SUPREME COURT OF QUEENSLAND

CITATION:	*Re: White Horses Pty Ltd* [2016] QSC 93
PARTIES:	**WHITE HORSES PTY LTD ACN 009 696 637** (applicant)
FILE NO/S:	BS3047/16
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	28 April 2016
DELIVERED AT:	Brisbane
HEARING DATE:	22 and 28 April 2016
JUDGE:	Jackson J
ORDER:	**The order of the court is that:**

1. **Pursuant to s 411(1) of the *Corporations Act* 2001 (Cth) ("the Act"), the applicant shall summon and convene a meeting ("the scheme meeting") of its shareholders ("the shareholders") for the purpose of considering and, if thought fit, resolving (with or without modification) to approve the scheme of arrangement between them and the applicant substantially in the form set out in the share scheme booklet ("the scheme booklet") included in exhibit SJG1 to the affidavit of Steven John Grant filed on 21 April 2016.**

2. **The scheme meeting shall be held on 28 May 2016 at the Burleigh Gold Club cnr Albion and Bardon Avenues, Miami, Queensland, 4220 at 10:00am (Brisbane time), or as soon thereafter as is convenient.**

3. **The scheme meeting shall be convened by sending to the shareholders by ordinary pre-paid post on or before 5 May 2016:**

   (a) the scheme booklet;

   (b) the notice of scheme meeting, substantially in the form contained in exhibit DW10 of the affidavit of Daniel Hamilton Weule filed on 22 March 2016; and

   (c) a proxy form, substantially in the form contained in exhibit DW11 of the affidavit of Daniel Hamilton Weule filed on 22 March 2016.

4. **The documents identified in paragraph 3 of this order:**

(a) shall be sent to those shareholders who are recorded in the applicant's register of shareholders, and to each shareholder at the address recorded in respect of that shareholder in the register of shareholders, as at 10:00am (Brisbane time) on 3 May 2016; and

(b) shall be deemed to be received in accordance with clause 46.5 of the Constitution of the applicant dated October 2007.

5. All voting at the scheme meeting, other than voting on any procedural motion, shall be conducted by poll.

6. A proxy may not vote at the scheme meeting unless the instrument appointing the proxy is received by 10:00am (Brisbane time) on 23 May 2016 sent to the applicant at an address nominated by it in the scheme booklet.

7. Pursuant to sub-section 411(1) of the Act, further or alternatively sub-section 411(4)(a)(ii)(A) of the Act, the shareholders (and all of them) shall jointly form one class for the purposes of the scheme meeting.

8. Except as otherwise provided for in this order, the Constitution of the applicant dated October 2007 shall govern the convening and proceedings of the scheme meeting as if it was a general meeting of the applicant, except that:

(a) clauses 24 to 30 (inclusive) of the Constitution of the applicant dated October 2007 shall not apply; and

(b) the poll (referred to in paragraph 5 of this order) shall be taken irrespective of whether a majority demands it.

9. With the exception of regulation 5.6.13, regulations 5.6.12 to 5.6.36A of the *Corporations Regulations* 2001 (Cth) shall not apply to the scheme meeting.

10. Daniel Hamilton Weule, or in his absence, Dale Leslie Streten, shall act as chairman of the scheme meeting and, in the absence of either, the scheme meeting shall elect some other person as chairman.

11. The explanatory statement contained in the scheme booklet, substantially in the form contained in exhibit SJG1 to the affidavit of Steven John Grant filed on 21 April 2016, is approved subject to the explanatory statement or information provided with it being amended to state that the directors propose to vote in favour of the scheme and that no director holds any marketable securities in the proposed buyer.

12. The applicant has liberty to apply.

13. The balance of the originating application filed 22 March 2016 is adjourned to 1 June 2016.

CATCHWORDS: CORPORATIONS – ARRANGEMENTS AND RECONSTRUCTIONS – SCHEMES OF ARRANGEMENT OR COMPROMISE – APPLICATION FOR ORDER FOR MEETING – where the applicant company proposed a scheme of arrangement and applied under s 411(1) of the *Corporations Act* 2001 (Cth) for the court to order a meeting of members – where the applicant company was a home unit company and the building was approaching the end of its serviceable life – where under the proposed scheme the applicant company's land and building would be sold to a developer, the purchase price allocated among the shareholders proportionately, then the applicant company would be wound up – whether the court should order a meeting of the members

CORPORATIONS – ARRANGEMENTS AND RECONSTRUCTIONS – SCHEMES OF ARRANGEMENT OR COMPROMISE – CREDITORS OR MEMBERS – CLASSES OF CREDITORS OR MEMBERS – where the members' right of occupation for each of the units, of differing value, was provided for under the constitution and supported by a lease between the applicant company and the relevant member – whether all of the members could meet and vote on the proposed resolution as a single class

Companies (Qld) Code, s 315
Companies Act 1931 (Qld), s 161
Companies Act 1961 (Qld), s 181
Companies Act Amendment Act 1889 (Qld), s 35
Corporations Act 2001 (Cth), ss 256B, 256C, 258B, 411, 412, 461
Corporations Law, s 411

Crumpton v Morrine Hall Pty Ltd [1965] NSWR 240, considered
Dungowan Manly Pty Ltd v McLaughlin (2012) 90 ACSR 62; [2012] NSWCA 180, considered
Re: Chevron (Sydney) Ltd [1963] VR 249, considered
Re: Jax Marine Pty Ltd [1967] 1 NSWR 145, considered
Re: Landmark Corporation Ltd [1968] 1 NSWR 759, considered
Wambo Coal Pty Ltd v Sumiseki Materials Co Ltd (2014) 88 NSWLR 689; [2014] NSWCA 326, cited
Wilson v Meudon Pty Ltd [2005] NSWCA 448, considered

COUNSEL: LA Jurth for the applicant

SOLICITORS: Merthyr Law for the applicant

[1] **Jackson J**: This is the first court hearing for a proposed scheme of arrangement. The application is made under s 411(1) of the *Corporations Act* 2001 (Cth) so that the court may order a meeting of the members of the applicant to be convened to consider a resolution for the proposed arrangement between the applicant and its members.

[2] The applicant is a home unit company. It was incorporated in December 1959 as the vehicle for the ownership of "White Horses", a low rise building of three stories comprising 49 units, including one styled as a penthouse.

[3] As is usual with a company title home unit building, the right of occupation for each unit that is provided for under the constitution and is supported by a lease between the applicant and the relevant shareholder.

[4] The proposed scheme would see the whole of the applicant's land including the building sold to a developer for a specified sum, with the purchase price allocated among the shareholders in accordance with the proportion that a shareholder's shares bear to the total number of shares issued by the company ("proportionate entitlement"), followed by a winding up of the company.

[5] The reason for the proposed scheme is that the building is approaching the end of its serviceable life. The company and its members are faced with the alternative of an expensive repair to return the building to a safe condition for any reasonable period of time on the one hand, or a sale of the land as a redevelopment site and a winding up of the company, on the other hand.

[6] The question for present consideration is whether the sale and wind up proposal can or should be effected by a scheme of arrangement. On a first court hearing, that question is whether the proposed scheme could be approved at the second court hearing under s 411(4)(b), if the meeting were held and the statutory majorities required under s 411(4)(a) as a pre-condition to the court's power to approve the scheme were achieved.

[7] In a practical sense, in the particular circumstances of a home unit company of the present kind, that question resolves to whether it is possible or appropriate to order that all of the members of the company should meet and vote on the proposed resolution as a single class.

[8] In some contexts, it has been said that the group or parcel of shares that entitles the holder to occupation of a particular home unit constitute a separate class of shares.

[9] In the present context, if that is right, there is only one member of the applicant (although more than one person might constitute the relevant membership) in each class. Accordingly, unanimous agreement of the members would be required in order to achieve the statutory majority in numbers of each class of members under s 411(4)(a). If unanimous agreement is required, there is no point to a scheme of arrangement. The members would be able to unanimously agree and bind themselves and the company to the arrangement without the need for a scheme. The transactional purpose could be achieved without the costs or processes of a scheme.

The relevant constitution

[10] A preliminary question of relevance is what is the current constitution of the applicant?

[11] Although there were prior constitutional instruments, starting with the memorandum and articles of association when the applicant was incorporated, the present discussion may be confined to the last three constitutions.

[12] The first of those was the October 2007 constitution. It is not apparently challenged as valid. Importantly, cl 28.5 provided that "[r]esolutions regarding the sale of the Land … must be approved by resolution passed without dissent".

[13] Second, the June 2010 constitution deleted cl 28.5 and added cl 46 under which the the board was purportedly empowered to "deal in the Land and Building on behalf of the Company" and to "at any time, place the Land and Building with a licensed real estate agent to obtain tenders for the sale and transfer of the Land and Building" subject to a requirement under cl 47 to seek a resolution "at [an] Extraordinary General Meeting … of at least 75% of voters … [to] approve the sale of the Land and Buildings."

[14] However, the applicant does not rely on the June 2010 constitution because it may be invalid.

[15] Third, the March 2015 constitution by cl 45 made further provision for sale of the Land and Buildings by the board if a special resolution passed at an extraordinary general meeting authorised the board to negotiate an agreement.

[16] However, the applicant does not rely on the March 2015 constitution because it may be invalid.

[17] Accordingly, the application falls to be considered by reference to the October 2007 constitution. However, the discussion which follows would not be significantly affected if either of the later constitutions applied.

Schemes of arrangements and classes of creditors or members

[18] The statutory process for approval by the court of a scheme of arrangement has the purpose or object that where a compromise or arrangement becomes binding on the members or a class of members and the company, it will bind dissenting members to the rights and obligations created under the scheme.

[19] Thus s 411(4) provides that an arrangement is binding on the members or on a class of members of a body and on the body if and only if the statutory majorities under s 411(4)(a) are achieved at a meeting convened in accordance with an order of the court under s 411(1)(a) and the court approves the scheme under s 411(4)(b).

[20] There is a long history of statutory predecessors to s 411.[1] From the beginning, it was recognised that where there may be different rights or obligations or interests for or among different classes of creditors or members under a proposed scheme of arrangement, there should be separate meetings of each relevant class.

[21] That requirement makes it necessary to identify at the first court hearing whether there should be separate class meetings because there are different classes of shareholders. Simon McKeon and Jonathan Farrer, "Takeovers and Public Securities: Deal

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1 *Corporations Law*, s 411; *Companies (Qld) Code*, s 315; *Companies Act* 1961 (Qld), s 181; *Companies Act* 1931 (Qld), s 161; *Companies Act Amendment Act* 1889 (Qld), s 35.

Protection Measures and Class Voting Requirements for Schemes of Arrangement",[2] said:

> "For this purpose, 'class' is not determined solely by reference to the type of shares held by shareholders. It requires a broader inquiry into the implications of the proposed scheme for shareholders. One of the more frequently cited descriptions of this inquiry is contained in the judgment of Bowen LJ in *Sovereign Life Assurance Co (in liq) v Dodd* [1892] 2 QB 573 at 583:
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> > 'It seems plain that we must give such a meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.'"

[22] There are several well known cases in Australia which have considered whether or not there are different classes of creditors or shareholders in particular contexts. See *Re: Jax Marine Pty Ltd*,[3] *Re: Chevron (Sydney) Ltd*[4] and *Re: Landmark Corporation Ltd*.[5]

[23] In *Jax Marine*, the question was whether there should be a separate class of unsecured creditors comprising those who were also shareholders of the company and a guarantor of some of the benefits promised under the scheme. It was held that the differences were not such that the particular creditors were unable to vote with the other unsecured creditors, even though on an application for approval it might be necessary to discount the vote of the creditors who had a personal and special interest.

[24] In *Landmark*, it was held that subsidiary companies were not required to meet as a separate class of creditors because of their interest in the company other than as members of the class of unsecured creditors.

[25] There is no specific case under s 411(1) or its predecessors involving the determination of whether the holders of the groups of parcels of shares associated with the right to occupy a particular unit should be treated as a separate class for the purpose of the scheme meetings.

Home unit companies and classes of shares

[26] Home unit companies are expressly recognised under s 258B(1) of the *Corporations Act* 2001 (Cth), under which if a company has a constitution, "under it the company may grant to a shareholder, as a shareholder, a right to occupy or use real property that the company owns or holds under lease, whether the right is a lease or licence or a contractual right."

[27] In contexts other than a proposed scheme of arrangement of the present kind, each group or parcel of shares entitling a holder to the right to occupy a home unit has been

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2 (2008) 26 *Company and Securities Law Journal* 402, 402.
3 [1967] 1 NSWR 145.
4 [1963] VR 249.
5 [1968] 1 NSWR 759.

said to be a separate class of shares. That conclusion was reached in *Crumpton v Morrine Hall Pty Ltd*,[6] *Wilson v Meudon Pty Ltd*[7] and *Dungowan Manly Pty Ltd v McLaughlin.*[8]

[28] In *Crumpton*, the members of a home unit company in general meeting resolved to alter the company's constitution by restricting the rights of a shareholder and unit occupier to a right of personal occupation. The aim was to prevent members from leasing or renting their units. It was held that the power of amendment of the Constitution did not authorise the change. In the course of his reasons, Jacobs J said:

> "I think that in the present case the shares are divided into different classes. I take heed of the fact that the Articles dividing up the groups of shares do not refer to the groups as classes, but it seems to me that when you have a home-unit company and the shares divided up into different groups so that one group has quite different rights from another group it makes no difference that the Articles avoid the use of the word 'class'. In fact, the groups of shares are different, the rights attaching to them are different, with the result that the capital is divided into different classes within the meaning of [the relevant article]."[9]

[29] In *Wilson*, the New South Wales Court of Appeal considered the power to amend the company's constitution to permit the holder of the shares associated with the penthouse to use and occupy part of a roof garden that had previously been associated with the shares relating to another unit and permitted the holder of those shares and lessee of that unit to occupy or use the relevant roof garden. Bryson JA said:

> "When Company Title Home Units were relatively new various reasons were expressed for doubting the effectiveness of the scheme …[but] the effectiveness of creation of contractual rights of occupation by articles of a company has come to be accepted. Decisions which recognise that rights of occupation in a home unit company may validly be given by articles of association to a member include *Fischer v Easthaven Ltd* (1963) 80 WN (NSW) 1155: *Crumpton v Morrine Hall Pty Ltd* [1965] NSWR 240; (1965) 82 WN (Pt 1) (NSW) 456; *Magill v Santina Pty Ltd* and *Brentwood Village Ltd v Corporate Affairs Commission (NSW)* (1983) 1 ACLC 1006: (1983) 8 ACLR 93 at 95-96 (McLelland J).
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> After decades of experience some generalisations about company title home units can now be ventured. One is that articles of association like article 6 of Meudon Pty Ltd create contractual licences, not leases: I deal with this further in an excursus. Another should, in my opinion, be that the shares related to each Home Unit are a class of shares, and that rights under them are entrenched against alterations unless the holders of those shares participate. Later I give reasons for

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6 [1965] NSWR 240.
7 [2005] NSWCA 448.
8 (2012) 90 ACSR 62.
9 [1965] NSWR 240, 245-246.

> this. Generalisations are not more than they are, and the constitution of each home unit company must be considered separately."[10]

[30] Later in his reasons, Bryson JA considered the question of separate classes in greater detail.[11] It is unnecessary to set them out in detail.

[31] In *Dungowan Manly*, the New South Wales Court of Appeal confirmed the approach that was taken in *Wilson*. The question in that case was the scope of a power to vary the rights of the members under the company's constitution and whether conduct varying those rights amounted to oppressive conduct or constituted a breach of the contract comprised in the constitution, giving rise to damages for breach of contract. Macfarlan JA said:

> "*Wilson* clearly established that a variation of the class rights of a shareholder entitled to occupy a company title home unit may occur even if the rights to exclusive use and occupation of the area comprising that unit remain unaffected."[12]

Separate classes of members under s 411(1) in this case

[32] In my view, the answer to whether each parcel of shares associated with the right to occupy a particular unit in "White Horses" is a different class, so that the holder or holders must be treated as a different class of member for a meeting to be convened and held under s 411, must be answered by reference to the terms of the scheme proposed.

[33] If the scheme proposed differential treatment between the holders of one parcel of shares and the holders of another parcel of shares there would be a strong case for concluding that there should be a meeting of each class of member before the scheme could be approved under s 411(4)(b).

[34] But that is not this case. The question in this case is whether the whole of the land should be sold, the proceeds distributed and the applicant wound up. If the scheme were approved, and its terms became binding, they would authorise the applicant acting by its directors to sell the land of the company under the proposed transaction and for that purpose to effect a surrender of each of the leases of the units (and to deal with any mortgagee of a lessee shareholder) in order to effect the transfer of the land to the proposed purchaser. On completion of the sale of the land, the shareholders would receive a share of 94 per cent of the net purchase price, based on their proportional entitlement.

[35] After that, the applicant would be wound up and any balance remaining after payment of the winding up costs distributed to the members in the same proportional entitlement.

[36] In my view, there is no differential treatment or interest under the proposed arrangement which would make it impossible for the members of the applicant to consult together and to vote at a single meeting or which would require that each member in respect of a parcel of shares associated with the right to occupy a particular

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10 [2005] NSWCA 448, [17]-[18].
11 [2005] NSWCA 448, [49]-[59].
12 (2012) 90 ACSR 62, 78 [71].

unit should be treated as a different class for the purposes of the proposed scheme. Although the holders of the shares are holders of different classes of shares in many contexts, in my view, for the particular purpose contemplated by the proposed scheme in this case, the rights and obligations of the members who hold parcels of shares in the applicant do not vary in a relevant way.

[37] To some extent, I am fortified in this conclusion by the fact that the purpose of the proposed arrangement is one that might have been achieved by a resolution to wind up the applicant under s 461(1)(a) of the *Corporations Act* 2001 (Cth). That is the ultimate end proposed by the scheme. The difference between the proposed scheme and proceeding in that fashion is that under the proposed scheme the members have the benefit of a specific proposed transaction of sale and the right to exercise their votes in general meeting in relation to that proposal. On a winding up under s 461(1)(a) the sale of the company's land would be a matter for the liquidators.

[38] Second, I have paid attention to the fact that the proposed scheme involves the return of nearly all of the purchase price on the sale of the land to the members of the applicant in advance of winding up. In other words, the scheme is to be carried out in a fashion which on one view involves a step that is effectively a reduction of capital.[13] The proposed reduction is one that is at least arguably fair and reasonable to the company's shareholders as a whole and will not materially prejudice the company's ability to pay its creditors and will only occur if a special resolution approves that part of the scheme which exceeds the majority required for a reduction of capital.[14]

[39] Alternatively, it might be suggested that the payment of the purchase price to the shareholders proportionately is one that is in effect to be made by way of dividend. It is unnecessary for the purpose of the present application to explore that possibility and the relationship of dividends and profits under the *Corporations Act* 2001 (Cth) and the company's constitution.[15]

[40] In reaching this conclusion, the greatest concern that I have had is that the proportionate entitlement of the members under the constitution may not truly reflect the relative values of the interests held by the members of the applicant. The right to occupy a unit has a commercial value that is not necessarily reflected in the proportionate entitlements under the constitution. For example, units of the same proportionate entitlement may have been renovated or fitted out to very different standards and may have been sold on market from time to time at values reflecting those standards. The value of one unit compared to another may be affected by other factors such as the aspect of or views from the particular unit. And nine of the units do not have an associated numbered car park.

[41] Accordingly, distributions in accordance with the proportionate entitlements held under the constitution under the proposed scheme may involve arguable unfairness. The commercial question addressed by one member may vary to that addressed by another according to these considerations. Nevertheless, it does not seem to me that the interests will necessarily so different as to make it impossible for the members to consult together with a view to their common interests.

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13 *Corporations Act* 2001 (Cth), s 256B,

14 *Corporations Act* 2001 (Cth), s 256C(1).

15 See *Wambo Coal Pty Ltd v Sumiseki Materials Co Ltd* (2014) 88 NSWLR 689, 705-716.

Other matters

[42] Generally speaking, other requirements for an order under s 411(1) are met. As a company, the applicant is a Part 5.1 body. The applicant proposes an arrangement between the applicant and its members.

[43] Fourteen days' notice of the hearing of the application was given to ASIC. ASIC had a reasonable opportunity to examine the terms of the proposed arrangement and the draft explanatory statement and to make submissions to the court.[16]

[44] The proposed scheme booklet contains a draft explanatory statement within the meaning of s 412(1)(a) of the CA. It explains the effect of the scheme and it states the material interests of the directors as directors and members of the applicant.[17] It sets out information material to the making of a decision by the members whether or not to agree to the arrangement.[18] It contains a unanimous recommendation by the directors recommending acceptance of the scheme.[19] It sets out the number of marketable securities of the company held by or on behalf of each director.[20] It sets out the directors intentions as to the non-continuation of the business.[21]

[45] It is not clearly stated that the directors by whom (or on whose behalf) shares in the company are held propose to vote in favour.[22] It is not clearly stated that no director holds any marketable securities in the proposed buyer.[23]

[46] There is no requirement for this scheme that the explanatory statement be accompanied by any expert reports. Nevertheless, the application for an order for the court to convene the scheme meeting is supported by a number of expert reports, which are to be included in the scheme booklet. There is an engineering report that details the risks associated with the building in its present condition and the range of costs for repairs. There is a valuation report of the land and buildings. There is an expert's report as to whether the offer is fair and reasonable or in the best interests of the members. There is a tax advice.

[47] The form of the proposed scheme booklet is complex. Nevertheless, it is not misleading in any way that requires significant amendment, in my view. It is regrettable, however, that in attempting to follow what are nowadays almost standard form methods for setting out information in the scheme booklet, the valuable twins of brevity and clarity are consigned to a secondary role. The intended reader of the explanatory statement is, after all, an owner of shares in a home unit company.

[48] The meeting is to be held within this jurisdiction.[24]

[49] Accordingly, orders should be made in accordance with the proposed draft orders amended to reflect that the explanatory statement is approved, subject to the explanatory statement or information provided with it being amended to state that the

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16 *Corporations Act* 2001 (Cth), s 411(2).
17 *Corporations Act* 2001 (Cth), s 412(1)(a)(i).
18 *Corporations Act* 2001 (Cth), s 412(1)(a)(ii).
19 *Corporations Regulations* 2001 (Cth), Schedule 8, [8301].
20 *Corporations Regulations* 2001 (Cth), Schedule 8, [8302].
21 *Corporations Regulations* 2001 (Cth), Schedule 8, [8310].
22 *Corporations Regulations* 2001 (Cth), Schedule 8, [8302].
23 *Corporations Regulations* 2001 (Cth), Schedule 8, [8302].
24 *Corporations Act* 2001 (Cth), s 411(3A).

directors propose to vote in favour of the scheme and that no director holds any marketable securities in the proposed buyer.