

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

APPLEGARTH J

No 1330 OF 2012

RE: AUZEX RESOURCES LIMITED

Applicant

BRISBANE

..DATE 21/02/2012

JUDGMENT

HIS HONOUR: On 17 February 2012 I made certain orders at the conclusion of the first Court hearing in this matter. Because I was in the middle of a trial time did not permit me to give my reasons that day.

1

The applicant seeks orders under section 411 of the *Corporations Act* 2001 to convene a meeting of its shareholders, other than the holders of excluded shares, to consider a scheme of arrangement between Auzex and its shareholders, other than holders of excluded shares.

10

20

By way of background, in related proceedings 9832 of 2011 Auzex demerged its exploration assets by a scheme of arrangement and capital reduction. The effect of this is that Auzex is a minerals development company. Its sole focus is the development of the Bullabulling Gold Project in Western Australia, in which it holds a 50 per cent interest. Auzex is listed on the Australian Stock Exchange.

30

The Bullabulling Gold Project has been developed by the Bullabulling Joint Venture and the other 50 per cent joint venturer is GGG Resources Plc ("GGG"). GGG is an English company, and is in the process of undertaking what is sometimes referred to as a "top-hatting" under which its shares will be acquired by an Australian holding company, Bullabulling Gold Ltd ("BBG"). BBG is to be listed on the Australian Stock Exchange and on the AIM market operated by the London Stock Exchange.

40

50

Accordingly, the scheme that is being proposed may be described as a merger scheme. The scheme proposal is that BBG will acquire all of the Auzex shares other than the excluded shares. The consideration for the acquisition referred to as the "Scheme Consideration" will be shares in BBG. The number of new BBG shares that each scheme shareholder will receive is the number of Auzex shares that they hold on the "Record Date" multiplied by the "Share Scheme Ratio". The share scheme ratio is more fully explained in section 10 of the Scheme Booklet.

1

10

20

The Shares Scheme Ratio formula takes into the account the fact that there are to be excluded shares. In order to create what is described as a "merger of equals" and to ensure that both Auzex and GGG have materially the same net cash assets when the scheme is implemented GGG will subscribe for shares in Auzex at an issue price equal to a 10 per cent discount for the five day value weighted average price of Auzex on the Australian Stock Exchange, ending on a date that is eight days before the date of the scheme meeting. This is referred to in the materials as the Cash Balancing Adjustment.

30

40

The effect of the timing of this calculation will allow the Share Scheme Ratio and thus the Scheme Consideration to be announced on the Australian Stock Exchange by Auzex and thereby become known to scheme shareholders with certainty before they vote on the scheme at the scheme meeting. The shares that GGG subscribes for will be excluded shares for the purposes of the scheme.

50

In the case of ineligible foreign shareholders the shares in BBG to which they would otherwise be entitled will be sold under a sale facility and the average proceeds of sale after deduction of any applicable brokerage taxes and charges will be remitted to the ineligible foreign shareholders.

10

Auzex shareholders who are scheme shareholders will thus, after the scheme is implemented, cease to hold shares in Auzex and will hold shares in BBG which is to be listed on the Australian Stock Exchange. Auzex will become a wholly owned subsidiary of BBG, as will GGG, and a 100 per cent interest in the Bullabulling Gold Project in Western Australia will be held by BBG.

20

The BBG top-hatting scheme has been approved by GGG's shareholders and is due to be considered by the English High Court for approval on 8 March 2012. It is thus expected that approval or sanction of that scheme of arrangement will be in place before the second Court hearing of the Auzex scheme by this Court.

30

40

The scheme is recommended unanimously by the Auzex directors. An independent expert, BDO, has been appointed by the Auzex board to assess the scheme. It has prepared a report which I have read. BDO concluded that the proposed merger is in the best interests of Auzex shareholders.

50

The principles governing applications under section 411 and what the Court must be satisfied of upon the first Court hearing have been stated in a number of cases. It is often said that the first Court hearing is governed by the *Eastment* principle. That is a reference to the judgment of Street CJ, (with whom Hutley and Samuels JJA agreed) in *FT Eastment & Sons Pty Ltd* (1977) 3 ACLR 69 at 72.

The principle is that at the first Court hearing the Court will not ordinarily summon a meeting unless the scheme is of such a nature and cast in such terms that if it receives the statutory majority at the meeting the Court would be likely to approve it on the hearing of a petition which is unopposed.

The Court exercises a supervisory jurisdiction to review the scheme and the explanatory statements and to raise any queries. The Court is concerned to ensure that the documents provided to shareholders present a fair picture. However, it is important that shareholders are not confused by unnecessary elaboration and detail. The adequacy of the information to be provided to the shareholders is to be assessed in a practical, realistic way, having regard to the complexity of the proposal.

At both Court hearings there is a duty of disclosure which falls on the applicant and its counsel. Senior Counsel for the applicant took me to certain matters, both in written and oral submissions, that were important to my decision to make

an order convening a meeting and which were in discharge of the ex parte disclosure principle.

1

I have considered the ineligible foreign shareholders issue. The ineligible foreign shareholders are few in numbers and I need not re-state matters that were canvassed in relation to ineligible foreign shareholders at the prior demerger scheme. I have had regard to the text of the scheme. Auzex intends that the receipt of BBG shares by US shareholders be in reliance upon the exemption from registration requirements in the US *Securities Act of 1933*. I will address this matter further at the second Court hearing.

10

20

Under the merger implementation agreement there is provision for a break fee of \$750,000 to be paid in certain circumstances if the scheme does not proceed. There are provisions which are commonly referred to as "No Shop, No Talk, No Due Diligence, Notification and Matching Rights". There is a fiduciary carve-out in clause 14.5. These provisions are disclosed in the scheme booklet.

30

40

The importance of addressing these exclusivity provisions was noted by Lindgren J in *Re APN News & Media Ltd* (2007) 62 ACSR 400 at [55]. The break fee in this case exceeds one per cent of the equity value of Auzex. That is more than the one per cent rule of thumb which appears in guidelines issued by the Takeovers Panel.

50

Mr Lawton in his affidavit has addressed the reasonableness of the break fee. The break fee was entered into voluntarily. There is a reverse break fee, that is if GGG does not proceed it is obliged to pay a break fee in the same circumstances. The break fee was agreed after substantial negotiation between Auzex and GGG and at the date of entry into the heads of agreement \$750,000 was a genuine pre-estimate of Auzex's legal, technical and other costs of its two schemes. Auzex's transaction costs have in fact exceeded this amount to date. Importantly, the break fee payable by Auzex is not payable if the shareholders vote down the scheme.

1  
10  
20

I am satisfied of the matters that need to be proved at the first scheme hearing. Auzex is a Part 5.1 body. The proposed scheme is an arrangement within the meaning of section 411. There has been proper disclosure to shareholders. The scheme is bona fide and properly proposed. ASIC has had a reasonable opportunity to examine the proposed scheme, the explanatory statement and to make submissions. It had notice of the proposed hearing date. It does not seek to appear at the first hearing. Other procedural requirements have been met.

30  
40

It will be appropriate for me to consider the provisions of section 411(17) at the second hearing in accordance with authorities relating to that section.

50

The scheme booklet is Exhibit JL18 to Mr Lawton's affidavit. The evidence that supports the contentions contained in the scheme is contained in various other affidavits. These

include a technical expert's report on mining interests and other matters that verify factual information contained in the scheme booklet.

1

For these reasons on Friday I made orders directing the convening of the scheme meeting. I made consequential orders, and I also made provision to permit the chairman to adjourn the scheme meeting, if required. The form of order accorded with existing practice and these are my reasons for making the order which I did on 17 February 2012.

10

20

-----

30

40

50