Federal Court of Australia

CW Group Holdings Limited, in the matter of CW Group Holdings Limited (No 2) [2025] FCA 43

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| File number: |  |
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| Judgment of: | **MOSHINSKY J** |
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| Date of judgment: | 3 February 2025 |
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| Catchwords: | **CORPORATIONS** – scheme of arrangement – second court hearing – application for approval of scheme – applicable principles – whether statutory and procedural requirements satisfied – whether the Court should exercise its discretion to approve the scheme – held: scheme approved  |
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| Legislation: | *Corporations Act 2001* (Cth), ss 411, 412*Federal Court (Corporations) Rules 2000* (Cth), r 3.5  |
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| Cases cited: | *Re Healthscope Ltd (No 2)* [2019] FCA 759; 136 ACSR 259*Re Medical Australia Ltd (No 2)* [2017] FCA 1429*Re NRMA Ltd (No 1)* [2000] NSWSC 82; 156 FLR 349*Re Permanent Trustee Co Ltd* [2002] NSWSC 1177; 43 ACSR 601*Re Seven Network Ltd (No 3)* [2010] FCA 400; 267 ALR 583*Re Signature Capital Investments Ltd (No 2)* [2016] FCA 385*Re Solution 6 Holdings Ltd* [2004] FCA 1049; 50 ACSR 113*Re Verdant Minerals Ltd (No 2)* [2019] FCA 841  |
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| Division: | General Division |
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| Registry: | Victoria |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Number of paragraphs: | 35 |
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| Date of hearing: | 3 February 2025  |
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| Counsel for the Plaintiff: | Mr PD Crutchfield KC with Mr BK Holmes |
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| Solicitor for the Plaintiff: | Herbert Smith Freehills |
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| Counsel for Sigma Healthcare Limited: | Mr SJ Maiden KC with Ms R Zambelli |
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| Solicitor for Sigma Healthcare Limited | Gilbert + Tobin |

ORDERS

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|  | VID 1240 of 2024 |
| IN THE MATTER OF CW GROUP HOLDINGS LIMITED (ACN 635 851 839) |
|  | CW GROUP HOLDINGS LIMIITED (ACN 635 851 839)Plaintiff |

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| order made by: | MOSHINSKY J |
| DATE OF ORDER: | 3 FEBRUARY 2025 |

THE COURT NOTES THAT:

There has been produced to the Court a statement in writing by the Australian Securities and Investments Commission (**ASIC**) in accordance with s 411(17)(b) of the *Corporations Act 2001* (Cth) (**Corporations Act**) that ASIC has no objection to the scheme of arrangement between the plaintiff (**CWG**) and its members which was agreed to by the members at a meeting held on 29 January 2025, the terms of which were set out in Annexure A to the orders of the Court made on 13 December 2024 (**Scheme**).

THE COURT ORDERS THAT:

1. Pursuant to s 411(4)(b) of the Corporations Act, the Scheme be and is hereby approved.
2. Pursuant to s 411(12) of the Corporations Act, CWG be exempted from compliance with s 411(11) of the Act in respect of the Scheme.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MOSHINSKY J:

## Introduction

1. This is the second court hearing in relation to a proposed scheme of arrangement (the **Scheme**) involving a merger of CW Group Holdings Limited (**CWG**) and Sigma Healthcare Limited (**Sigma**).
2. The first court hearing was held on 13 December 2024. On that occasion I made orders (the **December Orders**) substantially in the terms sought by CWG (namely, orders requiring CWG to convene and hold a meeting of its shareholders to vote on the Scheme (**Scheme Meeting**)) and published reasons for making those orders: *CW Group Holdings Limited, in the matter of CW Group Holdings Limited* [2024] FCA 1471 (the **December Reasons**). These reasons should be read together with those reasons. I will adopt the abbreviations used in the December Reasons.
3. The background to the Scheme is set out in the December Reasons. As set out in [5] of those reasons, if the Scheme is implemented:
4. Sigma will acquire 100% of the issued share capital of CWG from CWG shareholders as at the Scheme Record Date (as defined in the Scheme) (**Scheme Shareholders**);
5. in exchange for the transfer of their CWG shares, Scheme Shareholders will receive a combination of shares in Sigma and cash;
6. CWG will become a wholly-owned subsidiary of Sigma (which will remain listed on the ASX); and
7. the merged group will be owned as to approximately 85.75% by the Scheme Shareholders (i.e., the former CWG shareholders) and as to approximately 14.25% by existing Sigma shareholders on a fully diluted basis.
8. On 29 January 2025, the Scheme Meeting was held. The Scheme was agreed to by 100% of the shareholders present and voting and by 100% of the votes cast (in each case, in person or by proxy). Accordingly, the requisite statutory majorities have been satisfied.
9. CWG now seeks approval of the Scheme pursuant to s 411(4)(b) of the *Corporations Act 2001* (Cth).
10. In addition to the material before the Court for the first court hearing, the following material is before the Court:
11. two affidavits of Josef Gottlieb, the General Counsel and Company Secretary of CWG, dated 30 January 2025 and 1 February 2025;
12. a Conditions Precedent Certificate executed by CWG and Sigma, dated 3 February 2025; and
13. a letter from ASIC to the Directors of CWG dated 3 February 2025 stating, in summary, that ASIC has no objection to the Scheme.
14. For the reasons that follow, which draw substantially on CWG’s submissions, I consider it appropriate to make an order approving the Scheme.

## Applicable principles

1. I discussed the applicable principles in *Re Verdant Minerals Ltd (No 2)* [2019] FCA 841 at [6]-[7]. For ease of reference, I incorporate the substance of those paragraphs into these reasons in the following paragraphs.
2. In approving a scheme of arrangement, the role of the Court is supervisory, requiring the Court to be satisfied that there has been no oppression and that the compromise or arrangement is one that is capable of being accepted by shareholders looking to their own commercial advantage. In *Re NRMA Ltd (No 1)* [2000] NSWSC 82; 156 FLR 349 (***Re NRMA Ltd***) at [41], Santow J quoted with approval the following passage from Renard IA and Santamaria JG, *Takeovers and Reconstructions in Australia* (Butterworths, Sydney, 1990, loose-leaf), at 15,061:

… the court will determine: (1) whether all the conditions required by s 411 have been complied with; (2) whether the majority of members or creditors, though acting regularly, have acted in good faith and not in pursuit of some illegitimate purpose; and (3) whether the proposal was “at least so far fair and reasonable, as that an intelligent and honest man, who is a member of that class, and acting alone in respect of his interest as such member, might approve it”.\* Fundamentally, the jurisdiction is supervisory; the court is concerned to be satisfied that there has been an absence of oppression and that the compromise or arrangement is one which is capable of being accepted: see *Re Dorman Long & Co Ltd* [[1934] Ch 635]; *Scottish Insurance Corp Ltd v Wilsons and Clyde Coal Co Ltd* [1949] AC 462 at 486.

\* Per Fry LJ in *Re Alabama, New Orleans, Texas and Pacific Junction Railway Co* [1891] 1 Ch 213 at 247.

1. In deciding whether to give final approval to a scheme of arrangement, the Court will typically wish to be satisfied of the following matters:
2. that the orders of the Court convening a meeting of members were complied with;
3. that the meeting of members so convened has approved the scheme with the requisite majority;
4. that all the statutory requirements have been complied with;
5. that the majority of members have acted in good faith and not for any illegitimate purpose;
6. that there is no suggestion of oppression of any minority;
7. that the scheme is fair and reasonable so that an intelligent and honest person, who is a member and acting alone in respect of his or her interest as a member, might approve it;
8. that there was full and fair disclosure to members of all information material to the decision whether to vote for or against the scheme; and
9. that the plaintiff has brought to the attention of the Court all matters that could be considered relevant to the exercise of the Court’s discretion.

See *Re NRMA Ltd* at [41] per Santow J; *Re Seven Network Ltd (No 3)* [2010] FCA 400; 267 ALR 583 at [31]-[44] per Jacobson J; *Re Solution 6 Holdings Ltd* [2004] FCA 1049; 50 ACSR 113 at [18]-[21]; *Re Signature Capital Investments Ltd (No 2)* [2016] FCA 385 at [4]; *Re Medical Australia Ltd (No 2)* [2017] FCA 1429 at [4]-[5]; *Re Permanent Trustee Co Ltd* [2002] NSWSC 1177; 43 ACSR 601 at [8]-[10]; and *Re Healthscope Ltd (No 2)* [2019] FCA 759; 136 ACSR 259 at [6]-[7], [11]-[14].

## Statutory and procedural requirements

1. As required by r 3.5(b) of the *Federal Court (Corporations) Rules 2000* (Cth), an office copy of the December Orders was lodged with ASIC on 13 December 2024.
2. Paragraph 2 of the December Orders required CWG to send to its shareholders by 2 January 2025 an email containing a hyperlink to a website from which shareholders could view and download an electronic copy of the Scheme Booklet and lodge online an electronic voting form containing a proxy appointment and voting preference.
3. The December Orders required that the email and the Scheme Booklet be substantially in the form of drafts which were annexed to the affidavit of Josef Norman Gottlieb affirmed on 12 December 2024.
4. Each of these requirements has been satisfied: an email in the requisite form was sent to each CWG shareholder on 18 December 2024, and the version of the Scheme Booklet made available via that email was also in the requisite form. There were no instances of non-compliance with the December Orders in respect of the dispatch of the Scheme materials.
5. In addition, the effect of s 412(6) of the *Corporations Act* is that the Scheme Booklet was required to be registered by ASIC before CWG was permitted to send it to shareholders, and this requirement has also been satisfied.
6. Accordingly, all statutory and procedural requirements in respect of the dispatch of the Scheme materials have been complied with.
7. In accordance with paragraph 1 of the December Orders, the Scheme Meeting commenced at 6.00 pm (Melbourne time) and was held in person at Olympic Hotel, 31 Albert Street, Preston, Victoria, 3072, and virtually via an online platform.
8. In accordance with paragraph 4 of the December Orders, Mr Jack Gance was chairperson of the Scheme Meeting.
9. At the Scheme Meeting, the resolution to agree to the Scheme was agreed to by 100% of shareholders present and voting, and by 100% of the votes cast (in each case, in person or by proxy). It follows that the resolution was passed by the requisite statutory majorities. The requisite statutory majorities are: (i) a majority in number of the members present and voting (either in person or by proxy); and (ii) 75% of the votes cast on the resolution (either in person or by proxy): s 411(4)(a).
10. I note that voter turnout was high. The shares voted at the Scheme Meeting represented 99.16% of CWG’s total issued share capital eligible to vote, and the number of shareholders who voted was 88.1% of the total number of CWG’s shareholders eligible to vote.
11. Paragraph 7 of the December Orders required that, by no later than 27 January 2025, CWG publish an announcement on its website substantially in the form of Annexure B to the December Orders setting out the details for the second court hearing and the process for any person wishing to appear at that hearing to oppose the approval of the Scheme. This order has been complied with.
12. CWG has not received any notice from any person wishing to appear at the second court hearing to oppose the approval of the Scheme.
13. The Scheme is subject to a number of conditions precedent, such as the approval of CWG shareholders and the Court, as well as various Sigma shareholder approvals in relation to the Transaction.
14. Before approving a scheme, the Court will ordinarily require that all conditions precedent to the scheme (other than the Court’s approval of the scheme and the scheme coming into effect) have been satisfied or waived.
15. CWG has tendered a certificate to the effect that all conditions precedent (other than Court approval) have been satisfied. I am satisfied, on the basis of the certificate, that that is the case.

## Discretion to approve the Scheme

1. In exercising its discretion whether to approve a scheme, the Court will consider whether the scheme is fair and reasonable so that an intelligent and honest shareholder, properly informed and acting alone, might approve it.
2. CWG submits, and I accept, that the Court can be satisfied of these matters in the present case, for the following reasons:
3. the overwhelming support of the CWG shareholders reflected in the voting results of the Scheme Meeting. CWG submits, and I accept, that proof of the relevant statutory majorities establishes that *prima facie* the Scheme is fair. Courts have consistently held that the shareholders’ vote in favour of a scheme is evidence of its inherent fairness, and that shareholders are the best judges of their own commercial interests, such that the Court should be reluctant to make decisions contrary to the views of shareholders expressed at meetings;
4. the recommendation from all CWG directors that CWG shareholders vote in favour of the Scheme, for the reasons given in the Scheme Booklet, and the fact that each CWG director stated their intention to vote the CWG shares owned or controlled by them in favour of the Scheme;
5. the opinion of the independent expert that the Scheme is fair and reasonable and therefore is in the best interests of CWG shareholders, in the absence of a superior proposal;
6. the disclosures in the Scheme Booklet setting out a detailed description of the Scheme, including its potential benefits and disadvantages;
7. there is no application to oppose the orders approving the Scheme, and no evidence suggesting any oppression in the conduct of the Scheme Meeting; and
8. the Scheme contains measures to protect shareholders against performance risk.
9. In light of these matters, I am satisfied that the Court ought to exercise its discretion in favour of approving the Scheme.

## Section 411(17)

1. The Court’s power to approve a members’ scheme is restricted by s 411(17). At the approval stage, the Court must be satisfied there is no proscribed purpose as described in s 411(17)(a), or there must be provided to the Court a statement in writing by ASIC that it has no objection to the arrangement (see s 411(17)(b)).
2. A ‘no objection’ letter has been provided by ASIC. The letter satisfies the requirements of s 411(17)(b), and consequently the bar under s 411(17) to approval of the Scheme has been removed.
3. In any event, I am satisfied that there is no proscribed purpose as described in s 411(17)(a), and it is otherwise well established that the Court should not refuse approval of a scheme of arrangement merely because it could have been effected under Chapter 6 of the Act.

## Exemption from s 411(11)

1. Section 411(11) requires, subject to s 411(12), that a copy of the Court’s order approving a scheme of arrangement be annexed to every copy of the company’s constitution issued after the order is made. Section 411(12) allows the Court to exempt a body from compliance with this provision or to determine the period during which it shall comply.
2. It is submitted, and I accept, that exemption from compliance with s 411(11) is appropriate in the present circumstances.

## Conclusion

1. For the above reasons, I consider that CWG has satisfied all applicable statutory and procedural requirements for approval of the Scheme, and that it is appropriate that the Court exercise its discretion in favour of approving the Scheme.
2. I will therefore make orders substantially in the terms sought by CWG.

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| I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Moshinsky. |

Associate:

Dated: 4 February 2025