FEDERAL COURT OF AUSTRALIA

Trust Company (Nominees) Limited, in the matter of Angas Securities Limited v Angas Securities Limited (No 6) [2019] FCA 699

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| File number(s): | NSD 469 of 2015 |
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| Judge(s): | **BEACH J** |
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| Date of judgment: | 17 May 2019 |
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| Catchwords: | **CORPORATIONS** – creditors’ scheme of arrangement – second court hearing – debenture holders – further extension to run off phase not warranted – releases of third parties as part of scheme – conditions precedent to scheme – duties of trustee for debenture holders – adequacy of explanatory statement – advice to trustee – advice given – order made approving scheme under s 411(4)(b) of *Corporations Act* |
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| Legislation: | *Corporations Act 2001* (Cth) s 411(4)(b)  *Securities Act of 1933* (US) s 3(a)(10) |
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| Cases cited: | *Fowler v Lindholm* *& Ors* (2009) 178 FCR 563  *In re Alabama, New Orleans, Texas and Pacific Junction Railway Company* [1891] 1 Ch 213  *Re Boart Longyear Ltd (No 2)* (2017) 323 FLR 241  *Re Matine Ltd & Ors* (1998) 28 ACSR 268  *Trust Company (Nominees) Limited, in the matter of Angas Securities Limited v Angas Securities Limited (No 5)* [2019] FCA 482 |
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| Date of hearing: | 17 May 2019 |
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| Registry: | Victoria |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Category: | Catchwords |
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| Number of paragraphs: | 32 |
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| Counsel for the Plaintiff: | Mr R M Foreman |
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| Solicitor for the Plaintiff: | King & Wood Mallesons |
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| Counsel for the Defendant: | Mr J A Redwood |
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| Solicitor for the Defendant: | Johnson Winter & Slattery |

ORDERS

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|  | | NSD 469 of 2015 |
| IN THE MATTER OF ANGAS SECURITIES LIMITED (ACN 000 154 441) | | |
| BETWEEN: | THE TRUST COMPANY (NOMINEES) LIMITED  Plaintiff | |
| AND: | ANGAS SECURITIES LIMITED  Defendant | |

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| JUDGE: | BEACH J |
| DATE OF ORDER: | 17 May 2019 |

THE COURT ORDERS THAT:

1. Pursuant to s 411(4)(b) of the *Corporations Act 2001* (Cth) (**Corporations Act**), the scheme of arrangement (**Scheme**) between the Defendant and its Debenture Holders in the form of Annexure A to the Orders made in this proceeding on 5 April 2019 be approved.
2. Pursuant to s 411(12) of the Corporations Act, the Defendant be exempted from compliance with s 411(11) of the Corporations Act in respect of the Scheme.
3. Pursuant to s 283HA of the Corporations Act and s 63 of the *Trustee Act 1925* (NSW), the Plaintiff is directed that it is justified in proceeding on the basis of:
   1. consenting to the making of the above orders;
   2. executing the Deed of Release and General Security Deed (as defined in the Scheme) to facilitate the Scheme;
   3. seeking orders for the dismissal of this proceeding with no order as to costs,

and that to so proceed accords with the Plaintiff’s duties under the Trust Deed, the Corporations Act and at law.

1. This proceeding and proceeding NSD 1333/2014 be dismissed with no order as to costs, but without affecting the Plaintiff’s rights set out in the Deed of Settlement, the Deed of Release and the General Security Deed (as defined in the Scheme).
2. Orders 7, 8 and 9 of the Orders made in this proceeding on 9 June 2015 establishing the Loans Realisation Committee and regulating its operation be vacated.

THE COURT NOTES THAT:

1. Nothing in these orders affects the Plaintiff’s rights set out in the Deed of Settlement, the Deed of Release and the General Security Deed.

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

REASONS FOR JUDGMENT

BEACH J:

1. On 15 February 2019 Angas Securities Limited (Angas) applied for orders:
   1. pursuant to s 411(1) of the *Corporations Act 2001* (Cth) (the Act) convening a meeting of the holders of debentures issued by Angas to consider a proposed scheme of arrangement;
   2. approving the issue of the explanatory statement required by s 412(1)(a) of the Act to accompany the notice convening the scheme meeting (scheme booklet);
   3. subject to the outcome of the scheme meeting:
      1. approving the proposed scheme of arrangement pursuant to s 411(4)(b) of the Act; and
      2. terminating the existing run-off orders made by me on 9 June 2015 (as amended from time to time), pursuant to s 283HB of the Act.
2. On 5 April 2019 I made orders to the effect of paragraphs 1(a) and (b). The principal terms of the scheme proposed by Angas, and the relevant background facts which led Angas to propose the scheme, are summarised in my earlier reasons (*Trust Company (Nominees) Limited, in the matter of Angas Securities Limited v Angas Securities Limited (No 5)* [2019] FCA 482 at [2] to [11]).
3. Since the first Court hearing the following has transpired.
4. First, the scheme booklet was despatched to Angas’ debenture holders in accordance with my orders made on 5 April 2019.
5. Second, the scheme meeting was held on 30 April 2019. The voter turnout at the meeting was high; 49.02% of debenture holders entitled to vote on the scheme resolution voted in person or by proxy at the scheme meeting, and 86.39% by value and 79.73% by number of debenture holders present and voting in person or by proxy voted in favour of the scheme resolution. The Chairman of the meeting, the Honourable Bruce Debelle AO QC, has provided me with a copy of a report of the returning officer confirming such matters in addition to details concerning the proxies received.
6. Third, the conditions precedent to the scheme, listed in section 8.3 of the scheme booklet, have now been satisfied save for Court approval. There has now been formal registration of the Angas Asset Management Fund (AAMF) by ASIC and execution of the General Security Deed by the plaintiff (the Trustee).
7. Fourth, as to the variation of Angas’ AFSL to allow it to be the Responsible Entity of the AAMF, ASIC has approved the amendment of Angas’ AFSL. Further, Angas has executed the Deed Poll (Settlement of Legacy Assets) and the Deed Poll (Enforcement of Rights by Trustee) in its capacity as Responsible Entity of the AAMF. As to the General Security Deed, both Angas and the Trustee have now executed it.
8. Let me say something about my power to approve schemes of arrangement under s 411(4)(b) of the Act. In essence, my role at the second Court hearing is to assess the scheme, taking into account the “totality of the give and take that is the compromise or arrangement” and to determine on that basis whether the scheme is fair and reasonable (*Re Boart Longyear Ltd (No 2)* (2017) 323 FLR 241 at [56] per Black J). Of course, the Court can only approve a scheme of arrangement if the requisite majority of creditors vote in favour of the scheme, but I am not bound to approve the scheme simply because I previously made orders for the convening of a scheme meeting and subsequently the requisite majority of creditors agreed to it. But I accept that creditors voting collectively at their scheme meeting are better judges of what is to their commercial advantage and in their interests than the Court and accordingly, absent good reason, I should give effect to their intentions.
9. Now whilst there is no exhaustive statement of the matters as to which I must be satisfied before granting approval, it is not in doubt that in exercising my discretion under s 411(4)(b) of the Act, I should be satisfied that:
   1. the scheme complies with the law, including the relevant procedural requirements;
   2. the scheme was approved by creditors acting in good faith and for proper purposes;
   3. the scheme is sufficiently fair and reasonable that an intelligent and honest creditor, properly informed, acting alone, might approve it;
   4. there has been an accurate and comprehensive disclosure of the details of the scheme and its effect to those voting on it;
   5. there is no suggestion of oppression of any minority;
   6. there is no evidence that any third parties will be adversely affected by the operation of the scheme;
   7. the scheme does not offend against any aspect of public policy; and
   8. all matters that could be considered relevant to the exercise of my discretion have been brought to my attention.
10. I also need to be satisfied that the conditions precedent to the scheme have been met, and that ASIC has been given the opportunity to draw my attention to any relevant matter(s). I would say now that I am so satisfied concerning the conditions precedent. Moreover, ASIC has had adequate opportunity to draw any necessary matters to my attention. It has no objections and has provided a letter dated 15 May 2019 to the directors of Angas to that effect. Further, I am satisfied that there is no relevant Chapter 6 question to which s 411(17)(a) is directed.
11. Moreover, in considering whether the scheme complies with the law, including the relevant procedural requirements, I need to satisfy myself that the procedural and other requirements in the Act, *Corporations Regulations 2001* (Cth) and *Federal Court (Corporations) Rules 2000* (Cth) have been complied with, that there is no relevant class question, that the requirements for a valid resolution of the creditors have been satisfied and that the creditors voted in good faith and not for an improper purpose. I am so satisfied.
12. In particular, I am satisfied that the scheme materials have been properly despatched in accordance with my orders at the first hearing, the resolution agreeing to the scheme has been passed by the statutory majorities required by s 411(4)(a)(i), and ASIC as I say has been given an opportunity to consider the scheme proposal pursuant to s 411(17).
13. Now my task is to consider whether the scheme is fair and reasonable and the test of fairness and reasonableness is whether “an intelligent and honest creditor, properly informed, acting alone, might approve [the scheme]” (*Fowler v Lindholm* *& Ors* (2009) 178 FCR 563 at [79] per Emmett, Gordon and Jagot JJ).
14. Further, I have to be satisfied that “the minority is not being overridden by a majority having interests of its own clashing with those of the minority whom they seek to coerce.” (*In re Alabama, New Orleans, Texas and Pacific Junction Railway Company* [1891] 1 Ch 213 at 239 per Lindley LJ, applied in *Re Boart Longyear Ltd (No 2)* (2017) 323 FLR 241 at [57] per Black J).
15. More generally, the creditors’ vote in favour of the scheme is evidence of its inherent fairness. Put another way, if a majority of creditors have approved the scheme, it is unlikely that the scheme would be unreasonable. Further, I do not have to be satisfied that no better scheme could have been devised.
16. Further, it is also appropriate to look more broadly and to consider the indirect consequences of approving the scheme, the effects of the scheme on any third parties that have a legitimate interest in the deployment of Angas’ assets, and matters of public policy.
17. In my view the scheme should be approved in summary for the following reasons.
18. First, the relevant procedural requirements have been complied with. In particular:
    1. the scheme booklet was properly despatched in accordance with my orders at the first hearing;
    2. the resolution agreeing to the scheme has been passed by the statutory majorities required by s 411(4)(a)(i);
    3. ASIC has been given an opportunity to consider the scheme proposal pursuant to s 411(17);
    4. the conditions precedent to the scheme’s implementation have been satisfied; and
    5. Angas published a notice of the second Court hearing in accordance with Form 6 and *Federal Court (Corporations) Rules 2000* (Cth), rr 3.4(2) and (3) at least 5 days before the date fixed for the hearing of the application to approve the scheme.
19. Second, as I have said earlier the debenture holders voted overwhelmingly in favour of the scheme at the scheme meeting held on 30 April 2019; 86.39% by value and 79.73% by number of debenture holders present and voting in person or by proxy voted in favour of the scheme resolution.
20. Further, voter turnout at the scheme meeting was high (at 49%), particularly given that the scheme meeting was the fourth time that the debenture holders of Angas have been called together to vote on a proposal relating to their debenture debt since August 2015. The authorities relating to approval of a scheme where there has been low voter turnout at the scheme meeting are not relevant to this matter. But in any event, the comments of Santow J in *Re Matine Ltd & Ors* (1998) 28 ACSR 268 at 295 that “[t]he apathetic shareholder who chooses not to vote upon a scheme should not be presumed to be antagonistic to the scheme or to warrant paternalistic protection” are apposite.
21. Further, there is no suggestion of any bad faith motivation or improper purpose in the scheme being proposed. The scheme was proposed for the purpose of addressing the approaching end of the run-off in circumstances where Angas had been frank with its debenture holders that the full amount of the debenture debt would not be repaid. The scheme well appears to be a better option for the debenture holders than an external administration of Angas.
22. Third, the outcome of the scheme meeting is prima facie evidence that the scheme is fair and reasonable, and I am satisfied, based on its outcome, that an intelligent and honest creditor, properly informed and acting alone, would approve of the scheme. Further, the fairness and reasonableness of the scheme is supported by the evidence of the independent expert, Mr Jeff Hall of Summer Hall Associates. Mr Hall’s evidence is that the debenture holders are likely to be financially better off under the scheme than compared to an external administration of Angas, as noted in my earlier reasons ([38] to [51]).
23. Fourth, all matters of potential relevance to the approval of the scheme would seem to have been disclosed to me and, through the scheme booklet, to the debenture holders. Moreover, Angas included additional disclosure in the scheme booklet of matters that were raised by me at the first Court hearing. Further, the majority of the Trustee’s comments on the scheme booklet were also incorporated in the final scheme booklet approved by me and issued to debenture holders. Further, ASIC has not raised any concerns in relation to the terms of the scheme booklet with Angas or myself.
24. Fifth, Angas has received no notice that any debenture holder intends to oppose the exercise of my discretion to approve the scheme.
25. Sixth, no minority interests are adversely impacted by the scheme as the scheme:
    1. compromises only the debenture debt due to the debenture holders in consideration for their receipt of the scheme consideration;
    2. releases claims that the debenture holders may have against Angas, its current and former directors and the Trustee in consideration for receipt of the scheme consideration; and
    3. does not compromise or alter the terms of any future debt owed by Angas to any other third party.
26. Further, it would seem that third parties will be better off by Angas implementing the scheme. The position of future creditors of Angas will be improved through implementation of the scheme given that the $94 million debenture debt owed by Angas to its debenture holders will be replaced with equity interests in the AAMF and in Angas itself. Accordingly, Angas’ balance sheet will be significantly improved by implementation of the scheme by the transposition of debt to equity.
27. Seventh, the releases of claims by debenture holders against Angas, its current and former directors and the Trustee, and the mutual releases of claims between Angas and the Trustee, are fair and reasonable, principally for the five reasons set out in my earlier reasons (at [66] to [70]).
28. Eighth, there is no public policy question justifying my not approving the scheme.
29. Finally I should mention two other matters.
30. First, where no useful purpose would be served by compliance with s 411(11), it is usual to exempt the scheme company from annexing the scheme to every copy of the company’s constitution. I will give the necessary exemption in the present matter.
31. Second, Angas intends to rely on the exemption from compliance with the *Securities Act of 1933* (US) pursuant to s 3(a)(10) of that Act. This was disclosed in the scheme booklet and was disclosed to me in advance of the first Court hearing. It seems to me that the necessary pre-conditions for that exemption are well satisfied.
32. I will make the orders sought by Angas.

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| I certify that the preceding thirty-two (32) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Beach. |

Associate:

Dated: 17 May 2019