

SUPREME COURT OF QUEENSLAND

CITATION: *Re GARDA Capital; Re GARDA Funds Management* [2019] QSC 279

PARTIES: **BS 10478/19**

GARDA CAPITAL LIMITED ACN 095 039 366
(applicant)

BS 10479/19

GARDA FUNDS MANAGEMENT LIMITED ACN 140 857 405
(applicant)

FILE NO/S: BS No 10478 of 2019
BS No 10479 of 2019

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 19 November 2019

DELIVERED AT: Rockhampton

HEARING DATE: 19 November 2019

JUDGE: Crow J

ORDER: **BS 10478/19**

1. Pursuant to section 411(4)(b) of the *Corporations Act 2001* (Cth) (*Corporations Act*), the scheme of arrangement in this proceeding (Scheme), in the form contained in Annexure E of the Scheme Booklet which is exhibit "ICW-15" to the affidavit of Mr Isaac Clifford West affirmed on 10 October 2019, is approved.

2. Pursuant to section 411(12) of the *Corporations Act*, the Applicant is exempt from complying with section 411(11) of the *Corporations Act* in relation to the Scheme.

BS 10479/19

1. For the purposes of section 96 of the *Trusts Act 1973* (Qld), the Applicant is justified in:

(a) implementing the transfer of all the ordinary units in GARDA Capital Trust ARSN 150 164 720 (GCT) to

GARDA Capital Limited ACN 095 039 366 (GCL) as responsible entity for GARDA Diversified Property Fund ARSN 104 391 273 (GDF) (Trust Scheme);

(b) implementing the amendments to the constitution of GCT to give effect to the Trust Scheme (GCT Constitution Amendments);

(c) implementing the unstapling of the ordinary units in GCT from the ordinary shares in GCL;

(d) giving effect to the provisions of the constitution of GCT (as amended by the GCT Constitution Amendments); and

(e) doing all things necessary and taking all steps to put the Trust Scheme into effect.

CATCHWORDS: CORPORATIONS – ARRANGEMENTS AND RECONSTRUCTIONS – SCHEMES OF ARRANGEMENT OR COMPROMISE – APPROVAL OF SCHEME BY COURT – EXERCISE OF COURT’S DISCRETION – GENERALLY - where applicant seeks an order pursuant to section 411(4)(b) of the *Corporations Act* 2001 (Cth) approving a scheme of arrangement between it and its members – where all requirements for court approval have been established – whether the the proposed scheme of arrangement should be approved
EQUITY – TRUSTS AND TRUSTEES – APPLICATIONS TO COURT FOR ADVICE AND AUTHORITY – where applicant seeks an order that it is justified in proceeding on the basis that amending the constitution of its management investment scheme to give effect to the proposed trust scheme would be within its powers of alteration - where s 96 of the *Trusts Act* 1973 (Qld) requires a written statement of facts – whether affidavits provided in support of the application is sufficient to satisfy ‘a written statement of facts’ – whether judicial advice should be given
Corporations Act 2001 (Cth) s 9, 411, 601GC, s 601FC
Trusts Act 1973 (Qld) s 96

Re Coles Group Ltd (No 2) (2007) 65 ACSR 494
Re World Titanium Resources Ltd [2011] FCA 1480
Re Seven Network Ltd (No 3) 2010) 77 ACSR 701
Re NRMA Ltd (No 2) (2000) 34 ACSR 261
Re Anaconda Nickel Holdings Pty Ltd (2003) 44 ACSR 229
Re Central Pacific Minerals NL [2002] FCA 239
Re Bond Corp Holdings Ltd (1991) 5 ACSR 304
Re Hudson Conway Ltd (2000) 33 ACSR 657
Re Mirvac Limited (1999) 32 ACSR 107
Re Permanent Trustee Company Limited (2002) 43 ACSR 601

Re GARDA Capital Limited (Unreported, Supreme Court of Queensland, BS10478/19, Jackson J, 10 October 2019)

COUNSEL: M Oakes SC for the applicants

SOLICITORS: Jones Day for the applicants

Background

- [1] GARDA Capital Group is an ASX-listed real estate investment and funds management group that invests in Australian real estate through both equity and debt. GARDA Capital Group has a market capitalisation of approximately \$58 million.
- [2] GARDA Capital Group, which is listed on the ASX under the code ‘GCM’ consists of 26,430,000 GARDA Capital Limited (**GCL**) shares stapled to 26,430,000 GARDA Capital Trust (**GCT**) units. GARDA Funds Management Limited (**GFML**) is the responsible entity¹ and trustee for GARDA Capital Trust (**GCT**). GARDA Capital Limited, in its capacity as responsible entity for GARDA Diversified Property Fund receives management fees from GARDA Diversified Property Fund.
- [3] These applications concern:
- (1) a proposed scheme of arrangement (*Company Scheme*) between GCL and its members (*Scheme Shareholders*); and
 - (2) a proposed trust scheme (*Trust Scheme*) relating to a transfer of all units in GCT by its members (*Scheme Unitholders* and, together with the Scheme Shareholders, *Scheme Securityholders*).
- [4] GARDA Diversified Property Fund (**GDF**) is an Australian real estate investment trust (REIT) that has been listed on the ASX since July 2015. GARDA Diversified Property Fund invests in commercial office and industrial assets along the eastern seaboard of Australia and currently holds property assets in Brisbane, Cairns, Gold Coast, Mackay and Melbourne. GARDA Diversified Property Fund focuses on investing in and managing a diversified folio of established assets and creating new assets. It has a market capitalisation of approximately \$270 million and has a portfolio of 17 property assets independently valued at \$404 million. GARDA Capital Trust owns 11.8% of the GARDA Diversified Property Fund.
- [5] The executive chairman of GARDA Capital Group, Matthew Madsen, is the director of GARDA Capital Limited and GARDA Funds Management Limited. Mr Madsen and his fellow director, Mr Mark Hallett, are substantial shareholders of GARDA Capital Group. Mr Madsen and Mr Hallett have formed a committee of directors of GARDA Capital Group which is the target of the company rearrangement.
- [6] Mr Phillip Lee and Mr Morgan Parker are also directors of GARDA Capital Limited and GARDA Funds Management Limited, as well as being directors of GARDA Holdings Limited (**GHL**), a new public company formed in 2019. Mr Lee and Mr Parker have formed a committee of directors for the bidder. GARDA Property

¹ *Corporations Act* 2001 (Cth) s 9.

Group consists of GARDA Holdings Limited whose shares are to be stapled on a 1:1 basis to units in the GARDA Diversified Property Fund.

- [7] GARDA Diversified Property Fund was first registered as a Managed Investment Scheme on 16 April 2003. On 19 May 2015, the constitution of GDF was modified to enable GDF to be first publically offered on 2 July 2015. The rationale for the public offering was to raise investment funds from the market to allow the management of GARDA Capital Group to invest in commercial property through GARDA Diversified Property Fund.
- [8] GARDA Capital Group, through GARDA Capital Limited, as the manager and responsible entity for the GARDA Diversified Property Fund has achieved a compound annual return of 16.05% in the more than four years since initial public offering for GARDA Diversified Property Fund units.² The investment success “coupled with GDF’s expected growth profile, has led the Independent Directors to conclude that it would be in the best interests of GDF unit holders for GDF to internalise GCM”³. GARDA Property Group’s strategy to ‘internalise’ GCM has been identified by directors to include:
- (1) elimination of funds management, asset management, leasing and capital expenditure fees between GDF and GCM;
 - (2) reduced risk of GDF losing access to GCM’s proven real estate enhancement and asset creation strategies;
 - (3) 12.6% value increase for GDF unit holders;
 - (4) increased scale, liquidity and market capitalisation of the merged entity;
 - (5) alignment of GDF’s business model with the largest REITs in the Australian market in terms of structure and management, which may increase the pool of investors willing to invest in the Bidder; and
 - (6) an expected improved ability to source equity and debt capital to underpin the future growth of GARDA Property Group⁴.
- [9] The commercial substance of the internalisation is that GARDA Diversified Property Fund will internalise its responsible entity and manager, GARDA Capital Group, resulting in the ASX-listed entity which will be renamed GARDA Property Group and its securities will be referred to as GDF Stapled Securities. GARDA Diversified Property Fund is offering 1.6 GARDA Diversified Property Fund units and 1.6 GARDA

² Exhibit ISW-15 to the Affidavit of Mr Isaac Clifford West filed 10 October 2019, Fund Scheme Booklet, page 29, paragraph 2.4

³ Exhibit ISW-15, to the Affidavit of Mr Isaac Clifford West filed 10 October 2019, Fund Scheme Booklet, page 29, paragraph 2.4.

⁴ Exhibit ISW-15, to the Affidavit of Mr Isaac Clifford West filed 10 October 2019, Fund Scheme Booklet, page 29, paragraph 2.4.

Holdings Limited shares for every GARDA Capital Limited share and GARDA Capital Trust unit.⁵

[10] In order to achieve the internalisation, it is necessary to:

- (1) unstaple GARDA Capital Limited shares and GARDA Capital Trust units;
- (2) amend the GARDA Capital Trust constitution to allow the trust scheme to proceed;
- (3) approve the exchange of each GARDA Capital Limited share for 1.6 GARDA Holding Limited shares under the Company Scheme; and
- (4) approve the exchange of each GARDA Capital Limited unit for 1.6 GARDA Diversified Funds units under the trust scheme.

[11] Section 411(17) of the *Corporations Act 2001* (Cth) provides:

- (17) The Court must 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 ASIC stating that ASIC has no objection to the compromise or arrangement;

but the Court need not approve a compromise or arrangement merely because a statement by ASIC stating that ASIC has no objection to the compromise or arrangement has been produced to the Court as mentioned in paragraph (b).

[12] In *Re Coles Group Ltd (No 2)*⁶ Robson J said at page 498:

“[22] Many transactions which could be carried out under Ch 6 are carried out by a scheme of arrangement under Ch 5. The legislation provides a choice, and it is neutral as to the choice which is made. Thus, a corporation is entitled to choose a scheme of arrangement over Ch 6 if it wishes.

[23] The availability of this choice is well-established by authority...”

⁵ Exhibit ISW-15, to the Affidavit of Mr Isaac Clifford West filed 10 October 2019, Fund Scheme Booklet, page 29, paragraph 2.2.

⁶ (2007) 65 ACSR 494.

- [13] In *Re World Titanium Resources Ltd*⁷ Gilmore J noted that the takeover and scheme of arrangement provisions in the *Corporations Act* should be seen as “complimentary” and so long as the target shareholders under a proposed scheme are provided with sufficient disclosure, the use of a scheme “as a means of guaranteeing the bidder full ownership of the applicant without the delay, cost, expense or uncertainty associated with a takeover” is a “legitimate commercial interest”⁸.
- [14] In terms of s 411(17)(a), I am 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*. Additionally, I note that s 411(17)(b) is satisfied as ASIC has produced a statement that it has no objection to the arrangement.⁹
- [15] The internalisation proposed by GARDA Property Group as bidder of GARDA Capital Group, as target, proposes the use of a scheme of arrangement for which approval is required pursuant to section 411 of the *Corporations Act* and alteration to the GARDA Capital Trust and the GARDA Diversified Property Fund.
- [16] Section 96 of the *Trusts Act 1973* (Qld) provides as follows:

96 Right of trustee to apply to court for directions

- (1) Any trustee may apply upon a written statement of facts to the court for directions concerning any property subject to a trust, or respecting the management or administration of that property, or respecting the exercise of any power or discretion vested in the trustee.
 - (2) Every application made under this section shall be served upon, and the hearing thereof may be attended by, all persons interested in the application or such of them as the court thinks expedient.
- [17] GARDA Fund Management Limited as responsible entity for and trustee of GARDA Capital Trust seeks judicial advice in respect of the implementation of the internalisation scheme.

First Court Hearing

- [18] Section 411(1), (2), (3), (4), (6), (11), (12) provide:
- (1) Where a compromise or arrangement is proposed between a Part 5.1 body and its creditors or any class of them or between a Part 5.1 body and its members or any class of them, the Court may, on the application in a summary way of the body or of any creditor or member of the body, or, in the case of a body being wound up, of the liquidator, order a meeting or meetings of the creditors or class of creditors or of the members of the body or class of members to be convened in such manner, and to be held

⁷ [2011] FCA 1480.

⁸ [2011] FCA 1480, [35] – [36].

⁹ Exhibit ICW-31 to the Affidavit of Isaac Clifford West filed 18 November 2019.

in such place or places (in this jurisdiction or elsewhere), as the Court directs and, where the Court makes such an order, the Court may approve the explanatory statement required by paragraph 412(1)(a) to accompany notices of the meeting or meetings.

- (2) The Court must not make an order pursuant to an application under subsection (1) or (1A) unless:
 - (a) 14 days notice of the hearing of the application, or such lesser period of notice as the Court or ASIC permits, has been given to ASIC; and
 - (b) the Court is satisfied that ASIC has had a reasonable opportunity:
 - (i) to examine the terms of the proposed compromise or arrangement to which the application relates and a draft explanatory statement relating to the proposed compromise or arrangement; and
 - (ii) to make submissions to the Court in relation to the proposed compromise or arrangement and the draft explanatory statement.
- (3) In subsection (2), *draft explanatory statement*, in relation to a proposed compromise or arrangement between a body and its creditors or any class of them or between a body and its members or any class of them, means a statement:
 - (a) explaining the effect of the proposed compromise or arrangement and, in particular, stating any material interests of the directors of the body, whether as directors, as members or creditors of the body or otherwise, and the effect on those interests of the proposed compromise or arrangement in so far as that effect is different from the effect on the like interests of other persons; and
 - (b) setting out such information as is prescribed and any other information that is material to the making of a decision by a creditor or member of the body whether or not to agree to the proposed compromise or arrangement, being information that is within the knowledge of the directors of the body and has not previously been disclosed to the creditors or members of the body.
- (4) A compromise or arrangement is binding on the creditors, or on a class of creditors, or on the members, or on a class of members, as the case may be, of the body and on the body or, if

the body is in the course of being wound up, on the liquidator and contributories of the body, if, and only if:

- (a) at a meeting convened in accordance with an order of the Court under subsection (1) or (1A):
 - (i) in the case of a compromise or arrangement between a body and its creditors or a class of creditors—the compromise or arrangement is agreed to by a majority in number of the creditors, or of the creditors included in that class of creditors, present and voting, either in person or by proxy, being a majority whose debts or claims against the company amount in the aggregate to at least 75% of the total amount of the debts and claims of the creditors present and voting in person or by proxy, or of the creditors included in that class present and voting in person or by proxy, as the case may be; and
 - (ii) in the case of a compromise or arrangement between a body and its members or a class of members—a resolution in favour of the compromise or arrangement is:
 - (A) unless the Court orders otherwise—passed by a majority in number of the members, or members in that class, present and voting (either in person or by proxy); and
 - (B) if the body has a share capital—passed by 75% of the votes cast on the resolution; and
 - (b) it is approved by order of the Court.
- (6) The Court may grant its approval to a compromise or arrangement subject to such alterations or conditions as it thinks just.
 - (11) Subject to subsection (12), a copy of every order of the Court made for the purposes of paragraph (4)(b) must be annexed to every copy of the constitution of the body issued after the order has been made.
 - (12) The Court may, by order, exempt a body from compliance with subsection (11) or determine the period during which the body must comply with that subsection.

Orders Made at First Court Hearing

[19] On 10 October 2019, Jackson J made orders in relation to the convening of meetings required to be held in connection with the proposed schemes.

- [20] In proceeding BS10478/19 in relation to the Company Scheme, Jackson J made convening orders, including orders pursuant to section 411(1) of the *Corporations Act*:
- (a) for a meeting of Scheme Shareholders (*Scheme Meeting*) to be convened by GCL for the purpose of Scheme Shareholders considering whether to vote in favour of the Company Scheme; and
 - (b) approving the explanatory statement (*Scheme Booklet*) to be sent to Scheme Shareholders with the notice convening the Scheme Meeting (*Notice of Scheme Meeting*), forming part of exhibit 'ICW-15' to the affidavit of Mr Isaac Clifford West, filed 10 October 2019.
- [21] In proceeding BS10479/19 in relation to the trust scheme, Jackson J gave the first judicial advice, including directions pursuant to section 96 of the *Trusts Act* that GFML would be justified in:
- (a) convening the Extraordinary General Meeting¹⁰ of the members of GCT for the purposes of considering:
 - (i) the Trust Scheme Resolutions; and
 - (ii) a resolution to unstaple the ordinary units of GCT from the ordinary shares in GCL for the purposes of the GCT Constitution (*Trust Unstapling Resolution*); and
 - (b) subject to the members of GCT passing the Trust Scheme Resolutions and the Trust Unstapling Resolution, proceeding on the basis that amending the GCT Constitution in the manner set out in the Supplemental Deed Poll would be within the powers of alteration conferred by the GCT Constitution and section 601GC of the *Corporations Act*.

Developments Subsequent to First Court Hearing

- [22] On 10 October 2019, a sealed copy of the convening orders was lodged with the Australian Securities and Investments Commission (ASIC) as required by rule 3.5 of the *Corporations Proceedings Rules* (Qld).¹¹
- [23] The Scheme Booklet, in substantially the form approved by the Court in the convening orders, was lodged with ASIC on 10 October 2019 and ASIC has confirmed it had completed registration of the Scheme Booklet.¹²
- [24] To assist in convening and conducting the GCM Meetings, GCM appointed Link Market Services Limited (**Link**) to:

¹⁰ The Extraordinary General Meeting was a combined meeting of GCL and GCT.

¹¹ Exhibit ICW-24 to the Affidavit of Mr Isaac Clifford West filed 18 November 2019.

¹² Exhibit ICW-24 to the Affidavit of Mr Isaac Clifford West filed 18 November 2019.

- (a) provide email notifications to those Scheme Securityholders who have provided GCM with an email address for receipt of notices (*Email Notification Securityholders*);
- (b) print and mail all communications required in connection with the Schemes to all Scheme Securityholders who are not Email Notification Shareholders; and
- (c) act as the returning officer for the Extraordinary General Meeting and the Scheme Meeting, including by processing the receipt of:
 - (i) proxy forms which permit Scheme Securityholders to appoint up to two proxies for the purpose of attending and voting at the Extraordinary General Meeting (*General Meeting Proxy Form*), whether received online, by hand delivery, by post or by fax;
 - (ii) proxy forms which permit Scheme Shareholders to appoint up to two proxies for the purpose of attending and voting at the Scheme Meeting (*Scheme Meeting Proxy Forms*), whether received online, by hand delivery, by post or by fax;
 - (iii) powers of attorney which are executed by Scheme Securityholders for the purpose of attending and voting at the Extraordinary General Meeting and Scheme Meeting, or a certified copy of the power of attorney, whether received by hand delivery, by post or by fax; and
 - (iv) certificates of appointment of corporate representatives which are executed by GCM Securityholders for the purpose of attending and voting at the Extraordinary General Meeting and Scheme Meeting, whether received by hand delivery, by post or by fax.¹³

[25] On 8 October 2019, 108 Scheme Securityholders had notified Link that they wished to receive notices from GCM by email as prescribed by rule 19.3(d) of GCL's constitution and rule 21.1 of GCT's constitution and were therefore Email Notification Securityholders.

[26] On 11 October 2019, Mr Davidson uploaded a copy of the Scheme Booklet, including the Notices of Meetings, in substantially the form approved by the Court in the convening orders, to the ASX announcement platform and to the GCM investor website (<https://investors.GARDACapital.com.au/gcm-investor/>).

[27] On 16 October 2019, Link sent to each Email Notification Securityholder at their nominated email addresses an email (substantially in the form in which it appears in exhibit 'LD-10' to the affidavit of Mr Lachlan Davidson, filed 9 October 2019) containing web links enabling each Email Notification Securityholder to:

- (a) view the Scheme Booklet, including the Notices of Meetings, in substantially the form approved by the Court in the convening orders; and

¹³ Affidavit of Mr Lachlan Davidson filed 9 October 2019, paragraph 27.

(b) lodge proxy instructions online.¹⁴

[28] On 15 October 2019, Link, in accordance with the convening orders, posted to all Scheme Securityholders (excluding Email Notification Securityholders) the following hard copy documents:

- (a) a copy of the Scheme Booklet, including the Notices of Meetings, in substantially the form approved by the Court in the convening orders;
- (b) copies of the General Meeting Proxy Forms and the Scheme Meeting Proxy Forms in substantially the form they appear in exhibit 'LD-11' to the First Davidson Affidavit; and
- (c) a reply-paid envelope addressed to Link for the return of the General Meeting Proxy Forms and the Scheme Meeting Proxy Forms.¹⁵

[29] On 1 November 2019, GDF held the GDF Unitholder Meeting for the purposes of passing resolutions to approve the internalisation, including a resolution approving the acquisition for the purposes of ASX Listing Rule 10.1. GDF Unitholders approved the resolutions required to implement the internalisation by their requisite majorities.¹⁶

Extraordinary General Meeting

[30] At the Extraordinary General Meeting, Scheme Securityholders were required to consider whether to pass the following resolutions:

- (a) a resolution to unstaple the ordinary shares in GCL from the ordinary units shares in GCT for the purposes of the constitution of GCL (*Company Unstapling Resolution*);
 - (b) the Trust Unstapling Resolution;
 - (c) the Trust Constitution Amendment Resolution; and
 - (d) the Trust Acquisition Resolution,
- (together, the *EGM Resolutions*).

[31] The Extraordinary General Meeting commenced at 11:00 am (AEST) on 15 November 2019 at Dexus Place, Level 31 Waterfront Place, 1 Eagle Street, Brisbane QLD 4000.

[32] Mr Madsen was the chairman of the Extraordinary General Meeting and signed minutes recording what occurred at the Extraordinary General Meeting.¹⁷

[33] In accordance with the convening orders, read with the Notice of Extraordinary General Meeting, GCL's constitution and GCT's constitution, only instruments executed by

¹⁴ Affidavit of Mr Matthew Foster affirmed 15 November 2019, paragraph 9.

¹⁵ Affidavit of Mr Matthew Foster affirmed 15 November 2019, paragraph 13.

¹⁶ Affidavit of Mr Lachlan Davidson affirmed 13 November 2019, paragraph 7.

¹⁷ Affidavit of Mr Matthew Madsen filed 18 November 2019, paragraph 9.

Scheme Securityholders for the appointment of proxies that were received by Link by 11:00am (AEST) on 13 November 2019 were effective. Mr Madsen deposes that “no questions were asked and no comments were made by any GCM Securityholders”.¹⁸ The minutes of the EGM¹⁹ and the minutes of the Scheme Meeting²⁰ record notification to attendees of the second court hearing.

[34] At the Extraordinary General Meeting:

- (a) there were 71 Scheme Securityholders in attendance, whether in person or by proxy, attorney or corporate representative, representing 31.16% of all Scheme Securityholders by number but more importantly representing 89.96% of the total GCL shares on issue;²¹
- (b) a poll was conducted of the Scheme Securityholders in attendance in relation to the EGM Resolutions; and
- (c) the EGM Resolutions were passed as follows:²²

¹⁸ Affidavit of Mr Matthew Madsen filed 18 November 2019, paragraph 8(d).

¹⁹ Exhibit MGM-2 to the Affidavit of Mr Matthew Madsen filed 18 November 2019.

²⁰ Exhibit MGM-3 to the Affidavit of Mr Matthew Madsen filed 18 November 2019.

²¹ Affidavit of Mr Matthew Foster filed 18 November 2019, paragraph 27.

²² Affidavit of Mr Matthew Foster filed 18 November 2019, paragraph 36.

EGM Resolution	Vote	Scheme Securityholders voting (in person or by proxy, attorney or corporate representative)	Votes cast
Company Unstapling Resolution (special resolution of the members of GCL)	For	70 (98.59% of Scheme Securityholders who voted)	22,892,184 (100% of votes cast on the resolution)
	Against	1 (1.41% of Scheme Securityholders who voted)	131 (0.00% of votes cast on the resolution)
	Abstained	0	0
Trust Unstapling Resolution (special resolution of the members of GCT)	For	70 (98.59% of Scheme Securityholders who voted)	22,892,184 (100% of votes cast on the resolution)
	Against	1 (1.41% of Scheme Securityholders who voted)	131 (0.00% of votes cast on the resolution)
	Abstained	0	0
Trust Constitution Amendment Resolution (special resolution of the members of GCT)	For	70 (98.59% of Scheme Securityholders who voted)	22,892,184 (100% of votes cast on the resolution)
	Against	1 (1.41% of Scheme Securityholders who voted)	131 (0.00% of votes cast on the resolution)
	Abstained	0	0
Trust Acquisition Resolution (ordinary resolution of the members of GCT)	For	70 (98.59% of Scheme Securityholders who voted)	22,892,184 (100% of votes cast on the resolution)
	Against	1 (1.41% of Scheme Securityholders who voted)	131 (0.00% of votes cast on the resolution)
	Abstained	0	0

[35] The EGM Resolutions were therefore approved by Scheme Securityholders by their required majorities and the EGM was closed at 11.15am.

Scheme Meeting

[36] The scheme meeting commenced immediately after the close of the Extraordinary General Meeting at approximately 11:16 am (*Scheme Meeting*).

[37] At the Scheme Meeting, Scheme Shareholders were required to consider whether to pass a resolution (*Company Scheme Resolution*) to approve the Company Scheme by the majorities required by the *Corporations Act*, being:

- (a) a majority of Scheme Shareholders in fact present and voting at the Scheme Meeting (in person or by proxy, attorney or corporate representative); and
- (b) 75% of the total votes cast at the Scheme Meeting.²³

[38] Mr Madsen was the chairman of the Scheme Meeting and signed minutes recording what occurred at the Scheme Meeting. Again “no questions were asked and no comments were made by any GCL Shareholders”.²⁴

[39] In accordance with the convening orders, read with the Notice of Company Scheme Meeting and GCL’s constitution, only instruments executed by Scheme Shareholders for the appointment of proxies that were received by Link by 11:00 am (AEST) on 13 November 2019 were effective.

[40] At the Scheme Meeting:

- (a) there were 70 Scheme Shareholders in attendance, whether in person or by proxy, attorney or corporate representative, representing 30.30% of all Scheme Shareholders by number;
- (b) a poll was conducted of the Scheme Shareholders in attendance in relation to the Company Scheme Resolution; and
- (c) the Company Scheme Resolution was passed as follows:²⁵

	Scheme Shareholders voting (in person or by proxy, attorney or corporate representative)	Votes cast
For	69 (98.57% of Scheme Shareholders who voted)	22,850,696 (100% of votes cast on the Company Scheme Resolution)
Against	1 (1.43% of Scheme Shareholders who voted)	131 (0.00% of votes cast on the Company Scheme Resolution)
Abstained	1 Scheme Shareholder representing 37 Scheme Shares	-

[41] The Company Scheme Resolution was therefore approved by Scheme Shareholders by the majorities required by the Corporations Act and the meeting was closed at 11.22 am.

Satisfaction of Scheme conditions, no breach of obligations and no termination

²³ *Corporations Act 2001 (Cth)* 411(4)(a)(ii).

²⁴ Affidavit of Mr Matthew Madsen filed 18 November 2019, paragraph 12(d).

²⁵ Affidavit of Mr Matthew Foster affirmed 15 November 2019, paragraph 44.

- [42] There are various conditions, set out in the scheme implementation deed (included as ‘LD-5’ to the affidavit of Lachlan Davidson filed 9 October 2019), which must be satisfied before the Schemes can become Effective (*Scheme Conditions*).
- [43] The affidavit of Lachlan Davidson filed 18 November 2019 verifies that all of the Scheme Conditions, other than the condition in clauses 3.1(f) and (h) of the scheme implementation deed relating to the GDF Stapling and the Court making the approval orders and giving the second judicial advice, respectively, have now been satisfied.²⁶
- [44] The affidavit of Mr Madsen filed 18 November 2019 verifies that (a) neither GCM nor GARDA Property Group have issued a notice of termination under the scheme implementation deed and (b) as at 15 November 2019, GCM has not received a superior proposal.²⁷

Advertisement of Scheme

- [45] On 11 November 2019, being a date at least five days before the second court hearing, Jones Day caused a notice of the second court hearing to be published in *The Australian* newspaper in accordance with the convening orders.
- [46] No notice of appearance has been served on GCL by, nor any other correspondence received from, any person intending to appear at the second court hearing to oppose the Court’s approval of the Company Scheme.²⁸

Requirements for Court Approval of the Company Scheme

- [47] A court’s role in approving a scheme of arrangement is supervisory in nature. In *Re Seven Network Ltd (No 3)*²⁹ Jacobson J usefully set out the six key matters which the courts take into account in informing their discretion whether to approve a scheme:
- (a) whether, in voting to approve the scheme by the required majorities in the Corporations Act, shareholders have voted in good faith and not for an improper purpose;
 - (b) whether the scheme is fair and reasonable, so that an intelligent and honest man or woman who was a member of the relevant class of shareholders, properly informed and acting alone, might approve it;
 - (c) whether the applicant has brought to the attention of the court all matters that could be considered relevant to the exercise of the Court’s discretion;
 - (d) whether there has been full and fair disclosure of all material information to shareholders;

²⁶ Affidavit of Mr Lachlan Davidson sworn 19 November 2019, paragraph 5.

²⁷ Affidavit of Mr Matthew Madsen filed 18 November 2019, paragraph 15.

²⁸ Affidavit of Mr Isaac Clifford West filed 18 November 2019, paragraph 16.

²⁹ (2010) 77 ACSR 701 [35] – [40].

- (e) whether minority shareholders would be oppressed by the scheme;
and
- (f) whether the scheme offends public policy.

The Scheme Shareholders acted in good faith and for a proper purpose

[48] In the Company Scheme before the Court, there is no suggestion that Scheme Shareholders acted other than in good faith and for a proper purpose in voting to pass the Scheme Resolution at the Company Scheme meeting. Indeed, the Scheme Resolution was passed by Scheme Shareholders:

- (a) with regard to their own legitimate commercial interests; and
- (b) after having made an independent assessment of all material information, as set out in the Scheme Booklet, relevant to their decision on how to vote in relation to the Company Scheme.

The Company Scheme is fair and reasonable

[49] The Company Scheme is properly regarded as one which is fair and reasonable to all Scheme Shareholders, on the basis that, as disclosed to the Court at the first court hearing:

- (a) all Scheme Shareholders have the same entitlement to be paid the Company Scheme Consideration if the Company Scheme becomes Effective and have the same ‘community of interest’ under the Company Scheme;
- (b) the requirement that the transfer of Scheme Shares to the Bidder is *subject to* the issue of the Company Scheme Consideration to Scheme Shareholders, and the Bidder’s obligation to provide the Company Scheme Consideration under the GHL Deed Poll means that there is no ‘performance risk’ for Scheme Shareholders in relation to the implementation of the Company Scheme;
- (c) the Title Warranties and Capacity Warranties provided by Scheme Shareholders are not onerous or unreasonable as they simply ensure that:
 - (i) all Scheme Shareholders are treated equally and will be paid the same Company Scheme Consideration for all of their Scheme Shares; and
 - (ii) the overarching purpose of the Company Scheme, in allowing the Bidder to acquire GCM, is not frustrated;
- (d) the exclusivity provisions contained in the scheme implementation deed have been specifically brought to the attention of Scheme Shareholders and are subject to appropriate fiduciary ‘carve outs’ necessary to ensure the target board committee can continue to

pursue the best interests of GCM and Scheme Shareholders prior to the Company Scheme becoming Effective;

- (e) the internalisation has the unanimous support of the target board committee; and
- (f) the Independent Expert³⁰ has concluded in the Independent Expert's Report that the terms of the Schemes are fair and reasonable and therefore in the best interests of Scheme Securityholders.

No oppression and no contravention of public policy

[50] The passage of the company scheme resolution, and the subsequent implementation of the Company Scheme if approved by the Court, would not result in the oppression of minority Scheme Shareholders that did not vote in favour of the Company Scheme or offend public policy as that:

- (a) Scheme Shareholders were fairly represented at the Company Scheme meeting by those in attendance; and
- (b) Scheme Shareholders in attendance at the Company Scheme meeting had an opportunity to ask questions and comment on any matter relating to the internalisation.³¹

Proper disclosure

[51] All material information relevant to the internalisation and the decision of Scheme Shareholders whether to vote to approve the Company Scheme has been provided in fair, objective, and balanced language, to both:

- (a) Scheme Shareholders in the Scheme Booklet, including in relation to the purpose of the internalisation, the nature of the company scheme consideration, the recommendation of the target board committee, the opinion of the independent expert, the conditions to the Schemes becoming effective, the risks associated with Scheme Securityholders' investment in the bidder, what happens if a competing bid is received, information about the bidder, reasons to vote for or against the internalisation and details about the Company Scheme meeting and how Scheme Shareholders can vote; and
- (b) the Court during the course of the first court hearing and the second court hearing.

[52] The proposed Company Scheme is approved under section 411(4) of the *Corporations Act* as:

³⁰ Exhibit ICW-15, Annexure A to the Scheme Booklet, Report of Grant Thornton Corporate Finance dated 8 October 2019.

³¹ Affidavit of Mr Matthew Madsen filed 18 November 2019, paragraph 12(c).

- (a) the Company Scheme complies with the key requirements taken into account by the courts in deciding whether to approve a scheme of arrangement; and
- (b) the courts have recognised that:
 - (i) their supervisory jurisdiction over schemes of arrangement is ‘limited’;
 - (ii) ‘members are better judges of what is in their commercial interests than the court’; and
 - (iii) it is not the role of the court, in considering whether to approve a scheme, to ‘usurp the decision of shareholders by imposing its own commercial judgment on the scheme, nor to satisfy itself that no better scheme could have been devised’.³²

Second Judicial Advice

[53] At the first court hearing, Jackson J gave judicial advice to GFML under section 96 of the *Trusts Act* that it would be justified:

- (a) in convening the Extraordinary General Meeting for the purposes of considering the Trust Scheme Resolutions and the Trust Unstapling Resolution; and
- (b) subject to approval of the resolutions referred to in paragraph (a), proceeding on the basis that amending the GCT Constitution to give effect to the Trust Scheme would be within the powers of alteration conferred by the GCT Constitution and section 601GC of the Corporations Act.

[54] At this hearing, GFML seeks judicial advice under section 96 of the *Trusts Act* that, the resolutions referred to in referred to in paragraph 53(a) having been passed by the requisite majorities, it would be justified in proceeding on the basis that amending the constitution of GCT to give effect to the Trust Scheme would be within the powers of alteration conferred by the constitution of GCT and section 601GC of the *Corporations Act*.

[55] Section 601GC(1) of the *Corporations Act* provides that “[t]he constitution of a registered managed investment scheme may be modified... by special resolution of members of the scheme”.

[56] This raises the question of the width of the amendment power conferred by section 601GC(1) of the *Corporations Act*. Austin J held in *Re Mirvac Limited*³³ that the alteration power in section 601GC was very wide and quite unlimited in its terms.

³² *Seven Network*, 706-707. See also *Re NRMA Ltd (No 2)* (2000) 34 ACSR 261, 269 per Santow J; *Re Anaconda Nickel Holdings Pty Ltd* (2003) 44 ACSR 229, 237 per McLure J; *Re Central Pacific Minerals NL* [2002] FCA 239, [12]-[13] per Emmett J; *Coles Group*, [8]; *Re Bond Corp Holdings Ltd* (1991) 5 ACSR 304, 316 per Owen J; and *Re Hudson Conway Ltd* (2000) 33 ACSR 657, 662, 665, 667 per Beach J.

³³ (1999) 32 ACSR 107.

[57] Mirvac also saw the evolution of the two staged judicial advice structure and as a matter of practice trust schemes have proceeded by analogy with *Corporations Act* schemes in matters of disclosure to unitholders and the Court.

[58] As was accepted by Jackson J at the first court hearing, GFML is a trustee as:

- (a) section 601FC(2) of the *Corporations Act* provides that a responsible entity holds the property of a managed investment scheme on trust for the scheme members; and
- (b) a managed investment scheme is therefore an express trust, the trustee of which falls within the definition of “trustee” for the purposes of the *Trusts Act*.

[59] GFML has adduced evidence by way of affidavit which is sufficient to constitute a “written statement of facts”. At the first court hearing, Jackson J stated:

“Under section 96 of the *Trusts Act 1973*, the text of the section requires that there be a statement of facts. Some have the view that that requires, in most cases, or all cases, a formal statement of facts. It is a view I do not share. In my view, the affidavits which were filed in support of the application for an order under section 96 may be identified as containing the facts and therefore as being within the meaning of the section a statement of facts for the purpose of the orders sought and which make.”³⁴

[60] In all cases, s 96(1) of the *Trusts Act* requires a written statement of facts. In most cases, this is satisfied by a separate written statement of facts. In cases such as the present where there are extensive affidavits, that is sufficient to satisfy the requirement of a written statement of facts. Accordingly, the affidavits filed and read at the first court hearing and in support of this application for second judicial advice are sufficient to constitute a written statement of facts for the purpose of section 96 of the *Trusts Act*.

[61] The service of the Scheme Booklet, with the notification in section 9.3 that each GCM Securityholder has the right to appear at the second court hearing, is sufficiently expedient for the purposes of section 96(2) of the *Trusts Act*. At the first court hearing, Jackson J made the following finding regarding section 96(2):

“Section 96(2) of the *Trusts Act 1973* refers to a requirement to give notice to those who may be interested in the orders that are sought by way of judicial advice, unless the court considers it expedient.

In the present case, in my view, it would not be useful or appropriate to give notice of the application for the orders sought by GFML for judicial advice to make the orders that are made today, for the reason that it is proposed that there be a second application for judicial advice, as well as the fact that there will be, if the resolutions are passed, a second court hearing in relation to the scheme.

³⁴ Transcript of Proceedings, *Re GARDA Capital Limited* (Supreme Court of Queensland, BS10478/19, Jackson J, 10 October 2019) T5/9-15.

Any of the members who wish to be heard in opposition to the orders that will then be sought, or wish to be heard in relation to the advice that will then be sought by GFML as responsible entity of the GCT, will have an opportunity to be heard on those applications, having received notice of the fact of those applications, including the second application for judicial advice, with the scheme documents.”³⁵

- [62] I agree with the view expressed by Jackson J. For the purposes of both judicial advice hearings for the Trust Scheme, the applicants have correctly proceeded on the basis that there is a duty of disclosure which falls on the applicants and their counsel, as set out in relation to a *Corporations Act* scheme of arrangement in *Re Permanent Trustee Company Limited*³⁶ at paragraph [7].
- [63] GFML sought relief from ASIC from the equal treatment provision in section 601FC(1)(d) of the *Corporations Act*. Because of the standard overseas security holders’ problem with Australian securities issues, for some overseas security holders it will be necessary for their entitlement to be cashed out by a sale rather than receive the trust scheme consideration. ASIC has given formal relief from section 601FC(1)(d) of the *Corporations Act* to enable this to occur.³⁷ Disclosure in relation to such overseas security holders, referred to as ‘Ineligible Foreign Securityholders’, appeared primarily in section 9.12 of the Scheme Booklet.
- [64] I conclude that the application for second judicial advice is entirely within orthodoxy and it is appropriate that the judicial advice sought at this second court hearing be given.

Exemption from section 411(11) of the *Corporations Act 2001* (Cth)

- [65] It is accepted that an exemption from the operation of section 411(11) of the *Corporations Act* is appropriate in cases where:
- (a) a scheme does not purport to alter the target’s constitution or the rights of the target’s shareholders, creditors or persons dealing with the target; and
 - (b) upon implementation of the scheme, the target will become a wholly-owned subsidiary of the bidder.³⁸
- [66] Accordingly, it is concluded that it is appropriate to make an order exempting GCL from the operation of section 411(11) of the *Corporations Act* on the basis that:

³⁵ Transcript of Proceedings, *Re GARDA Capital Limited* (Supreme Court of Queensland, BS10478/19, Jackson J, 10 October 2019) T5/21-35.

³⁶ (2002) 43 ACSR 601 where Barrett J said: “The fact that the application is *ex parte* is not without some significance. The absence of any defendant or contradictor sharpens the duty of the applicant. While a case such as the present is distinguishable from one where an interlocutory injunction is sought in the absence of a defendant (in that there is here no defendant as such) I think it is fair to say that an applicant in this kind of situation, like an applicant *ex parte* for an injunction, carries the responsibility of bringing to the court’s attention all matters that could be considered relevant to the exercise of discretion.”

³⁷ Affidavit of Mr Isaac Clifford West filed 18 November 2019, paragraph 7 and exhibit ‘ICW-26’.

³⁸ *Re Anaconda Nickel Holdings Pty Ltd* (2003) 44 ACSR 229, 240; *Re Equinox Ltd* (2004) 49 ACSR 692, 696 per Heenan J; and *Re Bathurst Resources Ltd (No 2)* [2013] FCA 622, [18] per Barker J.

- (a) the Company Scheme does not alter GCL's constitution, nor the rights of any of GCL's shareholders, creditors or any third parties dealing with GCL; and
- (b) upon the Company Scheme becoming effective, GCL will become a wholly-owned subsidiary of GHL.

[67] The orders I make in the BS 10478/19 application are:

1. Pursuant to section 411(4)(b) of the *Corporations Act 2001* (Cth) (**Corporations Act**), the scheme of arrangement in this proceeding (**Scheme**), in the form contained in Annexure E of the Scheme Booklet which is exhibit "ICW-15" to the affidavit of Mr Isaac Clifford West affirmed on 10 October 2019, is approved.
2. Pursuant to section 411(12) of the Corporations Act, the Applicant is exempt from complying with section 411(11) of the Corporations Act in relation to the Scheme.

The orders I make in the BS 10479/19 application are:

1. For the purposes of section 96 of the *Trusts Act 1973* (Qld), the Applicant is justified in:
 - (a) implementing the transfer of all the ordinary units in GARDA Capital Trust ARSN 150 164 720 (GCT) to GARDA Capital Limited ACN 095 039 366 (GCL) as responsible entity for GARDA Diversified Property Fund ARSN 104 391 273 (GDF) (Trust Scheme);
 - (b) implementing the amendments to the constitution of GCT to give effect to the Trust Scheme (GCT Constitution Amendments);
 - (c) implementing the unstapling of the ordinary units in GCT from the ordinary shares in GCL;
 - (d) giving effect to the provisions of the constitution of GCT (as amended by the GCT Constitution Amendments); and
 - (e) doing all things necessary and taking all steps to put the Trust Scheme into effect.