SUPREME COURT OF QUEENSLAND

CITATION:	*Re: MIM Holdings Ltd* [2003] QSC 181
PARTIES:	**MIM HOLDINGS LTD** ACN 009 814 019 (applicant)
FILE NO:	SC 3264 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	16 June 2003
DELIVERED AT:	Brisbane
HEARING DATE:	12 June 2003
JUDGE:	B W Ambrose J
ORDER:	**1. I approve the scheme pursuant to s 411(4)(b) and s 411(6) of the *Corporation Act*.** **2. I order pursuant to s 411(12) of the *Corporations Act* that MIM Holdings Ltd be exempted from complying with s 411(11) of the *Corporations Act* in relation to the scheme** **3. I order that the costs of and incidental to this application be the applicant's costs in the scheme. I make similar orders with respect to the costs incurred by Xstrata Holdings Pty Ltd and Platinum Asset Management Ltd.**
CATCHWORDS:	CORPORATIONS LAW – Scheme of arrangement – application for approval of scheme of arrangement – where scheme approved by majority of shareholders – whether scheme should be approved *Corporations Act* 2001 (Cth), s 411, s 411(4)(a)(i), s 411(4)(a)(ii), s 411(4)(b), s 411(6), s 411(11), s 411(12), s 411(17), s 414(2), s 414(3)
COUNSEL:	D J S Jackson QC with L F Kelly for the applicant A Archibald QC with I R Perkins for Xstrata Holdings Pty Ltd M Stunden for the Australian Securities & Investments Commission J Edwards (sol) for Platinum Asset Management Ltd
SOLICITORS:	Allens Arthur Robinson for the applicant Mallesons Stephen Jacques for XStrata Holdings Pty Ltd Australian Securities & Investments Commission Gilbert & Tobin for Platinum Asset Management Ltd

[1] **AMBROSE J:** This is an application pursuant to s 411(4)(b) and/or s 411(6) of the *Corporations Act* for approval of an arrangement MIM Holdings Ltd ("MIM") made with Xstrata Holdings Pty Ltd ("Xstrata") between November 2002 and 7 April 2003 whereunder it was agreed that the board of directors of MIM would resolve to recommend to its shareholders that they proceed with a scheme of arrangement under Chapter 5 Part 5.1 of the *Corporations Act* whereunder Xstrata would take a transfer of all the issued shares in MIM and pay $1.72 per share.

[2] On 7 April 2003 a public announcement to this effect was made.

[3] On 10 April 2003 an application was made pursuant to s 411 of the *Corporations Act* for an order that a scheme meeting of all the shareholders in MIM be called to consider and if thought fit, approve that scheme. An order was made by White J pursuant to that application on 1 May 2003 approving the content of an explanatory statement by MIM to accompany the notice of meeting to be given to shareholders and directions were given as to the manner in which and place where the meeting was to be held.

[4] On the hearing of that first application Platinum Asset Management Limited ("Platinum"), a funds manager holding 2.5% of the issued share capital of MIM was given leave to be heard. It opposed the orders sought by MIM.

[5] Xstrata was given leave to support MIM's application.

[6] White J dismissed objections raised by Platinum and ordered that the meeting of shareholders sought by MIM be convened on 6 June 2003 to consider the scheme of arrangement between MIM and Xstrata, the terms of which were set out in a draft information memorandum, and the object of which was to effect the acquisition of all the issued shares in MIM by Xstrata. The object of the scheme was to enable Xstrata as a wholly owned subsidiary of its parent company Xstrata Plc to acquire all the assets of MIM.

[7] Directions were given as to the advertisement of the scheme meeting and the notification to be given to all shareholders in MIM. It was ordered that each shareholder be forwarded a copy of the information memorandum, a notice of meeting, and a proxy form.

[8] Importantly the content of the explanatory statement in the information memorandum required by ss 414(2) and (3) was specifically approved.

[9] Under s 411(4)(a)(ii) the arrangement or scheme would become binding only if adopted by the MIM shareholders with a resolution in favour –

(A) passed by a majority in number of the members voting either in person or by proxy at the meeting and

(B) passed by a 75% majority in value of the votes cast at that meeting.

[10] It is clear on the material which I will not recite that in fact a resolution adopting the scheme proposed by MIM was passed by approximately 58.5% in number of the shareholders voting at the meeting who also held 89.1% of the value of the shares held by shareholders voting at the meeting.

[11] It seems clear on the material that the adoption and/or approval of the proposed scheme on 6 June 2003 satisfied the requirements of s 411(4).

[12] MIM supported by Xstrata seeks approval of the scheme so adopted.

[13] It is clear that the meeting was validly held and that all regulatory prerequisites to approval of the scheme have been proved.

[14] However s 411(17) of the *Corporations Act* provides that approval must not be given unless the court is satisfied that the scheme or arrangement has not been proposed for the purpose of enabling any person to avoid the operation of any of the provisions of Chapter VI of the Act or

> "(b) There is produced to the court a statement in writing by ASIC stating that ASIC has no objection to the compromise or arrangement".

ASIC has given such a statement which has been produced to this court.

[15] There is a proviso to s 411(17) in these terms –

> "But the court need not approve a compromise or arrangement merely because a statement by ASIC stating that ASIC has no objection to the compromise or arrangement has been produced to the court as mentioned in paragraph (b)".

[16] It is contended that upon this application I have a general discretion to consider not merely events that have occurred since the order was made by White J on 1 May 2003, approving the content of the memorandum of information to be circulated with other documents to shareholders in MIM, and giving directions for the calling of the meeting but also a residual discretion to be exercised independently of that of White J as to the adequacy and/or accuracy of the information given to shareholders in that memorandum of information.

[17] With reference to events that have occurred since White J made her order which led to the shareholders approving the scheme on 6 June 2003, it emerges that there may have been one or more shareholders who "split their shareholding" with a view to thereby increasing the number of shareholders who might attend the meeting and/or deliver proxies and so increase the number of voters either adopting or rejecting the scheme proposed by MIM.

[18] In particular counsel for ASIC and counsel for Platinum submitted that if share splitting had been achieved for this purpose – and it was not suggested that there was any direct evidence to support this proposition – then that might in some circumstances be a matter that would justify a refusal of approval under the proviso to s 411(17).

[19] It is clear however on the whole of the material before me that even if a splitting of shareholding did occur it produced at the most an additional 574 parcels of shareholding, each of 375 shares which having regard to the majority of votes both by number and value at the meeting, to which I referred in para 10, could have had no effect on the outcome of the voting.

[20] All told MIM had an issued share capital of 1,997 million shares. The total number of votes cast was 1,457 million. The total number of votes in favour was 1,299 million. The total number of votes against was 158 million. As a matter of interest Platinum held about 48.9 million shares – about one third of the votes against.

[21] Undoubtedly had vote splitting occurred to such an extent as to make it likely or even possible that a majority in number voting either for or against adoption of the

scheme had been achieved by share splitting that may arguably at least have been a reason to decline to approve the scheme. It seems difficult to envisage how share splitting to achieve merely a numerical advantage in the voting could have had much effect on the value of the shares held by the shareholders who became entitled to vote only by reason of the share splitting exercise.

[22] However that may be, nobody upon this application contended that even if there had been a vote splitting exercise that resulted in an extra 574 shareholders being entitled to vote it would have had any but the slightest effect on the outcome of the voting and certainly insufficient to impinge upon proper compliance with the constraints imposed by s 411(4)(a).

[23] Even if the number of the members who voted to support the scheme was reduced by 1% and the value of the shares held by members who so voted was reduced by 1% there would still be a very significant majority of members in favour of adoption of the scheme to satisfy the requirements of s 411(4)(a)(i) and (ii) of the *Corporations Act*.

[24] I have considered the material read upon the application. In particular I have again considered the adequacy of the content of the information memorandum the terms of which White J approved on 1 May 2003.

[25] In my view no fault can be found in the content of that document. Without analysing that document in depth, it considered in great detail the movement in MIM share prices prior to the announcement of a possible arrangement or scheme in November 2002. It traced the movement in share prices since that time up until the time of preparation of the information memorandum. In my view it succinctly analysed the arguments in favour of adoption of the scheme and those against its adoption. No evidence was led to suggest that any part of the content of that memorandum was incorrect or in any way misleading or that any of the expert opinions or analyses are open to challenge by reason of information which has come to hand since 1 May 2003 – whether or not it was then available.

[26] In the absence of such material it would be inappropriate in my view upon this application to embark upon a consideration *de novo* of the very matters argued before White J which led to the orders she made on 1 May 2003.

[27] Stated very shortly the shareholders could choose either to have their shares sold to Xstrata at a price higher than they had been for some significant period of time or to hold those shares in the hope that in the medium to long term their market value would rise rather than fall or remain constant.

[28] At the close of argument Mr Thiney, one of the shareholders in MIM, stood up in court and sought to make some statements in opposition to giving the approval MIM sought – which in effect was not opposed by any of the other parties appearing upon the application. He said he did not wish to take any objection as to "due procedure" by which I assume he meant proof of strict compliance with all the directions given by White J on 1 May 2003. Mr Thiney stated that he had not sought any legal advice that might have permitted him to put into proper form the objections which he wished to advance. He said that he had in fact voted to oppose the scheme but of course had not succeeded. He complained of the complexity of the information that he and other shareholders had been given outlining the issues for consideration. In effect he stated that the directors in his view had not acted in

the interest of the shareholders in entering into the agreement with Xstrata in the first place. He stated that he believed that there had been other interested parties "who were prepared to pay more than the Xstrata offer". He advanced no evidence as to the identity of such parties or the terms upon which such payment was offered.

[29] At my request counsel for MIM drew my attention to various parts of the memorandum from which it appeared clearly enough that there had been some other offers made for MIM shares but that not one of the directors – even the managing director who opposed the scheme with Xstrata – had thought them worthy of acceptance. There were several sections in the report which dealt with this topic and indeed in the expert report relating to the fairness of the share price offered there was reference to offers. Stated shortly the material referred to in the memorandum of information indicated clearly enough that there had been other offers but it was the judgment of all directors that none of them had been as good as that made by Xstrata. The managing director who opposed the sale did so on the basis that although that share price may have been acceptable in the short term if shares needed to be sold, there was a possibility or – perhaps even a probability that in the medium to long term a higher offer might be made.

[30] I have given consideration to the statements made by Mr Thiney but am not persuaded that there is any evidence to support them and having regard to the length of time that has passed since White J made her order on 1 May 2003 in the absence of anything more precise than statements made from the floor of the court by a dissatisfied shareholder I am unprepared to adjourn this matter for further investigations to be made by somebody – apparently not by the dissatisfied shareholder – or to put the parties involved in this application to further expense or delay.

[31] I approve the scheme pursuant to s 411(4)(b) and s 411(6) of the *Corporation Act*.

[32] In the circumstances of this case I order pursuant to s 411(12) of the *Corporations Act* that MIM be exempted from complying with s 411(11) of the *Corporations Act* in relation to the scheme.

[33] I order that the costs of and incidental to this application be the applicant's costs in the scheme. I make similar orders with respect to the costs incurred by Xstrata Holdings Pty Ltd and Platinum Asset Management Ltd.