directed under s 236(2). Metlifecare has already announced to the market that institutional shareholders holding more than 50 per cent of its shares support the litigation. It is therefore difficult to see why it would feel the need to hold a meeting under Part 15 to ensure it has the support of the remaining shareholders. That could be done at any general meeting of the company.

[35] For these reasons, even if I was satisfied jurisdiction existed to make the initial orders Metlifecare seeks, I would have exercised my discretion against the making of those orders.

Result

[36] The application for initial orders is dismissed.

[37] Much of the material Metlifecare has adduced in support of the present application will still be relevant to any renewed application it may bring if the termination litigation is determined in its favour. I therefore grant Metlifecare leave to rely on that material in support of any renewed application for initial and final orders it might bring.

Costs

[38] If the parties cannot reach agreement they may file concise memoranda in the usual way and I will determine costs on the papers.

Lang J