[2003] QSC 139

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

WHITE J

No 3264 of 2003

IN THE MATTER OF MIM HOLDINGS LTD
(ACN 009 814 019)

and

MIM HOLDINGS LTD (ACN 009 814 019) Applicant

BRISBANE

..DATE 01/05/2003

JUDGMENT

Floor, The Law Courts, George Street, Brisbane, Q. 4000 Telephone: (07) 3247 4360 Fax: (07) 3247 5532

HER HONOUR: (Ex tempore) This is an application by MIM Holdings Limited pursuant to section 411 of the Corporations Act for an order that a meeting of MIM's members be held and to approve a scheme of arrangement and that the Court approve the explanatory statement to be sent to members and that the Court, in due course, approve the scheme of arrangement.

The scheme involves the acquisition of all of MIM's shares by Xstrata Holdings Proprietary Limited so that MIM would become a wholly owned subsidiary of that company. Although it is contemplated that an application of this kind will be made without notice save as to ASIC the court may grant leave to appear to an interested person. Xstrata sought, and was given, leave to appear and be heard yesterday.

Platinum Asset Management Limited, a funds manager, holds in its own right, and as manager, approximately 2.5 per cent of the issued capital of MIM. It sought, and was given without opposition, leave to appear and be heard. Platinum opposes orders of the kind sought by MIM. Mr Oakes SC for Platinum sought an adjournment of the application in order to permit a more comprehensive examination of the material including the independent expert's report and to prepare detailed proposals for inclusion in the explanatory statement if the meeting is ordered to be held.

Platinum also sought orders requiring MIM to disclose details of all other offers recently obtained for all or part of MIM's enterprise and operations. I declined to grant the

adjournment or to order disclosure. I concluded that there was no entitlement in a shareholder, in Platinum's position, to this level of information at this stage.

ASIC has appeared on this application represented by Ms Binstead. ASIC has had an opportunity as provided for in section 411 subsection 2 of the Corporations Act to examine the proposed scheme of arrangement and the draft explanatory statement relating to the scheme to be sent to shareholders. ASIC expresses no objection to a meeting being ordered for shareholders to consider and vote on the scheme arrangement and no objection to the contents of the draft explanatory statement.

As is its practice, it adopts a neutral position as to whether it will provide a statement to the Court that it has no objection to the scheme of arrangement pursuant to section 411 subsection 17(b) of the Corporations Act until after the shareholders have voted on it and it has had an opportunity to consider matters raised in the interim.

In effect, Platinum contends that any acquisition of MIM by Xstrata should be by takeover under chapter 6 of the Corporations Act and not chapter 5 essentially because it believes that the true market value of MIM's shares will thereby be achieved. The independent expert's report prepared for MIM by Grant Samuel has valued MIM's shares in the range $1.70 to $2.24 per share and has concluded that $1.72 per share, the price offered by Xstrata, is fair and that the

scheme is in the best interests of the shareholders. The majority of directors recommend the scheme to shareholders.

Mr Gauci, the managing director of MIM, does not. He believes that the offer is too low and that although a cash offer is attractive shareholders will forego value in the medium to longer term if the current offer is accepted. He considers that the offer is opportunistic as to timing and provides substantially more benefits to Xstrata than to MIM shareholders. He has concluded that Grant Samuel is too conservative in its approach in respect of a number of matters particularly estimates of future production rates and productivity, the life of the coal assets and the value of the coal assets.

These views are set out at length in the explanatory statement. As Mr Gauci notes, the Grant Samuel report fairly acknowledges that the valuation of such a vast enterprise involves a variety of subjective judgments and alternative judgments could be made. Other parties have made proposals in respect of MIM either in whole or in part since the approach by Xstrata. Mr Gauci believes that the shareholders might do better by MIM at least selling part of its coal business.

Grant Samuel has dealt with these other approaches at page 3 of its report. This is the area of disclosure, as I have mentioned, sought by Platinum. According to the Grant Samuel report, following the unsolicited approach by Xstrata

announced on 21st November 2002, MIM and its advisers undertook an extensive process to seek alternative offers for MIM. This included making approaches to all relevant mining companies and offering to provide access to detailed information regarding the company.

MIM and its advisers also reviewed alternative transaction structures including demergers, trade sales, IPO's and joint ventures of parts of its business. It was recognised that separate sales of the various individual business units could attract many more buyers than a sale of the whole company, however, a piecemeal sale ran the risk of MIM being left with businesses that were not optimal for a separate listed entity having regard to expected funding and earning projections. It also raised tax and transaction cost issues.

A number of parties conducted detailed due diligence on MIM. Both formal and informal proposals were made to and considered by MIM. None of these proposals involved a cash offer for the company. None would have delivered with certainty value superior to the Xstrata offer. The MIM board formed the view that none of these proposals was as attractive as the Xstrata offer having regard to issues including the value of the consideration offered and certainty of completion.

There remains an opportunity, it is said, for interested parties to make superior offers prior to the shareholders vote on the Xstrata offer. Grant Samuel, concluded:

> "In the absence of the Xstrata offer or an alternative proposal MIM shares are likely to trade at a significant discount to the Xstrata offer price."

This process is reflected in the letter to shareholders from the chairman contained in the materials to be sent out. Grant Samuel has set out extensively its sources of information. Much pertaining to the approaches would have been confidential. The issues are fairly set out in the material for the shareholders to consider. Mr Gauci's position is stated at length and there is no suggestion that it any other than properly reflects his views.

There is no requirement for an argumentative exchange between his views and those of the independent expert to be debated in this material.

Although different proposals for schemes will be approached differently and Mr Oakes has tendered one such scheme setting out the "no" case, the draft explanatory statement is comprehensive with a clear table of contents and written in a style which is relatively digestible and comprehensible. That it is not an alluring advertising product but a sober analysis of the proposal is not a cause for criticism and no more is required to inform the shareholders of the other view than is set out in the material.

Platinum contends that, at this stage, the Court should refuse outright to permit the meeting to be held because the Court

could not be satisfied that the arrangement has not been proposed for the purpose of enabling any person to avoid the operation of any of the provisions of chapter 6 of the Corporations Act. The question is, at what point in the process ought this to be considered by the Court. Section 411(17) provides:

> "The Court shall not approve a compromise or arrangement under this section unless:
>
> (a) it is satisfied that the compromise or arrangement has not been proposed for the purpose of enabling any person to avoid the operation of any of the provisions of Chapter 6; or
>
> (b) there is produced to the Court a statement in writing by the Commission stating that the Commission has no objection to the compromise or arrangement;
>
> but the Court need not approve a compromise or arrangement merely because a statement by the Commission stating that the Commission has no objection to the compromise or arrangement has been produced to the Court as mentioned in paragraph (b)."

There is no doubt, as French J observed pithily in Re Foundation Healthcare 2002, 42 ACSR, 252 at 265, that at the first Court hearing a scheme may appear on its face "so blatantly unfair or otherwise inappropriate that it should be stopped in its tracks before going any further." Otherwise, as Santow J said in re NRMA Limited 2000, 33 ACSR, 595 the Court will not usually go very far into the question of the whether the arrangement is one which warrants the approval of the Court but merely see that it is one which the Court would be likely to approve if the shareholders vote for it in the requisite majority.

The reason for this is textural in the first place. Section 411(17) dictates that a consideration of chapter 6 avoidance is to be made at the approval stage. That is, the second Court hearing. If ASIC produces a statement to the Court on that occasion stating that it had no objection to the arrangement then chapter 6 matters would not be considered. See re Arnotts Limited 1998, 16 ACLC 413 although, the Court may, in the exercise of its discretion, still not approve the arrangement for other reasons.

There are no features of the Xstrata proposal which Platinum has submitted demonstrate that chapter 5 has been preferred for the purpose of avoiding the operation of any of the provisions of chapter 6 which would immediately cause the Court to stop the whole procedure "in its tracks". The letter of 29 April 2003 from Xstrata to MIM explains that a scheme of arrangement is the only way in which Xstrata can fund the $4.9 billion necessary to complete the transaction because its lenders require a high level of certainty as to the outcome and as to the timing. That is not, in my view, avoiding the provisions of chapter 6 of the Corporations Act in the way contemplated by s.411(17)(a).

It is important to note that the Corporations Act in its chapter 5 provisions offers a true alternative to the way in which acquisitions may occur. It is, at this hearing, unnecessary to canvass the interesting historical development of this position set out in the appendix to MIM's submissions by Mr D Jackson QC and Mr L F Kelly.

Mr Oakes submitted that shareholders should be informed in the explanatory statement of the different compulsory acquisition thresholds between an acquisition by scheme of arrangement and an acquisition by takeover. That is simply not information of the kind contemplated for inclusion on the statement by the Corporations Regulations and would not, in my view, be helpful. The chapter 5 compulsory acquisition requirement is appropriately described and that is what the shareholders are concerned to know.

Mr Oakes also submitted that some strict regime for monitoring the information given to shareholders making inquiries ought to be put in place as occurred, he informed the Court, in the NRMA and Berri Foods cases, for example. It is notorious that there were strong feelings generated in the NRMA case and the nature of the cooperative in the Berri case suggests a similar level of engagement by the protagonists and antagonists.

There is no evidence or indeed any hint that any impropriety or partisanship will be engaged in by the operators of the shareholders' information telephone line or web site or, indeed, offices of MIM. In that circumstance, there is no basis for imposing a costly and burdensome requirement on the applicant to monitor its responses to inquiries.

Having reflected on all the concerns raised by Platinum I do not consider that they cause me to order any changes to the explanatory memorandum. ASIC with its regulatory and supervisory role has considered the explanatory statement and

expressed no concerns. This does not supplant the Court's role, of course, at this stage, but like French J in re Foundation Healthcare I, too, take some comfort from this.

I am therefore prepared to order that MIM be at liberty to convene the scheme meeting for shareholders and approve the explanatory statement in the draft form before the Court to accompany the notice of meeting and I have a more detailed draft order. Has there been any variation to that, Mr Jackson?

MR JACKSON: No, your Honour.

MR ROSENGREN: Only from my client's point of view your Honour, they don't pursue costs. I think costs was an issue that was at least raised yesterday in the written submissions.

HER HONOUR: Well, it certainly was fairly raised yesterday.

MR ROSENGREN: And that is not being pursued this morning.

HER HONOUR: So, there is nothing else then, Mr Archibald?

MR ARCHIBALD: Not from our part, your Honour, no.

HER HONOUR: Once again, thank you gentlemen and through you, Mr Rosengren also thank you to Mr Oakes for his assistance. I will ask my associate to return the volume of materials to you. You might be able to use it on another occasion but I have extracted the submissions from it. I will just then sign off on that order. Order as per draft.

MR JACKSON: Before your Honour rises may I, on behalf of the applicant extend our gratitude for the assistance of the Court in making itself available to deal with this sort of application which is an added burden to the usual-----

HER HONOUR: Well, fortunately, the civil list allowed us to do that - to devote a day to it. Thanks Mr Jackson.
