SUPREME COURT OF QUEENSLAND

CITATION:	*In the matter of Allied Gold Limited (No 2)* [2011] QSC 194
PARTIES:	**IN THE MATTER OF ALLIED GOLD LIMITED ACN 104 855 067** (Applicant)
FILE NO/S:	BS 3415 of 2011
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	7 July 2011
DELIVERED AT:	Brisbane
HEARING DATE:	20 June 2011
JUDGE:	McMurdo J
ORDER:	**Made on 20 June 2011:**

1. Pursuant to section 411(4)(b) of the *Corporations Act 2001*, the scheme of arrangement between the applicant and its shareholders, a copy of which is behind tab 6 of exhibit "AWR2" to the affidavit of Andrew Rankin sworn 17 June 2011, is approved subject to the implementation of the scheme remaining conditional upon the matters in clauses 3.1(7) and 3.1(8) of the Implementation Agreement made between the applicant and Allied Gold Mining plc dated 28 April 2011.

2. Pursuant to section 411(4)(b) of the *Corporations Act 2001*, the scheme of arrangement between the applicant and its optionholders, a copy of which is behind tab 7 of exhibit "AWR2" to the affidavit of Andrew Rankin sworn 17 June 2011 (the option scheme), is approved subject to the following:

(a) the implementation of the scheme remaining conditional upon the matters in clauses 3.1(7) and 3.1(8) of the Implementation Agreement made between the applicant and Allied Gold Mining plc dated 28 April 2011;

(b) the phrase "as at 8.00am on the Second Court Date" in clause 3.1 of the option scheme being replaced by the phrase "prior to the

Implementation Date".

3. Pursuant to section 411(12) of the *Corporations Act 2001*, the applicant is exempted from compliance with section 411(11) of the *Corporations Act 2001* in relation to the schemes of arrangement referred to in orders 1 and 2.

CATCHWORDS: CORPORATIONS – ARRANGEMENTS AND RECONSTRUCTIONS – SCHEMES OF ARRANGEMENT OR COMPROMISE – APPROVAL OF SCHEMES BY COURT – EXERCISE OF COURT'S DISCRETION – GENERALLY – where the applicant company applied for orders to approve schemes of arrangement – where the schemes provide for the 'top hatting' of the applicant company by a UK company – where orders made to convene meetings of members and optionholders of the applicant company were not complied with in all respects – whether the court should approve the schemes – whether irregularities had caused a substantial injustice

Corporations Act 2001 (Cth), s 411, s 1322

In the matter of Allied Gold Limited [2011] QSC 108, cited
Re Investorinfo Ltd [2005] FCA 1848, applied
Re Metals Exploration Limited [2007] FCA 84, cited
Re NRMA Ltd (No 2) (2000) 156 FLR 412, applied
Re Unilife Medical Solutions Limited (No 2) [2010] FCA 12, cited
Winpar Holdings Ltd v Goldfields Kalgoorlie Ltd (2001) 40 ACSR 221, cited

COUNSEL: R Lilley SC with C Jennings for the applicant

SOLICITORS: Norton Rose for the applicant

[1] On 4 May 2011, I made orders to convene meetings of the members and optionholders of the applicant company, Allied Gold Limited, to consider two concurrent schemes of arrangement. I also then approved explanatory statements to be sent to shareholders and optionholders. In my published reasons for those orders I set out the relevant terms of the schemes and it is unnecessary to repeat them here.[1]

[2] I ordered that the meetings be held on 6 June 2011. The meetings have been held and the required percentage of votes in favour of each scheme has been cast. On 20 June 2011, I made orders approving the schemes, pursuant to s 411(4) of the *Corporations Act 2001* (Cth) ('the Act'). These are my reasons for doing so.

[3] No party other than the applicant appeared on the application for approval. The Australian Securities and Investments Commission issued a notice under

1 *In the matter of Allied Gold Limited* [2011] QSC 108.

s 411(17)(b) of the Act that it had no objection to the schemes. In any case, the schemes had not been proposed for the purpose of avoiding the operation of any provision of Chapter 6 of the Act.

[4] At the first hearing, I ordered that the share scheme meeting be convened by sending to shareholders on or before 6 May 2011 the share scheme booklet, a notice of share scheme meeting and a proxy form, each substantially in a certain form. I made a similar order in relation to the option scheme meeting. However, there were some respects in which what was sent to shareholders or optionholders was not as I had ordered. The first concerned a notice of the meeting itself. Neither the shareholders nor the optionholders received a notice of the meeting separately from the scheme booklet. There was a notice of meeting within the booklet, but not separately from it. There were also other parts of the booklet which identified the time and place of the meeting. Secondly, the notice which was enclosed within the booklet sent to shareholders was the wrong notice. Through error, what was enclosed in the share scheme booklet was the notice of the option scheme meeting. The meetings were ordered to be held on the same day, with the shareholders' meeting to occur 30 minutes later than the optionholders' meeting. Nevertheless within the share scheme booklet, the reader was advised of the correct time for the shareholders' meeting.

[5] Fortunately, these problems were discovered shortly after the material had been dispatched on 6 May. On 9 and 10 May 2011, the applicant posted notices of the meetings to shareholders and optionholders and made available online at its web page those notices and corrected versions of the scheme booklets. The result was that shareholders and optionholders did receive notice of the meetings but about three or four days later than had been required by the orders and about one day within the 28 day period prescribed by s 249HA(1) of the Act.

[6] The late dispatch of the notices is a procedural irregularity within s 1322(1)(b)(ii) of the Act: *Re Unilife Medical Solutions Limited (No 2);*[2] *Re Metals Exploration Limited*.[3] The "proceeding", being in each case here the scheme meeting,[4] is not invalidated by this procedural irregularity "unless the Court is of the opinion that the irregularity has caused or may cause substantial injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid": s 1322(2). I was satisfied that the irregularity had not caused a "substantial injustice". The material which was sent to shareholders and optionholders on 6 May was sufficiently clear in conveying to the reader that the meeting would be held on the morning of 6 June at the relevant place. Shareholders may have been confused about the time, but if so, the consequence could only have been that they arrived half an hour early. The defects were also promptly rectified. Further, the substantial attendance at the meetings indicated that there was no real disadvantage to shareholders and optionholders. And no one objected to the application, upon this basis or otherwise.

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2 [2010] FCA 12.

3 [2007] FCA 84.

4 *Winpar Holdings Ltd v Goldfields Kalgoorlie Ltd* (2001) 40 ACSR 221 at [65].

[7] The share scheme booklet departed from that which had been approved in referring to a disadvantage of that scheme. That disadvantage was the fact that shareholders in Australia would have their shares in the applicant replaced by CDIs in the UK company. Those CDIs are considered to be less liquid than shares in the Australian company as I discussed in my previous judgment.[5] The scheme booklet, as sent to shareholders, explained that disadvantage precisely according to the approved booklet, except that the explanation appeared under a heading "CDIs will be less liquid in Allied Gold". What should have appeared, and what was originally proposed, was the heading "CDIs will be less liquid than shares in Allied Gold". The applicant or those advising it were concerned that this heading was potentially misleading. In my view, it was not misleading when considered in the context of the share scheme booklet which, prior to the page in question, had clearly explained that Australian shareholders would be receiving CDIs. Significantly, the text of this description of the disadvantage to investors was included after discussions with officers of ASIC, but ASIC expressed no concern about the inclusion of this heading. In my view, this heading did not make the option scheme booklet substantially different from that which was approved and ordered to be sent to shareholders.

[8] It was also drawn to my attention that the typeface and page layout was different from the booklet which I had approved. In my view, these differences were inconsequential.

[9] Another matter to be mentioned is that the material was not sent to three shareholders, because they became registered after the mailing list of Australian shareholders was created on 2 May 2011. Together they held 52,976 shares which was about 0.00442% of the total shares. The applicant, through its solicitors, wrote to each of them on 15 June informing them of the share scheme and of the second hearing. Again this is a procedural irregularity which will not invalidate the meeting unless ordered under s 1322(2). Again in my view this irregularity has not caused "substantial injustice".

[10] In my orders of 4 May 2011, there was a condition that the Articles of Association of Allied Goldmining Plc, which I described in my previous judgment as the UK company, be changed in accordance with what was proposed in the share scheme booklet. On 25 May, the board of directors of the UK company resolved to adopt those new Articles of Association which are consistent with what had been proposed and approved in the share scheme booklet. Accordingly, that condition was satisfied.

[11] I was satisfied that the scheme meetings were held at the times and at the location as ordered on 4 May. The voting at each meeting was conducted by poll and I was satisfied that the polling was properly completed. In particular, I was satisfied that proxy forms were duly received and taken into account at the scheme meetings. The scheme booklets were registered with ASIC after the first court hearing and before being dispatched to the shareholders and optionholders.

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5 *In the matter of Allied Gold Limited* [2011] QSC 108 at [10].

[12] At the optionholders' meeting, ten optionholders, holding 29,287,500 options, were present and voted either in person or by proxy. As at that date, the company had issued 59,357,500 options. All of the optionholders who voted on the scheme were in favour of it.

[13] At the shareholders' meeting, 250 shareholders, holding 663,896,542 shares, were present and voted in person or by proxy. That represented about 55.4% of the total number of shares issued as at the day of the meeting (1,198,537,554 shares). There were 208 shareholders, holding 660,633,520 shares, who voted in favour of the resolution, representing about 99.51% of the votes cast and about 83.2% of the shareholders voting. Some 42 shareholders, holding in total 3,263,022 shares, voted against the resolution. Those votes represented about 0.49% of the votes cast and about 16.8% of the shareholders voting. There were three shareholders, holding 72,705 shares, who abstained.

[14] Accordingly, each of the resolutions to approve the scheme was passed with the necessary majorities.

[15] The strong support for the schemes corresponded with the absence of any appearance by or on behalf of any shareholder or optionholder at the second hearing.

[16] On 15 June 2011, the applicant placed a newspaper advertisement advising of the second hearing. The Foreign Investment Review Board had no objection to the restructure of the applicant company according to these schemes.

[17] Ernst & Young remained of the views expressed in their report of 28 April 2011 to which I referred in my previous judgment.

[18] The ASX granted the UK company's CDIs official listing on the ASX, conditional upon certain conditions which were acceptable to the applicant and the UK company and which were able to be satisfied.

[19] There were some changes to the schemes in respect of the "Scheme Record Date" and the "Implementation Date". As originally proposed, the Scheme Record Date was to be four business days following the "Effective Date", which was the date on which a copy of the order approving the scheme was lodged with ASIC. However, the ASX required that interval to be five rather than four business days. The Scheme Record Date had to be postponed by one business day, so that with the intervention of a weekend, and in anticipation of the Effective Date being the date of the second hearing (20 June), the Scheme Record Date became 27 June 2011. This extension could have caused no mischief because trading in the shares was suspended from the Effective Date. The change to the Scheme Record Date in turn required a change to the Implementation Date. That date is defined in the schemes of arrangement as the date which is fixed by agreement between the applicant and the UK company. They agreed that the Implementation Date would be 30 June 2011. Neither of these changes provided any reason for declining to approve the

schemes. The change to the Scheme Record Date was brought to the attention of those attending the meetings and it was announced through the ASX and on the applicant's web page. On the page headed "Key Dates" in the share scheme booklet, there was a notation that all dates were "indicative only" and were subject to, amongst other things, all necessary approvals from the ASX and other relevant authorities.

[20] As at the date of the second hearing there were two conditions of the schemes which remained unsatisfied. The first was that the London Stock Exchange had not approved the UK company shares for official quotation on the premium segment of its Main Market. This was the condition specified within cl 3.1(7) of the Implementation Agreement made between the applicant and the UK company. Secondly, the "Depositary Interests" had not been cancelled, which was required immediately prior to "Close of Registers", which would be on the Scheme Record Date and therefore after the second hearing. That was the condition within cl 3.1(8) of the Implementation Agreement. At the hearing, the applicant and the UK company expected to shortly obtain the necessary approval from the LSE and expected that the Depositary Interests would be cancelled at the appropriate time. But in the circumstances, the order sought was that the schemes be approved subject to satisfaction of those conditions. This explains the proviso appearing within paragraphs 1 and 2 of the orders.

[21] I refer now to the second of the conditions in paragraph 2 of the order, approving the option scheme. This was necessary because cl 3.1(2) of the option scheme provided that it was conditional upon:

> "all the conditions set out in clause 3.1 of the Implementation Agreement having been satisfied or waived in accordance with the terms of the Implementation Agreement, as at 8.00am on the Second Court Date."

To satisfy those conditions by 8.00am on the date of the second hearing would have been impossible. It seems that by an error, the option scheme did not correspond with cl 3.1 of the share scheme, which provided that all of the conditions in the Implementation Agreement were to be satisfied or waived "prior to the Implementation Date". It was necessary then to qualify the approval of the option scheme by making that amendment to it. In doing so, I accepted the propositions set out by Gyles J in *Re Investorinfo Ltd*.[6] In particular, this alteration was minor, not affecting the substance of the scheme and was necessary to make it workable.

[22] I was satisfied that the schemes of arrangement were fair and reasonable and that intelligent and honest people, properly informed, could approve them.[7] As I have said, the view of Ernst & Young to which I referred in my previous judgment, which was that the schemes were in the best interests of shareholders and optionholders, was unchanged. The voting by shareholders was overwhelmingly in

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6 [2005] FCA 1848.

7 *Re NRMA Ltd (No 2)* (2000) 156 FLR 412 at 415.

favour of their scheme. All of the optionholders who voted supported the optionholders' scheme.

[23] It was appropriate to exempt the applicant from the requirements of s 411(11).

[24] For these reasons I made the orders approving the schemes which are set out in the heading of this judgment.