Federal Court of Australia

Alloggio Group Ltd, in the matter of Alloggio Group Ltd (No 2) [2023] FCA 1053

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| File number: | NSD 650 of 2023 |
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| Judgment of: | **KENNETT J** |
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| Date of judgment: | 28 August 2023 |
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| Date of publication of reasons: | 6 September 2023 |
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| Catchwords: | **CORPORATIONS** – members’ scheme of arrangement – second court hearing – application pursuant to s 411(4)(b) of the *Corporations Act 2001* (Cth) (the Act) for approval of scheme – consideration of evidence necessary for court to exercise discretion – exemption from compliance with s 411(11) of the Act – application granted |
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| Legislation: | *Corporations Act 2001* (Cth) s 411 |
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| Cases cited: | *Alloggio Group Ltd, in the matter of Alloggio Group Ltd* [2023] FCA 799  *CSR Limited, in the matter of CSR Limited* [2010] FCAFC 34; 183 FCR 358  *Dragontail Systems Limited, in the matter of Dragontail Systems Limited (No 2)* [2021] FCA 1109  *EcoBiotics Limited, in the matter of EcoBiotics Limited (No 2)* [2017] FCA 1031  *Fowler v Lindholm, in the matter of Opes Prime Stockbroking Limited* [2009] FCAFC 125; 178 FCR 563  *FT Eastment & Sons Pty Ltd v Metal Roof Decking Supplies Pty Ltd* (1977) 3 ACLR 69  *In the matter of BINGO Industries Limited* [2021] NSWSC 911  *In the matter of Foundation Healthcare Limited (No 2)* [2002] FCA 973; 43 ACSR 680  *Lion Nathan Limited, in the matter of Lion Nathan Limited (No. 2)* [2009] FCA 1261  *NRMA Limited (Application of); NRMA Insurance Limited (Application of)* [2000] NSWSC 408; 34 ACSR 261  *Permanent Trustee Company* [2002] NSWSC 1177; 43 ACSR 601  *Re Matine Ltd* (1998) 28 ACSR 268  *Re Professional Investment Holdings Ltd (No 2)* [2010] FCA 1336  *Re Ranger Minerals Ltd; Ex parte Ranger Minerals Ltd* [2002] WASC 207; 42 ACSR 582  *Re Seven Network Ltd (No 3)* (2010) 267 ALR 583  *Re Toll Holdings Limited (No 2)* [2015] VSC 236  *Seven Network Limited, in the matter of Seven Network Limited (No 3)* [2010] FCA 400; 77 ASCR 701  *TriAusMin Limited, in the matter of TriAusMin Limited (No 2)* [2014] FCA 833  *Vita Group Ltd, in the matter of Vita Group Ltd* (No 2) [2023] FCA 623 |
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| Division: |  |
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| Registry: | New South Wales |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: |  |
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| Number of paragraphs: | 21 |
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| Date of hearing: | 28 August 2023 |
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| Counsel for the Plaintiff: | Mr M Oakes SC with Ms S Scott |
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| Solicitor for the Plaintiff: | Travis Partners |
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| Counsel for the Interested Parties: | Ms B Ng |
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| Solicitor for the Interested Parties: | Talbot Sayer Lawyers |
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ORDERS

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|  | | NSD 650 of 2023 |
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| IN THE MATTER OF ALLOGGIO GROUP LIMITED ACN 645 582 225 | | |
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|  | ALLOGIO GROUP LIMITED ACN 645 582 225  Plaintiff | |

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| order made by: | Kennett J |
| DATE OF ORDER: | 28 August 2023 |

THE COURT ORDERS THAT:

1. Pursuant to s 411(4)(b) of the *Corporations Act 2001* (Cth) (**the Act**), the scheme of arrangement between Alloggio Group Limited ACN 645 582 225 (**Alloggio**) and:
   1. Davkat (Australia) Pty Ltd as trustee for Bandon Trust (being an entity controlled by William Creedon) and Bubbles 1 Pty Ltd as trustee for Karen Howard Family Trust (being an entity controlled by Karen Howard) (**Founding Shareholders**); and
   2. holders of fully paid ordinary shares in Alloggio who are not Founding Shareholders, (**Scheme Shareholders**),

the terms of which are contained at pages 256 to 276 of the Scheme Booklet which is Exhibit 1 in this proceeding, be approved.

1. Pursuant to section 411(12) of the Act, Alloggio be exempted from compliance with section 411(11) of the Act.
2. These orders be entered forthwith.

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

REASONS FOR JUDGMENT

KENNETT J

# INTRODUCTION

1. On 7 July 2023, following the first court hearing in this matter, I made orders under ss 411(1) and 1319 of the *Corporations Act 2001* (Cth) (**the Act**) that the plaintiff, Alloggio Group Limited (ACN 645 582 225) (**Alloggio**) convene meetings of its Founder Shareholders (**Founding Shareholders Scheme Meeting**) and of its other ordinary shareholders (**General Scheme Meeting**) (together **Scheme Meetings**) for the purpose of considering, and if thought fit, agreeing to a proposed scheme of arrangement to be made between Alloggio and its shareholders (**Scheme**) and approving a scheme booklet to be distributed by Alloggio to its shareholders (**Scheme Booklet**): see *Alloggio Group Ltd, in the matter of Alloggio Group Ltd* [2023] FCA 799.
2. On 28 August 2023, I made orders under s 411(4)(b) of the Act approving the Scheme, which will result in the acquisition of all the shares in Alloggio by Next Capital Pty Ltd (ACN 111 963 583) (**Next**) or its nominee, and exempting Alloggio from compliance with s 411(11).
3. These are my reasons for making those orders.

# BACKGROUND

1. The Scheme Meetings were held on 15 August 2023. The statutory majorities required by s 411(4)(a)(ii) of the Act were attained at the meeting, as follows:
2. Founding Shareholders Scheme Meeting: 100 percent of both members and shares present voting in favour; and
3. General Scheme meeting:
   1. 97.35 percent of members present voting in favour; and
   2. 99.92 percent of shares present voting in favour.
4. The application by Alloggio for the approval of the Scheme was uncontested.
5. Alloggio relied at the second court hearing on a further affidavit of Michael Anthony Potts, the Chief Financial Officer and Company Secretary of Alloggio. Mr Potts deposes to:
6. registration of the Scheme Booklet with the Australian Securities and Investments Commission (**ASIC**);
7. dispatch of the Scheme Booklet and other materials (by email and pre-paid post) in accordance with the orders made on the last occasion, by Alloggio’s share registry;
8. publication on 16 August 2023, on the Australian Stock Exchange, of an announcement giving notice of the second court hearing; and
9. holding of the Scheme Meetings and approval of the resolution as noted above.
10. Alloggio also tendered the following documents at the second court hearing:
11. a letter from ASIC to Alloggio’s directors advising, under s 411(17)(b) of the Act, that ASIC has no objection to the Scheme; and
12. a certificate, executed in the form of a deed by appropriate officers of Alloggio and the nominee of Next, certifying that the conditions precedent to the Scheme coming into effect (other than approval by the Court) have been satisfied or waived.

# LEGAL PRINCIPLES

1. A useful summary of the principles relevant to the exercise of the discretion to grant approval to a scheme after it has received the consideration and approval of a meeting of the members or creditors under s 411(4)(b) of the Act was set out by Halley J in *Dragontail Systems Limited, in the matter of Dragontail Systems Limited (No 2)* [2021] FCA 1109 at [8]–[11].

Insofar as discretionary considerations are concerned, the general principles which guide the Court’s discretion are well established and are helpfully summarised by Gleeson J in *EcoBiotics Limited, in the matter of EcoBiotics Limited (No 2)* [2017] FCA 1031 at [26]-[28], which I respectfully adopt.

The Court has a discretion whether to approve a scheme and is not bound to approve it merely because it has previously made orders for the convening of meetings or because the statutory majorities have been achieved: *Seven Network Limited, in the matter of Seven Network Limited (No 3)* (2010) 77 ASCR 701; [2010] FCA 400 (***Re Seven Network***) at [31] (JacobsonJ), citing *NRMA Limited (Application of); NRMA Insurance Limited (Application of)* (2000) 34 ACSR 261; [2000] NSWSC 408 (***Re NRMA***) at [22] (Santow J).

The Court will usually approach the task on the basis that the members are better judges of what is in their commercial interests than the Court: *Re Seven Network* at [32]-[33].

At [35] to [40] of *Re Seven Network*, Jacobson J set out the following six matters which courts have taken into account as informing their discretion regarding whether or not to approve a scheme:

(1) whether the shareholders have voted in good faith and not for an improper purpose: *In the matter of Foundation Healthcare Limited (No 2)* (2002) 43 ACSR 680; [2002] FCA 973 at [27] (French J, as his Honour then was);

(2) whether the proposal is fair and reasonable so that an intelligent and honest person who was a member of the relevant class, properly informed and acting alone, might approve it: *Fowler v Lindholm, in the matter of Opes Prime Stockbroking Limited* (2009) 178 FCR 563; [2009] FCAFC 125 at [79] (Emmett, Gordon and Jagot JJ);

(3) whether 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: *Permanent Trustee Company* (2002) 43 ACSR 601; [2002] NSWSC 1177 at [7] (Barrett J);

(4) whether there has been full and fair disclosure of all information material to the decision: *Re NRMA* at [30];

(5) whether minority shareholders would be oppressed by the scheme: *Re Ranger Minerals Ltd; Ex parte Ranger Minerals Ltd* (2002) 42 ACSR 582; [2002] WASC 207 at [39] (Parker J); and

(6) whether the scheme offends public policy: see for example *CSR Limited, in the matter of CSR Limited* (2010) 183 FCR 358; [2010] FCAFC 34 at [51]-[56] (Keane CJ and Jacobson J).

# CONSIDERATION

## Satisfaction of standard requirements

1. I am satisfied that the evidence relied upon by Alloggio establishes all of the procedural matters that are necessary to permit me to approve the Scheme.
2. The resolution seeking approval of the Scheme was passed by the requisite statutory majorities of 75% by votes cast and 50% by members voting at duly convened meetings of Alloggio’s shareholders.
3. Each of the conditions precedent to the Scheme had been satisfied or waived, other than final Court approval and lodgement of the order approving the Scheme with ASIC.
4. In the light of the letter from ASIC referred to above, s 411(17) is not a barrier to approval of the Scheme.

## Discretionary considerations

1. As to fairness, the Independent Expert report referred to in my earlier judgment concluded that the Scheme is fair and reasonable. I am satisfied that there is no evidence to the contrary and nothing to suggest that that opinion should not be accepted. The reasonableness of the Scheme was established, at least on a prima facie basis, at the first court hearing pursuant to the principle in *FT Eastment & Sons Pty Ltd v Metal Roof Decking Supplies Pty Ltd* (1977) 3 ACLR 69 at 72 (Street CJ, with whom Hutley and Samuels JJA agreed), subject to any new matters being brought to the Court’s attention at the Second Court Hearing.
2. There is nothing before me to suggest that the relevant Alloggio shareholders voted other than in good faith, that they cast their votes for an improper purpose or that any member had been treated in a way that may be characterised as oppressive. Nor is there anything that casts doubt on the procedural integrity of the processes followed for the Scheme Meetings.
3. Further, I note that no notice has been received of any opposition to the Scheme, no shareholders appeared to oppose the Scheme being approved at the Second Court Hearing and ASIC has provided a statement pursuant to s 411(17)(b) of the Act stating that it has no objections to the Scheme.
4. I am satisfied that fairness can be inferred in all the circumstances including the obtaining of the statutory majorities in the Scheme Meeting in a context where I was satisfied that there was adequate disclosure and those who voted did so as the best judges of their own interests.
5. Since the decision of Emmett J in *Lion Nathan Limited, in the matter of Lion Nathan Limited (No. 2)* [2009] FCA 1261 (***Lion Nathan***), a practice has grown up pursuant to which the Court requested and had regard to evidence of voter turnout for the purpose of assessing the integrity of the process. As Farrell J observed *TriAusMin Limited, in the matter of TriAusMin Limited (No 2)* [2014] FCA 833 (***TriAusMin***) at [10]:

Although the statutory requirement under s 411(4)(a)(ii) has been satisfied, it is the usual practice of the Court at the second court hearing to consider the number of shareholders who attended the Scheme Meeting in person or by proxy. Low shareholder turnout may be an indication that some procedural irregularity occurred. It is inappropriate to assume (in the absence of complaint) that shareholders who did not vote either did not have notice of the meeting or were silent in protest of the scheme: *Re Professional Investment Holdings Ltd (No 2)* [2010] FCA 1336 at [7] and *Re Seven Network Ltd (No 3)* (2010) 267 ALR 583 … at [61] per Jacobson J; apathy should not be presumed to be antagonism: *Re Matine Ltd* (1998) 28 ACSR 268 at 295 per Santow J.

1. Evidence of this kind was criticised as irrelevant and unnecessary by Jackman J in *Vita Group Ltd, in the matter of Vita Group Ltd* (No 2) [2023] FCA 623 (***Vita Group (No 2)***) at [6]. In my view, such evidence is unlikely to be necessary, but it does not follow that it is wholly irrelevant to the exercise of a judicial discretion. A very low turnout of members might lead the Court to seek confirmation that the Scheme Booklet and notice of the meeting had been successfully distributed to members in accordance with the Court’s orders, and that all who wished to vote in person or by proxy were able to do so. On the other hand, evidence that a substantial percentage of members voted may serve to indicate that there is no reason for such concern.
2. In *Vita Group (No 2)* his Honour also expressed firm views that evidence of the distribution of materials to shareholders and the conduct of meetings was unnecessary (at [4], [8]). A streamlined approach that reduces the costs incurred by parties and avoids weighing down the Court with unnecessary material naturally has a great deal to commend it. Cases may arise, however, where the judge hesitates to infer that relevant steps have been taken in the absence of evidence to that effect.
3. I hasten to add that the present case was not one that warranted any such hesitation. Evidence of the distribution of material and registration of the Scheme Booklet was given (albeit on information and belief) by Mr Potts, who also confirmed that the Scheme Meetings had occurred (he having attended them). His affidavit annexed the voting results, set out on a single page for each meeting, showing the resolution that was put and the votes cast (and the number of members voting) for and against. This material showed that 159 members voted in the General Scheme Meeting and that around 149 million votes were cast at the two Scheme Meetings. Allogio has 200,730,021 ordinary shares on issue. That level of engagement serves to confirm that there is no basis for any doubt as to the integrity of the process. I do not consider it necessary to be able to compare the level of attendance with, for example, Alloggio’s annual general meetings. Further, while a handful of members voted against the Scheme, none has sought to be heard against its approval.
4. In these circumstances, in my view, it was appropriate for Alloggio to rely on a single affidavit from an appropriate officer (together with the documents that were tendered) rather than presenting multiple affidavits from persons directly engaged in the particular processes. This approach relieves me of the need to express a view about the merits of any more complete reliance on the obligations of legal practitioners appearing on an *ex parte* application.

## Section 411(11) exemption

1. Section 411(11) of the Act provides that copies of all orders made by the Court for approving a scheme pursuant to s 411(4)(b) of the Act must be annexed to every copy of the company’s constitution issued after the approval of the scheme. Section 411(12) of the Act provides that the Court may exempt a company from complying with s 411(11) of the Act.
2. I am satisfied that it is appropriate to make an order pursuant to s 411(12) of the Act exempting Alloggio from compliance with s 411(11) of the Act, in circumstances where the Scheme will not amend its constitution and it will become a wholly owned subsidiary of the acquirer upon implementation of the Scheme: *Re Toll Holdings Limited (No 2)* [2015] VSC 236 at [18]–[19] (Robson J); *In the matter of BINGO Industries Limited* [2021] NSWSC 911 at [13] (Black J).

# DISPOSITION

1. In all the circumstances I was satisfied that it was appropriate for orders to be made approving the Scheme and exempting Alloggio from compliance with s 411(11) of the Act.

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| I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Kennett. |

Associate:

Dated: 6 September 2023