SUPREME COURT OF QUEENSLAND

CITATION:	*Re QT Mutual Bank Ltd (No 2)* [2016] QSC 265
PARTIES:	**QT MUTUAL BANK LTD** **ABN 83 087 651 054** (applicant)
FILE NO/S:	SC No 9068 of 2016
DIVISION:	Trial Division
PROCEEDING:	Originating Application
DELIVERED ON:	9 November 2016, *ex tempore*
DELIVERED AT:	Brisbane
HEARING DATE:	9 November 2016
JUDGE:	Bond J
ORDER:	**The orders of the Court are that:** **1. Pursuant to subsection 411(4)(b) of the *Corporations Act 2001* (Cth) (Act), the scheme of arrangement between the Applicant and its members, in the form of Exhibit 1 in the proceeding, be approved.** **2. The Applicant lodge with the Australian Securities and Investments Commission a copy of the approved scheme of arrangement at the time of lodging a copy of these Orders.** **3. Pursuant to section 411(12) of the Act, the Applicant be exempted from compliance with section 411(11) of the Act in relation to Order 1.** **4. There be no order as to costs.**
CATCHWORDS:	CORPORATIONS – ARRANGEMENTS AND RECONSTRUCTIONS – SCHEMES OF ARRANGEMENT OR COMPROMISE – APPROVAL OF SCHEME BY COURT – EXERCISE OF COURT'S DISCRETION – GENERALLY – where applicant convened a meeting of the applicant company's shareholders – where scheme has obtained a statutory majority at the meeting – where defect in compliance with previous order regarding the manner of notification to be given to members – where applicant decided to not notify deceased members of the meeting – whether the irregularity has caused, or may cause, substantial injustice – whether failure a reason to withhold the court's approval of the scheme *Corporations Act 2001* (Cth), s 411, s 1319, s 1322

Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd (2005) 194 FLR 322; (2005) 55 ACSR 185, cited
Re Pembury Pty Ltd [1993] 1 Qd R 125; (1991) 4 ACSR 759, cited
Re Permanent Trustee Company Limited [2002] NSWSC 1177, cited
Re QT Mutual Bank Ltd [2016] QSC 228, referred to
Re Seven Network Limited (No 3) [2010] FCA 400, followed
Ryan v South Sydney Junior Rugby League Club Limited (1974) 3 ACLR 486, followed
Scullion v Family Planning Association of Queensland (1985) 10 ACLR 249, followed

COUNSEL: M Oakes SC for the applicant
M Stewart QC for Royal Automobile Club of Queensland Ltd

SOLICITORS: Clayton Utz for the applicant
McCullough Robertson for Royal Automobile Club of Queensland Ltd

[1] This is the second court hearing in respect of an application, pursuant to s 411 of the *Corporations Act 2001* (Cth), concerning a scheme of arrangement between the applicant, QT Mutual Bank Limited (which I will refer to as "QTMB") and its members.

[2] The first hearing was heard before me on 21 September 2016 and my judgment is found in *Re QT Mutual Bank Ltd* [2016] QSC 228. The judgment records the nature of the scheme and the reasons I had for forming the view that, amongst other things, there was no apparent reason why the scheme should not, in due course, receive the court's approval if the necessary majority of votes was achieved by the meeting convened by the court order.

[3] The orders that I made, on the occasion of the first hearing, are recorded in the judgment. But essentially–

(a) I approved the scheme booklet and proxy forms in a particular form;

(b) I ordered that relevant documents be dispatched to QTMB members in a particular way; and

(c) I ordered that notice of the hearing of the second application be published by advertisement in a particular way.

[4] With one exception to which I will shortly turn, the material before me reveals that my orders were complied with; the meetings were held and the statutory majorities in favour of the scheme were obtained. The evidence reveals that, of the votes present, the percentage in favour of the scheme was 92.18% and, of the members present at the meeting, the percentage in favour of the scheme was also 92.18%.

[5] The voter turnout percentages for the scheme were relatively low. The votes participating were 25.20% of the total available votes and the persons participating were the same. The relatively low level of participation might be a concern if I was prepared to infer from it, that there must have been a flaw in the convening process, but I am not prepared to reach that conclusion.

[6] The evidence tends to the contrary.

[7] First, I have before me evidence, in the form of a number of affidavits by officers of Computershare Investor Services Pty Limited, revealing the process by which material was distributed to members and that material does not reveal any concern.

[8] Second, I agree with the submission that although that voter turnout, which was a total of 16,780 members, was less than the 25,728 turnout for the members' postal ballot (which I considered on the first hearing) the most likely explanation is the members not voting on the scheme proposal considered that the scheme proposal was likely to be supported and their vote was not as important as it had been on the member's postal ballot.

[9] Finally, there has been advertisement of this hearing, in accordance with my previous order and no member, or any other person, has appeared before me. Nor has anyone indicated – so an affidavit from the solicitors for QTMB reveals – any intention to appear at this hearing to object to the scheme.

[10] For these reasons, the relatively low voter turnout does not indicate I should have any concern in relation to the convening process.

[11] The evidence before me, then, is that all of the conditions required by s 411 of the Act in respect of the scheme have been complied with by QTMB. Moreover, Senior Counsel for both QTMB and the Royal Automobile Club of Queensland Limited have not – in compliance with their duty to draw to the court's attention all matters that could be considered relevant to the exercise of the court's discretion: see observations by Barrett J in *Re Permanent Trustee Company Limited* [2002] NSWSC 1177 – drawn to my attention any procedural concerns save, in the respect concerning notice of meeting, to which I will shortly turn.

[12] Finally, QTMB has obtained the statement in writing by ASIC, stating that ASIC has no objection to the proposed scheme of arrangement, contemplated by s 411(17)(b) of the Act.

[13] The approach I should take at this second hearing is that discussed in *Re Seven Network Limited (No 3)* [2010] FCA 400. Bearing in mind the considerations adverted to in that case and conscious of the analysis that I carried out in my judgment at the occasion of the first hearing, it seems to me, subject to the consideration which I will now turn, that I should approve the scheme.

[14] The issue which I have foreshadowed a number of times in these reasons is a defect in compliance with my order regarding the manner of notification to be given to members.

[15] Paragraph 2 of my previous order was in these terms:

> Pursuant to section 1319 of the Act, on or before 6 October 2016 there be dispatched to:
>
> (a) each QTMB member who has nominated an electronic address for the purposes of receiving notices of meeting and proxy forms from QTMB, at such address, an email substantially in the form of the documents exhibited at Tabs 18 and 19 of Mr Whitelaw's Affidavit.
>
> (b) each other QTMB member, by hand at, or prepaid post or courier to, the address of that QTMB member as set out in the register of members of QTMB, a copy of the Scheme Booklet and the proxy form exhibited at Tab 22 of Mr Whitelaw's Affidavit.

[16] That order was not complied with according to its terms.

[17] The reasons why that occurred and the extent of the non-compliance appear in an affidavit by the chief risk officer of QTMB. He deposes:

> (e) as at 30 September 2016, there were 252 members identified within QTMB's records as being deceased;
>
> …

(i) QTMB did not dispatch any documents in relation to the Special General Meeting, or the Court Ordered Meeting to 252 members of QTMB who were known to be deceased at 30 September 2016

…

(j) There were primarily 2 reasons for this decision and these can be summarised as follows:

(i) firstly, for the reasons noted above, in a number of cases it would not have been possible to understand who the nominated Executor was for documents to be sent to, or if they were in fact known to QTMB, their contact details might not have been known for dispatch of the relevant documents;

(ii) secondly, a key factor influencing this decision was considerations of compassion. Even where Executors might have been identified and their contact details had been known, it was considered to be inappropriate in this particular context to be sending documents relating to the membership of a deceased person to someone who, more often than not, is typically a spouse, child, or very close relative of the deceased. When non transactional QTMB materials have previously been inadvertently dispatched to persons associated with the deceased person, this has inevitably resulted in complaints to QTMB. This kind of situation was sought to be avoided by not dispatching the relevant documents to deceased members of QTMB.

[18] These reasons seem a sensible reason to make the decision which apparently was made. However, a judge of the Supreme Court had made an order and compliance with that order was not optional. That order had reserved liberty to apply. It was very obvious that the appropriate course was to bring an application to the court to modify the order that had been made, essentially for the reasons that had occurred. That is what should have occurred. Nevertheless, it did not.

[19] The questions are, what is the consequence and what I should do about it?

[20] Senior Counsel for QTMB draws my attention to ss 1322(1), (2), (4) and (6) of the Act. Those sections provide as follows:

(1) In this section, unless the contrary intention appears:

(a) a reference to a proceeding under this Act is a reference to any proceeding whether a legal proceeding or not; and

(b) a reference to a procedural irregularity includes a reference to:

(i) the absence of a quorum at a meeting of a corporation, at a meeting of directors or creditors of a corporation, at a joint meeting of creditors and members of a corporation or at a meeting of members of a registered scheme; and

(ii) a defect, irregularity or deficiency of notice or time.

(2) A proceeding under this Act is not invalidated because of any 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.

…

(4) Subject to the following provisions of this section but without limiting the generality of any other provision of this Act, the Court may, on application by any interested person, make all or any of the following orders, either unconditionally or subject to such conditions as the Court imposes:

(a) an order declaring that any act, matter or thing purporting to have been done, or any proceeding purporting to have been instituted or taken, under this Act or in relation to a corporation is not invalid by reason of any contravention of a provision of this Act or a provision of the constitution of a corporation;

(b) an order directing the rectification of any register kept by ASIC under this Act;

(c) an order relieving a person in whole or in part from any civil liability in respect of a contravention or failure of a kind referred to in paragraph (a);

(d) an order extending the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation (including an order extending a period

where the period concerned ended before the application for the order was made) or abridging the period for doing such an act, matter or thing or instituting or taking such a proceeding;

and may make such consequential or ancillary orders as the Court thinks fit.

…

(6) The Court must not make an order under this section unless it is satisfied:

(a) in the case of an order referred to in paragraph (4)(a):

(i) that the act, matter or thing, or the proceeding, referred to in that paragraph is essentially of a procedural nature;

(ii) that the person or persons concerned in or party to the contravention or failure acted honestly; or

(iii) that it is just and equitable that the order be made; and

(b) in the case of an order referred to in paragraph (4)(c)--that the person subject to the civil liability concerned acted honestly; and

(c) in every case--that no substantial injustice has been or is likely to be caused to any person.

[21] Senior Counsel's submission is that the "proceeding under this Act" which is relevant for the purposes of the operation of those sections, is the meeting which I had convened. I agree. He submits that the intention revealed by ss 1322(1) and (2) is that the proceeding not be invalidated unless the court is of the opinion that the irregularity is caused, or may cause, substantial injustice. He notes that deficiency of notice or time is specifically contemplated as the sort of "procedural irregularity" adverted to in s 1322(1). He then invites me not to form the opinion that the irregularity has caused, or may cause, substantial injustice. Although he concedes that 252 people may have been denied their opportunity to vote in respect of the meetings that I convened, in circumstances where 15,790 members voted in favour of the scheme, with 990 against; 252 further votes, however cast, would make no difference either way and the situation could not be regarded as giving rise to substantial injustice.

[22] I note that in any event, despite the fact that this hearing has been advertised, no one seeks to appear before me to contend that there has been a substantial injustice and no one has notified the solicitors for QTMB of any such intention.

[23] My attention has been drawn to the decision of Ryan J in *Scullion v Family Planning Association of Queensland* (1985) 10 ACLR 249 and the observations – quoted by his Honour with approval – by Holland J in *Ryan v South Sydney Junior Rugby League Club Limited* (1974) 3 ACLR 486 at 499 to the following effect:

> I do not think that an election of company directors should be equated fully to an election of candidates for parliamentary, local government or like office. In the former the focus must be on the private rights of a member of the company. In the latter the emphasis is upon the public interest. The object of the law and of rules governing the elections is the same in both cases, namely to ensure a proper election and the fulfilment of the wishes of the majority of those entitled to vote. The public has an interest in seeing that that object is achieved in relation to companies generally, but the members of a company by becoming members make their own contract with a company as to their rights in an election of directors and, prima facie, if the rights of a member are disregarded or infringed in such an election it can be said that he ought not to be bound to accept the results of that election. However I think that it would be going too far to say that a court would have no option but to declare an election void if there was any breach of a member's right under the articles even though on the evidence before the court it appeared that the majority of voters had not been prevented from electing the candidates of their choice or that there was no reasonable ground for believing that the majority might have been so prevented. To do so would be to give no weight to the interest of the members as a whole in having an election to settle a contest for control of the company brought to a conclusion with reasonable expedition so as to remove uncertainty and avoid the delay and expense involved in a succession of elections because of some breach of the articles. In my opinion it would not be a satisfactory solution of the problem to hold that a decision in favour of a new election is a matter for an exercise of discretion by the court. Rather I think that it is a case in which it is appropriate to allocate the onus of proof.

[24] That approach seems to me to be right.

[25] I note it is similar in approach to that taken by Byrne J in *Re Pembury Pty Ltd* [1993] 1 Qd R 125; (1991) 4 ACSR 759. In that respect it suffices to quote the three paragraphs of the headnote as follows:

> (i) Section 1322(2) of the Corporations Law provides, in general terms, that a proceeding under that Law will not be invalidated because of any procedural irregularity in the absence of substantial injustice that cannot otherwise be remedied. A meeting of members of a corporation and the proceedings conducted at such a meeting are a proceeding under the Corporations Law in the relevant sense. Further, a deficiency of notice or time and the absence of a quorum are procedural irregularities falling within the ambit of s 1322(2). Accordingly, the resolutions passed at the meeting of members of P held on 22 May 1991 were not invalid merely because of the two procedural irregularities.
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> (ii) Nothing in the language of s 1322 of the Corporations Law indicates that the defects and deficiencies which it identifies as procedural irregularities must arise from inadvertence. The evident purpose of the section requires a liberal construction and the section should not be restricted in its scope to instances of inadvertence or accidental non-compliance.
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> (iii) The resolutions will be invalidated by the court where the procedural irregularities cause (or may cause) a substantial injustice. This does not mean that the proceeding itself (in this case, the meeting and its resolutions) caused (or may cause) a substantial injustice: there must be a nexus between the procedural irregularity which has occurred and the matters of prejudice relied upon as constituting the injustice.

[26] It will be immediately obvious that if the approach there taken is correct, the authorities support the approach I have been invited to take by Senior Counsel for QTMB. Consistent with his duty, however, Senior Counsel drew my attention to some different observations made by Palmer J in *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* (2005) 194 FLR 322; (2005) 55 ACSR 185. His Honour's approach to s 1322 is revealed at [103] which provided:

> In the light of this observation and of the decisions in *Industrial Equity*, *ANZ Nominees*, *Scullion* and *Link Agricultural*, I think that the following general propositions may be formulated for the purposes of the application of CA s 1322:
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> - what is a "procedural irregularity" will be ascertained by first determining what is "the thing to be done" which the procedure is to regulate;
> - if there is an irregularity which changes the substance of "the thing to be done", the irregularity will be substantive;
> - if the irregularity merely departs from the prescribed manner in which the thing is to be done without changing the substance of the thing, the irregularity is procedural.

[27] His Honour then concluded that an irregularity which might have denied the opportunity of shareholders to vote on a resolution of the character of that with which he was dealing was to be regarded as substantive and not procedural.

[28] I express no view as to the correctness of the approach his Honour took in relation to the particular circumstances with which he dealt. However, I do note that s 1322 specifically adverts to a defect or deficiency of notice as being the type of thing that amounts to a procedural irregularity. It seems to me that the critical considerations are identifying the character of the proceeding which is the subject of consideration and then identifying the nature of the irregularity. I have already indicated that I think the character of the proceeding is the meeting that I convened and in those circumstances it seems to me that the deficiency in notice being given to some members is precisely the sort of thing that s 1322 contemplates as being a procedural irregularity.

[29] There being no reason to regard the irregularity as causing substantial injustice, it seems to me that s 1322(2) has the effect that the proceeding is not invalidated. I should record that Senior Counsel for QTMB indicated that if I took a contrary view he would apply under s

1322(4) which is conditioned by the matters referenced in 1322(6). I do not take a contrary view so that possible application does not need further to be considered.

[30] The result is that although I have condemned the decision which was made not to comply with the order without first approaching the Court, I nevertheless do not regard the failure as a reason to withhold my approval and I do not regard it as a reason to think that the meeting has been invalidated.

[31] I form the view that the scheme should be approved and I will order in terms of the draft provided to me, initialed by me and placed with the papers.