



## ASX RELEASE

**GetSwift Limited**  
**(ASX:GSW)**

1 December 2020

### **Scheme of arrangement – Reasons for Judgment**

GetSwift Limited (**GetSwift**) refers to its announcement of 27 November 2020 and notes that the Court today issued reasons for making orders further adjourning the second court hearing for the proposed scheme of arrangement between GetSwift and its shareholders (**Scheme**) until 10.15am (Sydney time) on Monday, 7 December 2020.

A copy of the Court orders and reasons for judgment are attached. GetSwift notes that paragraphs 121 to 137 of the Reasons for Judgement set out the reasons for the Court forming the view that if the conditions precedent to the Scheme are satisfied, it would be appropriate to make orders approving the Scheme under section 411(4)(b) of the *Corporations Act 2001* (Cth).

GetSwift notes that, among other things, her Honour's detailed reasons are highly relevant to the issue raised in the Treasurer's letter of 20 November 2020, namely whether contingent creditors may be negatively impacted by the Scheme. In light of the Court's rejection of the objections raised by the Australian Securities and Investment Commission (the only contingent creditor which now opposes approval of the Scheme), GetSwift intends to seek to persuade the Treasurer that there is no basis to oppose the Scheme on national interest grounds.

*This announcement has been authorised by the Board of Directors.*

### **About GetSwift Limited**

#### ***Technology to Optimise Global Delivery Logistics***

GSW is a technology and services company that offers a suite of software products and services focused on business and logistics automation, data management and analysis, communications, information security, and infrastructure optimization and also includes ecommerce and marketplace ordering, workforce management, data analytics and augmentation, business intelligence, route optimization, cash management, task management shift management, asset tracking, real-time alerts, cloud communications, and communications infrastructure (collectively, the "GetSwift Offering"). The GetSwift Offering is used by public and private sector clients across industries and jurisdictions for their respective logistics, communications, information security, and infrastructure projects and operations.

GetSwift is headquartered in New York and is listed on the Australian Securities Exchange (ASX:GSW).

For further background, please visit [www.getswift.co](http://www.getswift.co). GetSwift is an emerging growth company and is subject to a variety of risks. The Company is not yet profitable, and there can be no assurance that it will achieve profitability. The Company's business and a variety of investment considerations are discussed in more detail in the Company's filings with the Australia Securities Exchange (ASX). Investors are encouraged to review the more complete information contained in such filings.

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# FEDERAL COURT OF AUSTRALIA

## GetSwift Limited, in the matter of GetSwift Limited (No 2) [2020] FCA 1733

File number(s): NSD 1057 of 2020

Judgment of: **FARRELL J**

Date of publication of reasons: 1 December 2020

Date of judgment: 27 November 2020

Catchwords: **CORPORATIONS** – members’ scheme of arrangement – application under s 411(4)(b) of the *Corporations Act* 2001 (Cth) – application to approve members’ scheme of arrangement proposed for the purpose of re-domiciling a listed public company to a place outside Australia – where approval under *Foreign Acquisitions and Takeovers Act* 1975 (Cth) has not yet been obtained – where the Australian Securities and Investments Commission intervenes to oppose application on the basis that the Commonwealth is a contingent creditor in relation to a pecuniary penalty in respect of claimed contraventions of continuous disclosure laws during the currency of litigation – consideration of whether there is a ‘real or practical risk, as opposed to a theoretical risk’ that implementation of scheme will materially prejudice contingent creditors

Legislation: *Corporations Act* 2001 (Cth) ss 411, 553B  
*Court Order Enforcement Act*, RSBC 1996, c 78  
*Foreign Acquisitions and Takeovers Act* 1975 (Cth)

Cases cited: *Amtcor Limited, in the matter of Amtcor Limited (No 2)* [2019] FCA 842  
*Atlassian Corporation Pty Limited, in the matter of Atlassian Corporation Pty Limited* [2013] FCA 1451; [2014] FCA 60  
*Attorney-General for the Commonwealth of Australia v Alinta Limited* [2008] HCA 2; (2008) 233 CLR 542  
*Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liquidation) (No 4)* [2020] FCA 1499  
*Australian Securities and Investments Commission v National Australia Bank Limited* [2020] FCA 149  
*Australian Securities and Investments Commission v*

*Westpac Banking Corporation (No 3)* [2018] FCA 1701  
*Capilano Honey Limited, in the matter of Capilano Honey Limited* [2018] FCA 1568; (2018) 131 ACSR 9  
*Commonwealth of Australia in the matter of Leahy Petroleum – Retail Pty Ltd (subject to a deed of company arrangement v Leahy Petroleum – Retail Pty Ltd (subject to a deed of company arrangement)* [2005] FCA 1422; (2005) 55 ACSR 353  
*CSR Limited, in the matter of CSR Limited* [2010] FCAFC 34; (2010) 183 FCR 358  
*GetSwift Limited, in the matter of GetSwift Limited* [2020] FCA 1382  
*Heartware Limited, in the matter of Heartware Limited* [2008] FCA 1997  
*In the matter of Stork ICM Australia Pty Ltd* [2006] FCA 1849; (2007) 25 ACLC 208  
*Marengo Mining Ltd, in the matter of Marengo Mining Ltd* [2012] FCA 1220  
*News Corporation Ltd* [2004] FCA 1480  
*Peplin Limited* [2007] FCA 1387; [2007] FCA 1558  
*Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355  
*In the matter of Centro Properties Limited and CPT Manager Limited in its capacity as responsible entity of Centro Property Trust* [2011] NSWSC 1465; (2011) 86 ACSR 584  
*Re Matine Limited* (1998) 28 ACSR 268  
*Re Sylvania Resources Ltd* [2009] FCA 955; (2009) 179 FCR 306  
*Sundance Energy Australia Limited, in the matter of Sundance Energy Australia Limited* [2019] FCA 1944  
*Unilife Medical Solutions Limited, in the matter of Unilife Medical Solutions Limited (No 2)* [2010] FCA 12  
*Webb v GetSwift Limited (No 6)* [2020] FCA 1292

Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Corporations and Corporate Insolvency
Number of paragraphs:	139
Dates of hearing:	12, 13, 16, 26, 27 November 2020

Counsel for the Plaintiff	Mr J Sheahan QC & Mr D Sulan
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Solicitor for the Interested Party	Phi Finney McDonald

## ORDERS

NSD 1057 of 2020

IN THE MATTER OF GETSWIFT LIMITED ACN 604 611 556

**GETSWIFT LIMITED ACN 604 611 556**

Plaintiff

**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION**

Intervener

**RAFFAELE WEBB**

Interested Person

**ORDER MADE BY: FARRELL J**

**DATE OF ORDER: 27 NOVEMBER 2020**

### THE COURT ORDERS THAT:

1. The application for orders under s 411(4)(b) of the *Corporations Act* be stood over to **10.15 am on Monday, 7 December 2020.**
2. GetSwift must advise the Court within one business day after it becomes aware of a decision made by the Treasurer with respect to FIRB approval with a view to fixing a date for the further hearing of the application for orders under s 411(4)(b) of the *Corporations Act*.
3. There be liberty to apply on 24 hours' notice.

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

## REASONS FOR JUDGMENT

### FARRELL J:

1 The second court hearing in relation to a proposed scheme of arrangement between GetSwift  
2 Limited and its members has been conducted over a number of days since 12 November 2020.  
3 These are reasons for making orders to adjourn the further hearing of the application for orders  
4 under s 411(4)(b) of the *Corporations Act 2001* (Cth) until 7 December 2020 rather than  
5 refusing approval of the scheme.

### BACKGROUND

6 GetSwift was incorporated as an Australian public company in the state of Victoria in March  
7 2015.

8 GetSwift and its subsidiaries (**GetSwift Group**) provide technology and services to clients in  
9 over 70 countries around the world. Its software products and services focus on business and  
10 logistics automation, data management and analysis, communications, information security  
11 and infrastructure optimisation.

12 GetSwift's registered office is in Sydney, but it is headquartered in New York City and has  
13 technology centres in Denver, Colorado in the United States of America (**USA**) and in  
14 Belgrade, Serbia. In the year to 30 June 2020, 54.1% of all new customers acquired by  
15 GetSwift were in North America.

16 Ordinary shares in GetSwift (**GetSwift Shares**) were first listed on the Australian Stock  
17 Exchange (**ASX**) under the code "GSW" on 7 December 2016 following an initial public  
18 offering of GetSwift Shares at 20 cents each pursuant to a prospectus lodged with the Australian  
19 Securities and Investments Commission (**ASIC**) on 26 October 2016. GetSwift Shares are also  
20 traded on the Open Market segment "Quotation Board" operated by the Frankfurt Stock  
21 Exchange and in the United States of America (**USA**) on the OTC Pink Open Market operated  
22 by OTC Markets Group, in each case without the consent of GetSwift.

23 GetSwift raised capital over the course of 2017 in circumstances which have proved to be  
24 controversial. GetSwift raised an aggregate of \$24 million at 80 cents per GetSwift Share in  
25 two tranches, on 4 July 2017 and 15 August 2017 (**first capital raising**). GetSwift conducted  
26 a further placement, in which it raised an additional \$75 million at \$4.00 per share on  
27 22 December 2017 (**second capital raising**). At the time that a trading halt was imposed on

GetSwift on 22 January 2018, the price of a GetSwift Share had fallen to \$2.92. The price fell further to \$1.31 when the trading halt ceased on 19 February 2018 following corrective disclosures made by GetSwift to the ASX. At the close of trading on 5 November 2020, the share price of GetSwift was 35 cents.

7 A number of representative actions were commenced under Part IVA of the *Federal Court of Australia Act 1976* (Cth) against GetSwift and Joel Macdonald (a director of GetSwift) between 20 February 2018 and 13 April 2018. On 23 May 2018, the Federal Court of Australia ordered that only the action commenced by Mr Webb on 13 April 2018 (NSD 580 of 2018) could continue (the **Webb proceeding**). That order was upheld upon appeal to the Full Court and special leave to appeal the Full Court's decision was refused by the High Court.

8 The Webb proceeding was filed on behalf of persons who acquired GetSwift Shares during the period from 24 February 2017 until 19 January 2018 and who claim to have suffered loss as the result of contraventions of s 674(2) of the *Corporations Act* and ss 1041E and 1041H of the *Corporations Act* and equivalent provisions of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) and the *Australian Consumer Law*. The claims in those proceedings are that GetSwift and Mr Macdonald engaged in misleading and deceptive conduct and made false and misleading statements in the manner in which they made announcements to the market on the ASX, including in relation to 16 client contracts; that GetSwift failed to meet its continuous disclosure obligations in relation to information about certain client contracts and client contracts generally; and that Mr Macdonald was involved in the contraventions. The relief sought includes declarations of contravention against GetSwift and Mr Macdonald as well as compensation for loss suffered.

9 On 22 February 2019, ASIC commenced proceedings (VID 146 of 2019) against GetSwift and two of its directors, Mr Macdonald and Bane Hunter. Those proceedings were later amended to include Brett Eagle who was a director and corporate counsel at the relevant time (**ASIC proceeding**). ASIC's claims relate to a series of announcements that GetSwift submitted to the ASX between February and December 2017 concerning agreements it had entered into with clients for the use of GetSwift's software-as-a-service platform in the periods leading up to the first capital raising and the second capital raising. ASIC claims that there were 20 contraventions of s 674(2) the *Corporations Act* and breaches of s 1041H of the *Corporations Act* and s 12DA of the *ASIC Act* and the maximum penalty for each of those alleged contraventions is \$1 million. ASIC seeks:



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- (a) Declarations of contraventions against GetSwift and each of Messrs Macdonald, Hunter and Eagle;
  - (b) Pecuniary penalties payable to the Commonwealth against GetSwift in relation to the alleged continuous disclosure contraventions and against Messrs Hunter and Macdonald in relation to the alleged continuous disclosure contraventions and breach of directors' duties "in such amount as the Court considers appropriate in respect of each of the declared contraventions";
  - (c) Orders disqualifying each of Messrs Macdonald, Hunter and Eagle from managing corporations for a period of time to be determined;
  - (d) Its costs.

10 Issues of liability in the ASIC proceeding were heard between 15 June 2020 and 30 September 2020 and judgment has been reserved.

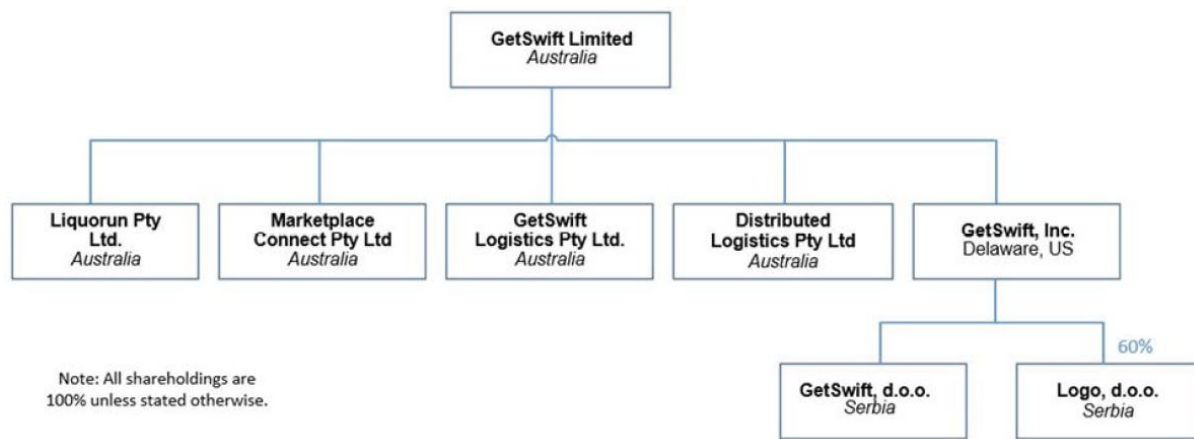
11 The Judge who is currently listed to preside at the trial in the Webb proceeding is the same judge who presided in the trial in the ASIC proceeding. The respondents to the Webb proceeding filed an application seeking that that matter be reallocated to a different Judge. That application was dismissed on 9 September 2020 and the parties were given leave to appeal the judgment: *Webb v GetSwift Limited (No 6)* [2020] FCA 1292. The respondents lodged an appeal on 23 September 2020 and are currently waiting for the Court to advise a hearing date for the appeal. Trial dates for hearing the substantive application in the Webb proceeding have been vacated. It is not expected that the trial judge in the ASIC proceeding will deliver judgment on liability in the ASIC proceeding until after the appeal in the Webb proceeding has been heard and judgment delivered and not before February 2021. If ASIC is successful on the issue of liability in the ASIC proceeding, it will then be necessary for a further hearing to determine appropriate penalties.

## PROPOSED SCHEME AND FIRST COURT HEARING

12 On 4 September 2020, GetSwift entered into a Scheme Implementation Deed (**SID**) with GetSwift Technologies Limited (**Holdco**) in relation to a proposed **scheme** of arrangement between GetSwift and its shareholders, the intended purpose of which is to re-domicile GetSwift to Canada. Holdco was incorporated in British Columbia, Canada, on 19 May 2020 for the purpose of implementing the scheme and it has not otherwise conducted business.

On the same day, GetSwift announced its intention to establish an off-market **unmarketable parcel share buy-back facility**. An unmarketable parcel would comprise up to 946 GetSwift Shares. The maximum number of GetSwift Shares in an unmarketable parcel was calculated on the basis that each GetSwift Share had a buy-back price of \$0.52815 per GetSwift Share as at 7 pm (Sydney time) on 3 September 2020 such that the aggregate value of the parcel was \$500. A holder of an unmarketable parcel could sell its shares to GetSwift without incurring brokerage or handling costs until 5 pm on 21 October 2020.

GetSwift's current group structure is as follows:



A scheme of the kind proposed is sometimes called a “top hat” scheme. If the scheme is implemented, all of the issued GetSwift Shares will be transferred to Holdco and GetSwift shareholders (other than ineligible foreign shareholders) would be issued one Holdco share for every seven GetSwift shares. GetSwift would be delisted from the ASX and Holdco shares would be listed on the NEO Exchange Inc in Canada (NEO). Holdco shares which would otherwise have been issued to ineligible foreign shareholders as scheme consideration will be sold on NEO and the net proceeds distributed to those former shareholders in proportion to their holding. A shareholder on the record date of the scheme will be an “**ineligible foreign shareholder**” if their registered address is in a jurisdiction other than Australia (including its external territories), Canada, New Zealand, the USA and any other jurisdiction that Holdco determines that it is lawful and not unduly onerous or impracticable to issue Holdco shares to a GetSwift Shareholder with a registered address in that jurisdiction. The evidence before the Court indicates that approximately 0.15% of GetSwift Shares were held by ineligible foreign shareholders.

By an application lodged with the Court on 21 September 2020, GetSwift sought orders under ss 411(1) and 1319 of the *Corporations Act* in relation to convening a meeting of GetSwift shareholders (**scheme meeting**) for the purpose of considering a resolution to approve the proposed scheme (with or without modifications). It also sought orders under ss 411(4)(b), 411(12) and (if necessary) 411(6) of the *Corporations Act*. The first court hearing was held on 8 and 9 October 2020.

Exhibit B in the proceedings is a **scheme booklet** which discloses the following information about the proposed scheme, GetSwift and Holdco.

As at 9 October 2020, GetSwift's capital structure comprised 215,629,796 GetSwift Shares and 15,142,167 unlisted options over GetSwift Shares (**Options**): section 5.8 of the scheme booklet. GetSwift has entered into binding agreements with all holders of GetSwift options to amend the terms of their issue to effectively place all holders of Options in the same position with respect to rights to shares in Holdco as were previously enjoyed in respect of shares in GetSwift. GetSwift obtained a waiver of ASX Listing Rule 6.23.4 to permit this treatment of the options without obtaining shareholder approval: section 10.6 of the scheme booklet.

GetSwift and Holdco have the same board: sections 5.4 and 6.2 of the scheme booklet. The directors' interests in GetSwift Shares and Options were as follows as at 9 October 2020:

Name	Role	Relevant interests in GetSwift Shares	Options
Stanley Pierre-Louis	Independent Chairman and non-executive director		687,500
Bane Hunter	Chief Executive Officer and executive director	21,531,627	5,500,000
Joel Macdonald	President, Managing Director and executive director	51,567,357	1,000,000
Marc Naidoo	Independent non-executive director		300,000
Carl Mogridge	Independent non-executive director	150,000	200,000

As at 1 October 2020, Mr Macdonald was a substantial holder in respect of 23.91% of the issued capital and Mr Hunter was a substantial holder in respect of 9.99% of the issued capital: section 5.9 of the scheme booklet.

The directors recommended that GetSwift shareholders vote in favour of the proposed scheme, as they intended to do in the absence of a superior proposal. In their view, the reasons to vote in favour of the proposed scheme outweighed the reasons to vote against it: Chairman's letter and sections 3.1 and 3.2 of the scheme booklet.

22 The **independent expert** (Shinewing Australia Corporate Finance Pty Ltd) found that, on balance, implementation of the scheme was in the best interests of GetSwift shareholders in the absence of a superior proposal: Annexure B to the scheme booklet. The independent expert took these matters into account (among others set out in Annexure B):

- (a) GetSwift is an “early stage technology company” and it may need to raise additional capital to fund research and development activities and its global expansion plans.
- (b) The Canadian and neighbouring US technology industries are among the largest in the world.
- (c) GetSwift’s operations have been predominantly US-centric in the last few years, with corporate and operational headquarters located in New York City, New York, and GetSwift’s main technology centre located in Denver, Colorado in addition to a technology centre in Belgrade, Serbia.
- (d) Approximately 54.1% of GetSwift’s new customer acquisitions in the financial year ending 30 June 2020 relate to the North American market.
- (e) GetSwift’s most recent capital raising (in which GetSwift entered into a put option agreement (**LDA Agreement**) with LDA Capital Limited (**LDA**) and LDA Capital, LLC (**LDA LLC**)) was with a US-based alternative investment group.
- (f) Following implementation of the scheme, key business stakeholders who are more familiar with local US and Canadian laws may be more at ease dealing with a Canadian-based head company. However, GetSwift’s US business is already primarily being undertaken through its US subsidiary, therefore any additional benefit may be limited.
- (g) There may be operational efficiencies in the longer term from North American based directors, management and employees having access to lawyers, accountants and taxation advisers in the same time zone as its primary business operations.

23 The Chairman’s letter and section 3.2 of the scheme booklet discloses that the directors identified the possible reasons to vote against the scheme as being, in summary:

- (a) A GetSwift shareholder might wish to maintain an interest in an ASX listed company with GetSwift’s specific characteristics so as to maintain the existing investment profile.
- (b) A GetSwift shareholder might believe that a superior proposal will emerge in the future.

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- (c) Holdco shares will confer different rights and protections to those available with respect to GetSwift shares and some of those differences may be considered disadvantageous.
  - (d) There are one-off transaction costs associated with the proposed scheme.
  - (e) GetSwift shareholders may prefer liquidity on the ASX as no active market may develop for Holdco shares.

24

Section 8 of the scheme booklet disclosed general risks, risks relating to the transaction and risks related to GetSwift's business. In the course of the first court hearing, section 8.3(e) was amended to include the following disclosure:

... If the ASIC Proceedings result in adverse findings or orders or settlement outcomes against either Mr Hunter or Mr Macdonald, it is possible that the consequential effects could similarly have a material adverse impact on Mr Hunter's or Mr Macdonald's (as the case may be) ability to continue to serve GetSwift and Holdco in their current capacities.

NEO has indicated that, if the disqualification orders sought by ASIC against Mr Hunter and Mr Macdonald in the ASIC litigation are secured, that may present a concern for NEO regarding their suitability to continue as directors or officers of Holdco. However, NEO has advised the Company that at present, it is satisfied that the ASIC litigation is adequately disclosed in Holdco's draft preliminary prospectus (provided to NEO in connection with Holdco's listing application) and does not in and of itself present a suitability concern. NEO has further advised that Mr Hunter and Mr Macdonald will be accepted as directors and officers of Holdco, subject to clearing any customary international background checks, but not subject to any other condition or other requirement.

The BCSC will be the principal regulatory body responsible for Holdco's status as a reporting issuer in Canada. It is expected that the BCSC will consider the results of the ASIC Proceedings when the outcome is known. Under the Securities Act (British Columbia), the BCSC has broad powers to make orders in the public interest. If there is an adverse finding in the ASIC Proceedings, the BCSC has the power to require a hearing under s 161 of the Securities Act (British Columbia) and the power to make orders including requiring Mr Hunter and Mr Macdonald to cease being directors or officers or otherwise involved in the management of Holdco.

Mr Hunter and Mr Macdonald each possess substantial skills and experience in relation to GetSwift's business, which may be difficult to replace quickly and in such circumstances could have a material adverse effect on GetSwift's business plan and strategy. Holdco will undertake to inform the BCSC of any material changes or updates with respect to the civil proceedings that occur from time to time following the receipt for a prospectus of Holdco from the BCSC. In addition, Mr Hunter and Mr Macdonald have each proposed to undertake to complete a course offered by Simon Fraser University and supported by the BCSC with respect to the financing, governance, and compliance responsibilities of public companies within six months of the receipt for a prospectus of Holdco. Mr Hunter and Mr Macdonald completed such course entitled *Public Companies Financing, Governance and Compliance* on 25 September 2020. Holdco will ensure that the prospectus of Holdco will include, in the risk factors and in the legal proceedings section, disclosure of Holdco's proposed undertaking to keep the BCSC apprised of updates in the civil proceedings and the proposed undertaking by Mr Hunter and Mr Macdonald to complete the governance

course referred to above. Refer to Section 10.7 for further information on material disputes and litigation to which the GetSwift Group, Mr Hunter and Mr Macdonald are currently a party.

25 The Court notes that by an affidavit sworn on 9 October 2020, Mark Bernard Joseph Crean, a partner at Jones Day, solicitors to GetSwift in these proceedings, advised the Court at [12] that Messrs Hunter and Macdonald had informed him that if ASIC secures disqualification orders against them in the ASIC proceeding and the British Columbia Securities Commission (that is, the **BCSC**) also made orders disqualifying them from being involved in the management of Holdco, to the extent that their continued involvement would lead NEO to de-list Holdco, both Mr Hunter and Mr Macdonald would agree to comply with any such orders in respect of Holdco so as to maintain the NEO listing.

26 Section 4.4 of the scheme booklet disclosed that the proposed scheme is subject to the following conditions (among others) which are also conditions of the SID which are disclosed at section 10.4:

- (a) Obtaining shareholder approval to the scheme by the requisite majorities at the scheme meeting;
- (b) Obtaining Court approval under s 411(4)(b) of the *Corporations Act*;
- (c) Obtaining necessary regulatory approvals, including from ASIC, the ASX and pursuant to the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FIRB Act**) (the last of which will be referred to as **FIRB approval**);
- (d) NEO approving the listing of Holdco shares on NEO, subject only to the scheme becoming effective and the satisfaction of customary listing conditions that are typical to a listing application on NEO;
- (e) No restraining order, injunction or other order being made that would prevent or delay the scheme made by a court of competent jurisdiction or regulatory authority being in effect as at 8 am on the day of the second court hearing; and
- (f) The condition with respect to FIRB approval reflects the condition in cl 3.1(a)(i) of the SID that before 8 am on the day the Court makes an order approving the scheme:

**FIRB approval:** either:

- (A) the Treasurer (or the Treasurer's delegate) has provided no objection notification to the Scheme either without conditions or with conditions accepted by Holdco (acting reasonably); or
- (B) following notice of the proposed Scheme having been given under the FIRB Act, the Treasurer has ceased to be empowered to make any

order under Part 3 of the FIRB Act because the applicable time limit on making orders and decisions under the FIRB Act has expired;

27 Section 5.6 of the scheme booklet discloses GetSwift's historical financial information for the financial years ending on 30 June 2018, 2019 and 2020. It discloses (among other things) the following:

<b>Historical consolidated statement of profit and loss</b>	<b>Year ended 30 June 2020 \$'000</b>	<b>Year ended 30 June 2019 \$'000</b>	<b>Year ended 30 June 2018 \$'000</b>
Revenue and other income	26,589	3,820	1,477
Other gains	1,790	5,184	5,360
Operating loss/ loss before income tax	(31,166)	(19,494)	(12,123)
<b>Total comprehensive loss for the period</b>	<b>(31,241)</b>	<b>(20,350)</b>	<b>(12,386)</b>

<b>Historical consolidated statement of financial position</b>	<b>Year ended 30 June 2020 \$'000</b>	<b>Year ended 30 June 2019 \$'000</b>	<b>Year ended 30 June 2018 \$'000</b>
Total current assets	54,914	70,428	97,721
Property, plant and equipment	1,917	176	61
Intangible assets	18,887	7,923	22
Deferred tax assets	47	-	-
Other assets	190	114	-
Total non-current assets	21,041	8,213	83
<b>Total assets</b>	<b>75,955</b>	<b>78,641</b>	<b>97,804</b>
Total current liabilities	22,713	4,599	4,965
Total non-current liabilities	2,850	11	9
<b>Total liabilities</b>	<b>25,563</b>	<b>4,610</b>	<b>4974</b>
<b>Net assets</b>	<b>50,392</b>	<b>74,031</b>	<b>92,830</b>
<b>EQUITY</b>			
Share capital	103,840	103,242	103,242
Other reserves	6,241	5,054	4,359
Accumulated losses	(65,892)	(34,265)	(14,771)
Non-controlling interests	6,204	-	-
<b>Total equity</b>	<b>50,392</b>	<b>74,031</b>	<b>92,830</b>

<b>Historical consolidated statement of cash flow</b>	<b>Year ended 30 June 2020 \$'000</b>	<b>Year ended 30 June 2019 \$'000</b>	<b>Year ended 30 June 2018 \$'000</b>
Net cash outflow from operating activities	(26,790)	(26,812)	(9,166)
Net cash outflow from investing activities	(8,720)	59,428	(55,827)
Net cash inflow (outflow) from financing activities	(1,536)	-	-
Net (decrease) increase in cash and cash equivalents	(37,047)	32,616	17,722
Cash and cash equivalents at end of period	33,949	68,809	35,845

28 Section 5.7 of the scheme booklet discloses that:

To the knowledge of the GetSwift Directors at the last practicable date before this Scheme Booklet, other than as disclosed in this Scheme Booklet or as otherwise disclosed to ASX by GetSwift, the financial position of GetSwift has not materially changed since 30 June 2020.

29 Section 6.3 of the scheme booklet discloses the proposed governance structure of Holdco.

30 Section 6.5 of the scheme booklet discloses Holdco's intentions for GetSwift if the scheme is implemented including with respect to removal of GetSwift from the ASX and its conversion to a proprietary company, Holdco's listing on other exchanges, board composition as set out above, location of the head office in New York, retention of current employees and maintenance of the current dividend policy (that is, the intention to retain future earnings and other cash resources for development and growth of the business). Further:

- (a) Section 6.5(f) says the following about Holdco's intentions with respect to the business, operation and assets of GetSwift Group:

Holdco currently intends that the business of the GetSwift Group will be conducted in the same manner as at the date of this Scheme Booklet. Holdco does not intend to make any material changes to the business of the GetSwift Group as a result of or immediately following implementation of the Transaction.

Holdco intends to continue to operate the business of GetSwift under its current name.

Holdco may undertake a review of GetSwift and its business, operations and assets following implementation of the Transaction to determine how to best operate and further develop and grow the business and operations of the company. Decisions regarding future business operations will be made following completion of that review and in light of circumstances at the relevant time. Additionally, future economic, market and business conditions may cause Holdco to make changes it considers necessary and in the interests of its shareholders.

- (b) Section 6.5(j), discloses that:

Other than set out in this Section 6.5, it is Holdco's intention to the extent possible:

- to continue the business of GetSwift;
- not to make any major changes to the business of GetSwift nor to redeploy or transfer any of GetSwift's assets, other than the movement of cash amongst subsidiaries in the ordinary course of business for purposes such as working capital and projects; and
- to continue the employment of GetSwift's present employees.



31 Section 6.6 of the scheme booklet makes disclosures about the LDA Agreement. Pursuant to the LDA Agreement, GetSwift could, at any time during a commitment period of 36 months commencing on 11 March 2020 require LDA to subscribe for GetSwift Shares having a total issue price not exceeding US\$45 million, subject to GetSwift satisfying certain conditions in the LDA Agreement. The LDA Agreement therefore provides GetSwift with access to committed equity capital in the event GetSwift requires capital for use in its business (including for working capital purposes). Pursuant to the LDA Agreement, the scheme is a transaction that would require GetSwift, LDA, and LDA LLC to novate the LDA Agreement to add Holdco as a party in place of GetSwift and to update the conditions applicable to drawdowns to reflect the re-domiciliation of GetSwift to Canada and the listing of the Holdco shares on NEO. As of the date of the scheme booklet, the parties had not entered into the Amended LDA Agreement. GetSwift advised shareholders of its intention to novate the LDA Agreement.

32 The scheme booklet also makes disclosures with respect to the following issues:

- (a) The rights and liabilities attaching to Holdco shares: section 7.3;
- (b) A comparison of the key aspects of Australian and Canadian shareholder rights and corporate laws: section 7.4 and Annexure A;
- (c) Taxation implications of the implementation of the scheme: section 9;
- (d) Disputes and litigation, including in relation to the Webb proceeding and the ASIC proceeding: section 10.7; and
- (e) ASIC has granted relief relating to disclosure under paragraph 8302(d) of Part 3 of Sch 8 to the *Corporations Regulations 2001* (Cth) and ASIC waived compliance with Listing Rule 6.23.4 to permit the treatment of the Options as set out in section 10.6 of the scheme booklet: section 10.8.

33 Based on the evidence before the Court at the first court hearing:

- (a) The scheme booklet appeared to have been verified in the usual way; and
- (b) The scheme of arrangement in Annexure C of the scheme booklet and the deed poll in Annexure D of the scheme booklet provided for the usual protections against execution risk upon implementation of the scheme. On 1 October 2020, GetSwift and Holdco entered into a deed poll in common form in schemes of arrangement in Australia designed to protect GetSwift shareholders against risk in relation to receipt of scheme consideration in exchange for their GetSwift Shares. By a letter dated 6 October 2020,

Dentons Canada LLP, Canadian counsel to HoldCo, expressed the opinion that Holdco is a corporation in good standing in British Columbia, it has the necessary power and authority to enter and perform its obligations under the deed poll, that according to the laws of British Columbia and Canada, the deed poll was duly authorised, executed and delivered and constitutes a legal, valid and binding obligation of Holdco, no consents or approvals of any governmental body or authority was required for its execution and delivery and that does not violate its articles or the notice of articles of Holdco.

34 Senior counsel for ASIC, Mr Halley SC, and counsel for Mr Webb, Mr Davies, appeared at the first court hearing on 8 and 9 October 2020. Mr Davies advised that Mr Webb did not seek to oppose orders being made convening a scheme meeting but that as a shareholder and contingent creditor of GetSwift arising out of the Webb proceeding, he would reserve his position on whether orders should be made under s 411(4)(b) of the *Corporations Act*. Mr Halley initially sought an adjournment of the first court hearing to allow ASIC further time to consider the scheme, but ultimately did not oppose orders being made convening the scheme meeting having regard to additional disclosures made in the scheme booklet.

35 Having regard to:

- (a) The evidence before the Court at the first court hearing;
- (b) The principles I discussed in *Capilano Honey Limited, in the matter of Capilano Honey Limited* [2018] FCA 1568; (2018) 131 ACSR 9 at [32]-[34] in relation to matters it is appropriate to take into account at the first court hearing; and
- (c) The fact that similar re-domiciliation schemes have previously been approved by this Court in cases including *News Corporation Ltd* [2004] FCA 1480; (2004) 51 ACSR 394; *Peplin Limited* [2007] FCA 1387; [2007] FCA 1558; *Heartware Limited, in the matter of Heartware Limited* [2008] FCA 1997; *Re Sylvania Resources Ltd* [2009] FCA 955; (2009) 179 FCR 306; *Unilife Medical Solutions Limited, in the matter of Unilife Medical Solutions Limited (No 2)* [2010] FCA 12; *Marengo Mining Ltd, in the matter of Marengo Mining Ltd* [2012] FCA 1220; *Atlassian Corporation Pty Limited, in the matter of Atlassian Corporation Pty Limited* [2013] FCA 1451; [2014] FCA 60; *Sundance Energy Australia Limited, in the matter of Sundance Energy Australia Limited* [2019] FCA 1944,

on 9 October 2020, the Court made orders convening the scheme meeting and addressing other related matters.

36 The orders made on 9 October 2020 included the following:

- For personal use only
- (a) That a scheme meeting to consider a scheme substantially in the form set out in Annexure C to the scheme booklet be convened at 10 am on 9 November 2020 (AEDT) to be held as a wholly virtual meeting by means of audio visual technology, with no physical assembly and otherwise in accordance with orders made on 24 September 2020. In relation to the orders made by Yates J on 24 September 2020, see *GetSwift Limited, in the matter of GetSwift Limited* [2020] FCA 1382;
  - (b) Authorising despatch of the scheme booklet and related materials in the approved form on or before 9 October 2020 by electronic means or by post (to shareholders with registered addresses in Australia) and by airmail or international courier service (to shareholders with registered addresses outside Australia);
  - (c) Requiring despatch of the scheme booklet and related materials on or before 14 October 2020 in relation to shareholders in respect of which the delivery system log indicates that email delivery was unsuccessful;
  - (d) Requiring provision of the scheme booklet and related materials to new GetSwift members who appear on the register after 9 October 2020 on either of 19 or 30 October 2020;
  - (e) Appointing Stanley Pierre-Louis or failing him Marc David Naidoo as chair of the scheme meeting;
  - (f) Requiring voting on the resolution to approve the scheme be conducted by poll; and
  - (g) Requiring publication in *The Australian* newspaper on or before 4 November 2020 of a notice of the second court hearing to be held on Thursday, 12 November 2020 at 10.15 am.

#### EVENTS BETWEEN THE FIRST AND SECOND COURT HEARINGS

37 On 21 October 2020, the Court made orders under s 1319 of the *Corporations Act* authorising communications with GetSwift Shareholders in accordance with a script marked as Exhibit D in the proceedings.

38 On 30 October 2020, GetSwift advised the ASX that it had acquired a total of 275,377 GetSwift Shares under the unmarketable parcel share buy-back facility and that it had 1,642 shareholders. Accordingly, GetSwift's issued capital at the time of the scheme meeting was 215,354,419 GetSwift Shares.

GetSwift also filed an **Appendix 4C** with the ASX on 30 October 2020. In it, GetSwift reported that its cash and cash equivalents at the end of the quarter ending 30 September 2020 had reduced to \$16.2 million compared with a figure of \$34.0 million at 30 June 2020. GetSwift also reported (at 8.6.1 of Appendix 4C) that:

... the company does not expect the current level of net operating cash outflows to continue. This higher level of spend is not expected to continue. In addition, the customer receipts related to the spend during the current quarter are expected to be received in the first quarter of 2021. As noted in the Scheme Booklet dated 9 October 2020 the company believes that it is reasonably foreseeable that the GetSwift group will continue as a going concern having regard to a number of factors including current working capital, receivables and access to the LDA Facility referred to in item 7 above. The company anticipates that its ability to continue as a going concern will likely be dependent on its ability to obtain additional equity, debt or other financing as and when required until it is able to achieve profitable operations. The company's directors currently have a reasonable expectation that the company will be able to obtain sufficient funds from existing shareholders or external parties in order to continue as a going concern.

The scheme meeting was held on 9 November 2020. The votes cast in relation to the resolution to approve the scheme were as follows:

	<b>For</b>	<b>Against</b>	<b>Abstain</b>	<b>Total votes</b>
<b>Votes</b>	163,989,097	697,281	1,000	164,686,378
<b>Holders</b>	82	42	1	124
<b>Percentage of votes</b>	99.58%	0.42%	n/a	100%
<b>Percentage of holders</b>	66.13%	33.87%	n/a	100%

Mr Webb filed an interlocutory application on 11 November 2020 seeking leave to appear at the second court hearing under r 2.13 of the *Federal Court (Corporation) Rules 2000* (Cth) and on the basis there be no order as to costs. Mr Webb also filed written submissions and an affidavit affirmed by Timothy Michael Luke Finney on 10 November 2020. Mr Finney is a director of Phi Finney McDonald (**PFM**), Mr Webb's lawyers in the Webb proceeding.

ASIC filed a notice of intervention on 11 November 2020, written submissions and the affidavit of Anthony Vardy (a lawyer employed by ASIC) affirmed on 6 November 2020.

## SECOND COURT HEARING

The Court was satisfied, based on the evidence before the Court on the first day of the second court hearing on 12 November 2020, that:

- (a) The scheme booklet and the orders made on 9 October 2020 were lodged with ASIC on 9 October 2020 and the scheme booklet was registered on that day.

- For personal use only
- (b) The orders made on 9 October 2020 with respect to despatch of the scheme booklet and proxy forms, the conduct of the scheme meeting on 9 November 2020 and publication of a notice of the second court hearing in *The Australian* have been complied with in all material respects.
  - (c) Save as set out under the heading “Conditions which were not satisfied or waived as at 12 November 2020”, all necessary regulatory approvals had been obtained.
  - (d) GetSwift’s shareholders approved the scheme by the majorities required under s 411(a)(ii) of the *Corporations Act*.
  - (e) The procedural and other requirements in the *Corporations Act*, *Corporations Regulations 2001* (Cth) and the *Federal Court (Corporations) Rules 2000* (Cth) have been complied with.
  - (f) The fairness and reasonableness of the scheme in the interests of shareholders is supported by the report of the independent expert. The Court is satisfied that an intelligent and honest shareholder, properly informed and acting alone, could approve of the scheme. That view is supported by the majorities by which the scheme was approved: see *Amcors Limited, in the matter of Amcor Limited (No 2)* [2019] FCA 842 (*Re Amcor Limited (No 2)*) at [10] (Beach J). There is no suggestion of oppression of any minority shareholders.
  - (g) ASIC did not provide the “usual letter” pursuant to s 411(17)(b) of the *Corporations Act* indicating that it had no objection to the scheme of arrangement. In such a circumstance, under s 411(17)(a), the Court must not approve a scheme unless it is satisfied that the scheme has not been proposed for the purpose of enabling any person to avoid the operation of any of the provisions of Chapter 6. The Court is satisfied that the scheme was not proposed for that purpose.

44 The Court notes that, although votes were cast at the scheme meeting in respect of over 76% of all GetSwift Shares on issue at the time of the scheme meeting, only 7.7% of shareholders voted. If GetSwift Shares in which Messrs Macdonald and Hunter have a relevant interest are disregarded, there would be no material effect on the achievement of the margins by which statutory majorities were achieved. While the turn-out at the scheme meeting by number of shareholders was low, the Court is satisfied that all necessary measures were taken to draw the scheme booklet and notice of the scheme meeting to the attention of GetSwift shareholders and there is nothing in the evidence that suggests that there was any error in the printing or despatch

of the scheme booklet which might have caused voter turnout to be low. There is no reason to infer that there was a protest vote and such apathy should not be presumed to be antagonism: see *Re Matine Limited* (1998) 28 ACSR 268 at 295 (Santow J).

As at 12 November 2020, there were two outstanding issues.

***Conditions which were not satisfied or waived as at 12 November 2020***

First, not all conditions precedent to the scheme were satisfied or waived by 8 am on 12 November 2020. By an email sent to the Court at 9.39 am on that day, GetSwift proposed orders approving the scheme subject to conditions that:

- (a) on or before 2 December 2020 (AEDT):
  - (i) the Treasurer (or the Treasurer's delegate) has provided no objection notification to the Scheme either without conditions or with conditions accepted by GetSwift Technologies Limited (Holdco) (acting reasonably); or
  - (ii) following notice of the proposed Scheme having been given under the Foreign Acquisitions and Takeovers Act 1975 (Cth) (**FIRB Act**), the Treasurer has ceased to be empowered to make any order under Part 3 of the FIRB Act because the applicable time limit on making orders and decisions under the FIRB Act has expired; and
- (b) issuance by the British Columbia Securities Commission of a receipt for a final non-offering prospectus of Holdco on or before 8 December 2020 (AEDT).

By his affidavit sworn on 11 November 2020, Mr Crean gave evidence as follows:

- (a) The reason why GetSwift proposes that the condition must be satisfied by 2 December 2020 is so that all of the events which need to occur by 31 December 2020 to enable Holdco shares to be listed on NEO can occur. If they do not, NEO's conditional approval to listing will cease to have effect.
- (b) He had a conversation with officers of the Treasury in relation to FIRB approval. The Treasury officer indicated that there was no assurance that the Treasurer would make a decision by 11 December 2020. He confirmed that a relevant issue was the position of contingent creditors and that it would assist the Treasurer if the Court made its position on that issue clear.

The Court notes that the issues relevant to the Court's decision whether or not to approve a scheme do not turn on the same national interest considerations which are relevant to the Treasurer's decision whether or not to grant FIRB approval.

49 At the time of the second court hearing, the Court would usually know whether FIRB approval has been given and whether the approval is subject to conditions which the bidder considers acceptable but which have not previously been advised to shareholders of the scheme company. In those cases, the Court is in a position to consider whether the conditions accepted by the bidder are of a kind which would make it inappropriate to approve the scheme unless shareholders are given the opportunity to vote in relation to the scheme being effected subject to those conditions. That is particularly so where, as here, the target company shareholders will be shareholders of the bidder upon implementation of the scheme. Accordingly, unless the Court was not minded to approve the scheme for other reasons, it would be appropriate to adjourn the hearing pending determination of the terms of any FIRB approval. The Court indicated that it would be prepared to disclose whether it would be minded to grant approval under s 411(4)(b) (to which the issue concerning the position of contingent creditors was relevant) subject to FIRB approval being given and no other issue arising which might affect that position before any final order was made.

### *Contingent creditors*

50 Third, senior counsel for Mr Webb and ASIC appeared to oppose the scheme on the basis that the re-domiciliation of GetSwift to Canada would materially prejudice their interests as contingent creditors. No other creditors or contingent creditors gave notice of their intention to attend the second court hearing to oppose the scheme and none did.

51 GetSwift did not oppose Mr Webb's interlocutory application for leave to appear and leave was granted. Mr Finney's affidavit was read. ASIC appeared on behalf of the Commonwealth and on its own behalf as contingent creditors in respect of fines and ASIC's costs respectively which GetSwift may be required to pay in the ASIC proceeding and investigation costs which ASIC may be entitled to recover if it is successful in the ASIC proceeding. ASIC also appeared to make submissions concerning matters that go to the public interest regarding regulatory oversight of Australian listed public companies. Mr Vardy's affidavit was read.

### **WOULD PREJUDICE TO THE INTERESTS OF CONTINGENT CREDITORS BE A REASON TO REFUSE TO MAKE ORDERS UNDER S 411(4)?**

52 The essence of ASIC's concerns about the implementation of the scheme as explained in its written and oral submissions at the second court hearing on 12 November 2020 were also recorded in a letter sent by ASIC's solicitors, Johnson Winter and Slattery (JWS) to Jones Day dated 19 October 2020 as follows:

ASIC's concerns primarily relate to the proposed delisting of GetSwift and its conversion into a proprietary company limited by shares and the risk that GetSwift's assets (including cash) may be or already have been moved outside of Australia, and that, as a result of the Scheme, GetSwift may be unable or otherwise have little incentive as a proprietary company, rather than a listed entity, to take all necessary steps to ensure that it is able to and does in fact meet any liability to pay, inter alia:

- 1 any pecuniary penalties imposed against it by the Court in the ASIC Proceeding;
- 2 ASIC's legal and investigation costs, if ASIC is successful in the ASIC Proceeding; and
- 3 any judgment, cost order or settlement sum in the Webb Proceeding.

Bearing in mind that the claims made in the ASIC Proceeding and the Webb Proceeding principally arise out of contraventions of the continuous disclosure obligations by GetSwift as a listed entity in the periods leading up to significant capital raisings, ASIC is of the view that the Scheme, does not adequately protect the interests of GetSwift's contingent creditors, as there is no indication that GetSwift as a proprietary company, or Holdco as the new listed entity for the GetSwift Group will make available, or otherwise retain within Australia, sufficient assets to meet any potential liabilities arising in connection with the ASIC Proceeding and Webb Proceeding. These concerns are highlighted by the statements made in section 6.5(j) of the explanatory statement in relation to the Scheme, published on 12 October 2020, which provides that:

Other than set out in this Section 6.5, it is Holdco's intention to the extent possible:

...

- not to make any major changes to the business of GetSwift nor to redeploy or transfer any of GetSwift's assets, other than the movement of cash amongst subsidiaries in the ordinary course of business for the purposes such as working capital and projects: and

[our emphasis]

This appears to suggest that the directors of Holdco may transfer any assets at any time in the ordinary course of business.

ASIC is also concerned that the novation of the LDA Agreement from GetSwift to Holdco may have serious ramifications with regard to the solvency of GetSwift. In its most recent annual report, one of the four factors which the directors of GetSwift relied on in determining that the group will continue as a going concern was that "the group has access to the LDA Facility (as per note 5(d)) providing funds up to \$45 million, subject to the terms of the agreement". If GetSwift no longer has access to the funds under the LDA Agreement, it is not clear whether GetSwift would remain as a going concern and have access to sufficient funds to meet any potential liabilities arising in connection with the ASIC Proceeding and Webb Proceeding.

53 Jones Day wrote to ASIC on 29 October 2020 stating that GetSwift understood that contingent creditors were seeking comfort that they would not be worse off as a result of the scheme, but equally GetSwift should not be in a worse position vis-a-vis its contingent creditors or its ability to operate and fund its businesses in the ordinary course. To that end, Jones Day indicated that



Holdco was prepared to give an undertaking to the effect of the first Holdco undertaking set out at [58] below.

On Mr Webb's behalf, PFM wrote to Jones Day on 3 November 2020 and cited well-recognised authorities (on which ASIC and Mr Webb relied in their written and oral submissions) as follows:

As was made clear in *Re Centro Properties Limited* [2011] NSWSC 1465; 6 BFRA 543; 86 ACSR 584; (at [32]), in deciding whether to grant approval to a scheme, the Court "will properly take into account not only the direct effects of the schemes upon the persons who will be bound by them but also consequential effects upon other persons having an interest in the broader context in which the schemes will operate". This includes the interests of contingent creditors with claims against the company: *Re CSR Ltd* [2010] FCAFC 34; 183 FCR 358; 265 ALR 703. In exercising its discretion, the Court should be satisfied that there is no evidence that any third parties will be disproportionately adversely affected by the operation of the Scheme: *Amtcor Limited, in the matter of Amtcor Limited (No 2)* [2019] FCA 842 at [8].

PFM went on to express the same concerns as ASIC has in its submissions to the Court:

On analysis, the Scheme raises concerns for contingent creditors of GetSwift, such as the Applicant and group members in the Webb Proceeding. In particular, the Applicant has concerns about GetSwift's solvency post-implementation of the Scheme and its capacity to meet any judgment debt in favour of the Applicant and group members. The concerns are principally based on the following 3 matters that flow from approval of the Scheme (addressed in further detail below):

- a) The novation of the LDA Facility, replacing GetSwift with Holdco as the beneficiary of the facility (Scheme Booklet, section 6.6), in circumstances where the LDA Facility was identified in the annual statement for FYE2020 as one of four factors underpinning the director's view that GetSwift would continue as a going concern (notwithstanding that GetSwift reported an operating loss of just over \$31 million for the 2020 financial year).
- b) Any new capital raisings post implementation of the Scheme would accrue to the benefit of Holdco rather than GetSwift, in circumstances where GetSwift has approximately \$16 million remaining in cash, a cash burn rate of approximately \$5 million per month and Holdco has refused to indemnify GetSwift in respect of any adverse judgment debt arising from the Webb Proceedings.
- c) The review of the operations of GetSwift post implementation of the Scheme foreshadowed in the Scheme Booklet is opaque, and framed by reference to a consideration of "the interests of shareholders" (Scheme Booklet, section 6.5(f)), which will likely stand in direct opposition to the interests of the Applicant and group members (as creditors) if successful in the Webb Proceeding.

Consistently with Mr Webb's written submissions to the Court, PFM went on to say:

Holdco has declined to provide any indemnity to GetSwift in respect of any adverse judgment against GetSwift in the Webb Proceedings, and refuses to submit to the jurisdiction of the Federal Court of Australia (as stated in your correspondence of

8 September 2020).

...

[Mr Webb] is concerned, particularly in light of Holdco's refusal to indemnify GetSwift for any liability arising out of the Webb Proceeding, that the practical effect of the Scheme being approved will be to accrue the benefit of future investments and revenues from the GetSwift Group to Holdco, while ringfencing liabilities within GetSwift, an entity of increasingly questionable solvency.

By a letter dated 4 November 2020 from Jones Day to Mr Finney at PFM, GetSwift made the same offer to Mr Webb as that made to ASIC. The letter noted that the passage quoted above incorrectly referred to correspondence with Jones Day rather than with Quinn Emanuel, GetSwift's lawyers in the Webb proceeding, which is also in evidence in these proceedings. In Quinn Emanuel's letter of 8 September 2020, Quinn Emanuel said to PFM:

GetSwift Limited will remain the owner of the shares in all of its operating companies (as is the present case). As such, there is no basis for Holdco to provide any indemnity to GetSwift Limited in respect of any potential adverse judgment against GetSwift Limited, nor is there any basis for Holdco to submit to the jurisdiction of the Federal Court of Australia.

### **First Holdco undertaking**

By the email sent to the Court at 9.39 am on 12 November 2020, GetSwift provided a draft undertaking to be provided to the Court by Holdco (**first Holdco undertaking**) as follows:

GetSwift Technologies Limited (**Holdco**) undertakes to the Court that:

Until such time that both the Webb proceeding (FCA proceeding no. NSD 580 of 2018) and the ASIC proceeding (FCA proceeding no. VID 146 of 2019) are resolved on a final basis (by way of judgment, settlement or discontinuance), including the final resolution of any relevant appeal proceedings resulting therefrom, any capital raised by Holdco by way of debt or the issue of equity will be used only for the purpose of funding the business activities of GetSwift Limited (**GetSwift**) and GetSwift's subsidiaries in the ordinary course in a manner consistent with how GetSwift would otherwise conduct its business activities, absent the scheme of arrangement the subject of this proceeding, and subject to:

1. Holdco retaining sufficient funds from any such fundraising to meet its ongoing overhead and operating costs; and
2. any applicable legal obligations.

For the avoidance of doubt, Holdco submits to the jurisdiction of the Federal Court of Australia for the purposes of any action to enforce this undertaking.

Neither ASIC nor Mr Webb was satisfied that the first HoldCo undertaking addressed their concerns.

## Second Holdco undertaking

60 In the afternoon of 12 November 2020, GetSwift tendered a different undertaking. There have been some slight amendments to that document since then and it is convenient to set out the undertaking taking into account those amendments (**second Holdco undertaking**):

GetSwift Technologies Limited (**Holdco**) undertakes to the Court that, until such time as any adverse judgment, including, but not limited to, any award of damages, compensation and/or penalties, in each of the Webb proceeding (FCA proceeding no. NSD 580 of 2018) and the ASIC proceeding (FCA proceeding no. VID 146 of 2019), and any order under s 91 of the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act) in respect of the ASIC proceedings, has been satisfied, including a final determination of damages in respect of all group member claims in the Webb proceeding, or each of the proceedings are otherwise resolved on a final basis (by way of settlement or discontinuance), including the final resolution of any relevant appeal proceedings resulting therefrom, Holdco will indemnify GetSwift Limited (**GetSwift**) in respect of any liability in respect of pecuniary penalties or other monetary liabilities that may be ordered against GetSwift in any adverse judgment in the Webb proceeding and in the ASIC proceeding, inclusive of any pre or post-judgment interest and costs orders, and in addition any order against GetSwift under s 91 of the ASIC Act in respect of the ASIC proceeding.

This undertaking will take effect immediately upon commencement of the Implementation Date (as that term is defined in the proposed scheme of arrangement between GetSwift and its members under section 411 of the *Corporations Act 2001* (Cth)).

For the avoidance of doubt, Holdco submits to the jurisdiction of the Federal Court of Australia for the purposes of any action to enforce this undertaking.

61 The second court hearing was stood over to the next day to allow consideration of the second Holdco undertaking.

62 On 13 November 2020, senior counsel for Mr Webb, Ms Collins SC, indicated that Mr Webb was satisfied with the second Holdco undertaking and that on that basis he withdrew his opposition to the Court making orders under s 411(4)(b).

63 Mr Halley advised that ASIC did not accept that an undertaking such as the second Holdco undertaking would address its concerns as a contingent creditor because:

- (a) Although he could not point to any provision of Canadian law which would prevent a judgment obtained in this Court based on the second Holdco undertaking from being enforced in Canada, Mr Halley submitted that there is a prospect that it may not be effective to indemnify ASIC because Holdco would have its own liabilities, its own assets, its own commitments and any ability of Holdco to meet any obligations of GetSwift in Australia would have to be subject to those considerations. The indemnity provided by the second Holdco undertaking would not be secured or rank ahead of other creditors or other

arrangements that Holdco had entered into. Holdco can operate in quite a different manner to how the GetSwift Group operates today. In effect, GetSwift can be allowed to “wither on the vine”, without any re-charging of capital through fundraising.

- (b) If, however, GetSwift remains the listed holding company (that is, the “economic entity”), all economic activity will be conducted under its umbrella. Enforcement issues remain the same as those that ASIC expected to face when it commenced the ASIC proceeding. While GetSwift is listed in Australia and is the primary economic entity, GetSwift’s directors have duties and its two principal shareholders (Messrs Macdonald and Bane) have an incentive to bring assets on-shore and conduct its operations so that GetSwift avoids winding up and maintains its value. ASIC does not have assurance that, if the scheme is implemented, the directors of GetSwift as a proprietary company subsidiary of Holdco would have the same incentive to bring assets on-shore or at least make them available to creditors here for the purposes of satisfying debts.
- (c) Where some \$100 million has been raised by an Australian listed company and a trial has been held in relation to ASIC’s claims that there were contraventions of the continuous disclosure provisions and the misleading and deceptive conduct provisions of the *Corporations Act* at relevant times, ASIC is concerned that “if this all goes offshore, that is, the economic entity”, then effectively the ability to recover any pecuniary penalties or costs orders is compromised and will not be able to be met satisfactorily under the second Holdco undertaking.
- (d) It might make a difference if Holdco provided an indemnity directly to ASIC, but that was a matter on which Mr Halley would require instructions.

64 Senior counsel for GetSwift, Mr Sheahan QC, made the following submissions orally and in written submissions.

65 First, although ASIC has an interest in opposing approval of the scheme on the basis that it is a contingent creditor, it has provided no evidence as to the value of its contingent claims. ASIC must be able to prove some material prejudice to it consequent on the operation of the proposed scheme.

66 Second, the fact that the shareholders might agree to exchange their GetSwift Shares for Holdco shares and future capital raisings might be conducted through Holdco and not GetSwift is something on which creditors of GetSwift have no say, since GetSwift Shares are not the property of GetSwift.

67 Third, contingent creditors have no “right” to the proceeds of any future capital raising. That is a threshold issue. The willingness of shareholders to dilute their interest in return for capital is not something in which creditors have a legitimate interest. In any event, the position of contingent creditors is likely to be improved by the scheme. As explained in the scheme booklet, one of the objectives of the scheme is to enable Holdco (and the GetSwift Group generally) to access greater capital in the North American market that is “more familiar with and more likely to invest in earlier to mid-stage technology companies, which may lead to a re-rating of the GetSwift Group and a stronger market capitalization and valuation over time”. The greater ability of Holdco to raise capital or debt, the greater the prospect that the GetSwift Group, including GetSwift, will remain a going concern. In turn, the ability of the GetSwift Group to continue to operate as a going concern provides a greater prospect that GetSwift will be in a position to satisfy any judgment that may in the future be awarded to ASIC or Mr Webb.

68 Fourth, statements in section 6.5 of the scheme booklet indicate that, should the scheme be approved, Holdco currently intends to continue to operate the business of GetSwift and does not intend to make any material changes to the business of GetSwift. Holdco has expressed its current intention not to redeploy or transfer any of GetSwift’s assets, other than the movement of cash among subsidiaries in the ordinary course of business for purposes such as working capital and projects.

69 Fifth, in response to a question put by the Court concerning why the impact of the loss of GetSwift’s capacity to raise capital directly was not relevant to whether contingent creditors would be materially prejudiced, having regard to the fact that GetSwift is an early to mid-stage technology company with a significant cash burn and it has never reported a profit in the five years of its existence so that its business model requires continued access to capital, Mr Sheahan made the following submissions:

- (a) All creditors deal with companies on the basis of the balance sheet as it exists; future prospects are not something ever assured to a creditor, much less a contingent creditor.
- (b) The only considerations of “public policy” or “commercial morality” which are relevant for the purpose of s 411(4) of the *Corporations Act* are those which find a basis in the text and purpose of that Act: see *CSR Limited, in the matter of CSR Limited* [2010] FCAFC 34; (2010) 183 FCR 358 (*Re CSR Limited*) at [51] (Keane CJ and Jacobson J). In *Re CSR Limited*, the relevant policy of the *Corporations Act* was to be found in s 256B, dealing with capital reductions. Relevantly, the policy reflected in s 256B was

that a reduction in capital may occur notwithstanding that it may involve an increase in the abstract risk to those with claims against the company: *Re CSR Limited* at [48] and [66]. The proposition that any increase in the level of risk of non-payment is unacceptable was specifically rejected in *Re CSR Limited* at [48]. GetSwift's proposed scheme does not involve a capital reduction and there is nothing in the *Corporations Act* which might inform the exercise of the discretion under s 411(4) in a case such as this. The authorities cited by ASIC for the proposition that a Court should not approve a scheme unless it is clearly satisfied that contingent creditors are not worse off by reason of the implementation of the scheme (being the same as those referred to at [55] above and *In the matter of Stork ICM Australia Pty Ltd* [2006] FCA 1849; (2007) 25 ACLC 208) are all cases which involved reductions of capital.

- (c) The only capacity of GetSwift affected by the scheme is the capacity to raise capital. That issue is addressed by the second Holdco undertaking. The prospect that ASIC would not be paid if GetSwift was not able to do so has not been shown to be a realistic one. There would be no benefit to Holdco, as the new parent company, in allowing GetSwift to fail to meet any judgment debt. To do so would likely lead to GetSwift entering into a form of insolvent administration; which would undoubtedly lead to the end of the operation of the GetSwift Group as a going concern and an insolvency practitioner taking control of GetSwift's assets, including GetSwift's shares in the GetSwift Group's operating subsidiaries.
- (d) There is a lack of commercial reality in what appears to be the basis of ASIC's submissions: that is, that Holdco would allow GetSwift to be wound up rather than ensure that it is able to pay a penalty of indeterminate amount and costs which may amount to a few hundred thousand dollars. GetSwift Group and its assets will continue to be owned by GetSwift and they continue to have value. The LDA Agreement, which will be vested in Holdco if the scheme goes ahead, will provide a source of equity capital which will enable Holdco to ensure that its only currently existing asset of any value, namely GetSwift, does not go into liquidation.
- (e) It would also be uncommercial for Holdco to allow GetSwift to become insolvent having regard to the terms of the novated LDA Agreement which GetSwift, Holdco, LDA and LDA LLC entered into on 4 November 2020. There has been no drawdown under the US\$45 million (said to be A\$63 million) facility to date. The commitment period ends on 7 March 2023. These features of the LDA Agreement are relevant:

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- (i) LDA's obligations to subscribe for Holdco shares is subject to the "Capital Call Conditions" set out in cl 3.3 which include that representations and warranties made in the LDA Agreement remain true at any time a capital call is made. One of the ongoing warranties is set out in cl 6.5(c) and that is to the effect that neither Holdco nor any of its subsidiaries "is insolvent, has committed an act of bankruptcy, proposed a compromise or arrangement ... taken any proceedings to have itself declared or, to its knowledge, had any proceeding taken to declare it bankrupt or wound-up ... [or] to have a receiver appointed of any part of its assets".
  - (ii) It is an event of default if any of the warranties is found to have been false and misleading in any material respect when made or becomes false or misleading or if any of the events mentioned in cl 6.5(c) occur: cl 14.2.
  - (iii) Clause 10.4 of the LDA Agreement requires Holdco to use reasonable endeavours to ensure that no business decision is taken that will or is likely to cause a material adverse effect on Holdco. A material adverse effect means any effect on the business, operations, financial condition or (in so far as they may reasonably be foreseen) prospects of Holdco and its subsidiaries that is material and adverse to Holdco and its subsidiaries taken as a whole.

So unless Holdco wishes to give up entirely the value of this enormously attractive source of at call capital worth US\$45 million, it has to put GetSwift in funds to enable it to satisfy a judgment debt in Australia, if it can. And the obvious source of its ability to do so is to call on the LDA Agreement to create the funds to permit such a judgment debt to be satisfied.

- (f) ASIC's desire that GetSwift should remain an Australian listed company, rather than be a subsidiary of a Canadian listed company, is "almost incoherent" in the absence of some suggestion that there is material difficulty in enforcing a judgment against Holdco in Canada and in the absence of any basis for concluding that GetSwift would not be able to satisfy any order that was made against it in the ASIC proceeding.

70 Sixth, Mr Sheahan responded to the Court's question of whether it is consistent with the due administration of justice for an Australian listed company which is the subject of significant regulatory litigation to seek to re-domicile out of Australia during a hearing on liability and before any penalty has been decided.

71 Mr Sheahan submitted that questions related to the due administration of justice come down to whether implementation of the scheme will stand in the way of enforcement of ASICs rights and full recovery of whatever its rights might be. The way concerns about the administration of justice are vindicated is by seeking an asset preservation order against defendants to constrain them from dealing with their assets if that is thought to be necessary. As matters stand, ASIC has no basis in evidence in these proceedings for suggesting to the Court that there is any plan for making the assets of the GetSwift Group not amenable to satisfy any order that is made in the ASIC proceeding. There is no asset preservation order being sought nor has ASIC suggested a basis for thinking there might be a ground for one.

72 In response, Mr Halley submitted that:

- (a) The existence of the LDA Agreement does not remove concerns as to whether GetSwift would be allowed to become insolvent in the face of the award of substantial penalties or judgments in the ASIC and Webb proceedings. While GetSwift's insolvency might mean that Holdco would lose the benefit of the LDA Agreement, it would commercially still be available to Holdco to develop businesses outside the GetSwift Group and raise capital from sources other than LDA.
- (b) ASICs concern and interest in this case is not simply limited to its legal costs incurred with respect to the civil penalty case; ASIC would not be intervening to save legal costs. This case raises a fundamental question of how it is that companies listed on the ASX can be held accountable for serious contraventions of continuous disclosure laws if, at the "pointy end", they can move offshore and then leave the creditors, contingent creditors, the Commonwealth, ASIC and others to have to rely on indemnities provided by offshore corporations in circumstances where, upon implementation of the scheme, that offshore corporation has no assets and no liabilities other than GetSwift Shares.
- (c) While Mr Sheahan sought to minimise the amount that might be recovered in the ASIC proceeding, there are 20 claimed contraventions for each of which the maximum penalty is \$1 million. Further, ASIC's costs are not in the order of a couple of hundred thousand dollars; Mr Finney has estimated that costs incurred in the Webb proceeding on a party/party basis is \$4 million to 30 September 2020 (being slightly less than 70% of total legal professional fees and disbursements incurred by Mr Webb).
- (d) GetSwift is subject to ongoing significant cash burn and the LDA Agreement is one of the bases on which the directors are satisfied it may continue as a going concern (as



disclosed in Appendix 4C filed with the ASX on 30 October 2020) but the LDA Agreement is being novated for the benefit of Holdco if the scheme is implemented.

- (e) The Court should not accept that the resolution of the Webb proceeding and the ASIC proceeding will happen quickly, given that the Judge who presided in the liability phase of the ASIC proceeding will only deliver judgment after the appeal on the question of whether that Judge should preside in the Webb proceeding has been determined. The Webb proceeding will have to be heard, the penalty phase of the ASIC proceeding will have to be heard if ASIC is successful on the question of liability and judgment in the Webb proceeding and the penalty phase of the ASIC proceeding will need to be delivered. Accordingly, it is likely that Holdco will be conducting its operations for at least a year or more before those proceedings are resolved.
- (f) As a matter of commercial reality, there is the prospect of a substantial amount of time for change in the structure and operations of Holdco and the statements in section 6.5 of the scheme booklet are statements of current intention only.

73 The proceedings were stood over to Monday, 16 November 2020. At that time the Court indicated that it would publish reasons subsequently but it was not minded to refuse to make orders under s 411(4)(b) of the *Corporations Act* on the basis that having regard to Holdco's willingness to provide the second Holdco undertaking, it had not been demonstrated that there is a real or practical risk, as opposed to a theoretical risk, that as a result of implementation of the scheme, the contingent creditors will be materially prejudiced in relation to the receipt of any amount to which they may become entitled pursuant to the Webb proceeding or the ASIC proceeding or in relation to ASIC's investigation costs.

74 Mr Halley then raised, for the first time, ASIC's concern that a Canadian court might not give effect to a judgment of the Federal Court of Australia enforcing an undertaking in the form of the second Holdco undertaking on the basis that it is direct or indirect enforcement of a penalty imposed in a foreign jurisdiction. The second court hearing was stood over to 26 November 2020 to allow ASIC and GetSwift to obtain expert evidence and provide written submissions on that issue.

### **Treasurer's letter**

75 On 24 November 2020, GetSwift released to the ASX a copy of a letter dated 20 November 2020 which it said it received late on 23 November 2020. The letter was issued by Federal Treasurer, the Hon Josh Frydenberg MP, indicating that his preliminary view was that he

should issue an order prohibiting GetSwift from making the proposed acquisition of GetSwift under s 67 of the FIRB Act on the basis that the re-domiciliation of GetSwift while the “Australian legal proceedings currently on foot” are yet to be resolved would be against the national interest on the basis that the re-domiciliation may have a “negative impact on the interests of possible contingent creditors associated with those proceedings”. GetSwift was provided with a period in which it may respond to the Treasurer’s concerns.

### **GetSwift undertaking**

When the Court reconvened on 26 November 2020, GetSwift advised the Court that GetSwift would be prepared to provide an undertaking to the Court. While amendments were made to the form of the **GetSwift undertaking**, its ultimate form was as follows:

GetSwift Limited (**GetSwift**) undertakes to the Court, Mr Raffaele Webb and the Australian Securities and Investments Commission that, in the event GetSwift Technologies Limited (**Holdco**) fails to meet any of its obligations under the Deed Poll appearing in the Annexure to this undertaking (**Deed Poll**), GetSwift will promptly take all reasonable and practicable steps to enforce GetSwift’s rights under the Deed Poll against Holdco.

GetSwift undertakes to the Court that, except as provided in clause 3.2 of the Deed Poll, it will not agree to vary or terminate the Deed Poll except with leave of the Court.

This undertaking will take effect immediately upon Holdco’s execution of the Deed Poll and will terminate automatically upon the termination of the Deed Poll pursuant to clause 3.2 of its terms.

### **Deed polls**

GetSwift also advised that it was willing to enter into a deed poll with Holdco in either one of two forms. In each case, Holdco provided an Australian address and submitted to the non-exclusive jurisdiction of the Federal Court of Australia and Supreme Court of New South Wales and courts hearing appeals from those Courts.

In scenario 1, the deed poll would relevantly provide as follows:

#### **1.3 Nature of Deed Poll**

Holdco acknowledges that this Deed Poll may be relied on and enforced by GetSwift in accordance with its terms even though GetSwift is not a party to it.

#### **2. Holdco obligations**

##### **2.1 Holdco undertakings**

- (a) Holdco undertakes to provide GetSwift with sufficient funds to permit it to discharge its liabilities to the extent that GetSwift is unable to discharge them as and when they fall due, until such time as any

adverse judgment, including, but not limited to, any award of damages, compensation and/or penalties, in the Webb Proceedings, the ASIC Proceedings and any order under s 91 of the ASIC Act in respect of the ASIC Proceedings, has been satisfied, including a final determination of any award of damages in respect of all group member claims in the Webb Proceedings, or the proceedings are otherwise resolved on a final basis (by way of settlement or discontinuance), including the final resolution of any relevant appeal proceedings resulting therefrom, to the extent of Holdco's assets, as at the date any claim on this undertaking is made.

- (b) Holdco undertakes to not oppose the enforcement in British Columbia of any judgment against it of any superior court in Australia under, or in relation to, this Deed Poll.
- (c) Holdco undertakes not to allege, submit or seek to characterise in any proceedings that any of its obligations under this Deed Poll involve direct or indirect enforcement of a penalty.

### **3. Conditions to obligations**

#### **3.1 Conditions**

The obligations of Holdco under this Deed Poll are subject to the Scheme becoming Effective.

#### **3.2 Termination**

The obligations of Holdco under this Deed Poll will automatically terminate upon the satisfaction by GetSwift or Holdco of any adverse judgment, including, but not limited to, any award of damages, compensation and/or penalties, in the Webb Proceeding, the ASIC Proceeding and any order under s 91 of the ASIC Act in respect of the ASIC Proceedings, or the proceedings are otherwise resolved on a final basis (by way of settlement or discontinuance), including the final resolution of any relevant appeal proceedings resulting therefrom.

The deed poll for scenario 2 is the same as the deed poll for scenario 1 save that cl 2.1(a) provides as follows:

Holdco undertakes to provide GetSwift with sufficient funds to permit it to discharge its liabilities, to the extent that GetSwift is unable to discharge them, arising from any adverse judgment, including, but not limited to, any award of damages, compensation and/or penalties, in the Webb Proceeding (including a final determination of any award of damages in respect of all group member claims), the ASIC Proceeding and any order under s 91 of the ASIC Act in respect of the ASIC Proceeding, to the extent of Hold co-op's assets, as at the date any claim on this undertaking is made.

### **Mr Webb's position**

Ms Collins advised the Court that, as a contingent creditor of GetSwift, Mr Webb has no objection to the Court making orders under s 411(4)(b) of the *Corporations Act* if the Court accepts the second Holdco undertaking, the GetSwift undertaking and a deed poll in the form of that for scenario 1 was executed by Holdco. Ms Collins advised that Mr Webb drew more

comfort from the scenario 1 deed poll than the scenario 2 deed poll because in scenario 1 Holdco is undertaking to ensure that GetSwift will remain solvent until judgment is obtained whereas in scenario 2, GetSwift may become insolvent during the course of the Webb proceeding or the ASIC proceeding which would give rise to a number of issues including (if the hearing in the Webb proceeding had not yet occurred) the need to obtain leave to proceed with that hearing.

### **ASIC's position**

Mr Halley advised the Court that ASIC maintains its objection to the Court making orders under s 411(4)(b) of the *Corporations Act* approving the scheme.

ASIC relied on an expert opinion which it obtained from James Sullivan QC, a specialist in corporate law in British Columbia and a partner at Blake, Cassels & Graydon LLP. Mr Sullivan has been a member of the bar in British Columbia since 1988 and has been an author or co-author of a number of books and papers primarily relating to class actions. The Court accepts that Mr Sullivan was qualified to give an opinion concerning the matters on which that opinion was sought.

On 18 November 2020, Mr Sullivan was asked to respond to the following questions, albeit that he responded to them as if the references to “Canada” below were references to “British Columbia”:

1. Is any judgment obtained by ASIC in the Federal Court of Australia requiring HoldCo to comply with the Undertaking enforceable, in whole or in part, in Canada, insofar as it relates to:
  - (a) an order in the nature of specific performance requiring Holdco to do an act or thing to give effect to the Undertaking; or
  - (b) the payment of the sum due under an adverse judgment against GetSwift.
2. Is any judgment obtained by ASIC in the Federal Court of Australia requiring HoldCo to comply with the Undertaking enforceable, in whole or in part, in Canada, insofar as it relates to the payment of pecuniary penalties to the Commonwealth of Australia?
3. If any judgment obtained by ASIC in the Federal Court of Australia requiring HoldCo to comply with the Undertaking is enforceable, in whole or in part, in Canada, what steps would ASIC need to take to enforce this judgment against HoldCo in Canada?
4. If any judgment requiring HoldCo to comply with the Undertaking is obtained by ASIC in Canada, what remedies are available to ASIC under Canadian law?
5. If HoldCo fails to comply with any judgment obtained by ASIC in Canada,

what remedies are available to ASIC under Canadian law?

84 On 23 November 2020, Mr Sullivan was asked to respond to the further question:

To what extent, if at all, does the letter from Jones Day dated 23 November 2020, and the Deed Polls annexed to that letter, cause you to change or qualify any of the opinions that you would have otherwise expressed in answer to questions [1] to [5] contained in the document entitled “Questions for Expert”, and if so, how?

85 In this regard, the Court notes that Mr Sullivan had less time to consider the documents briefed to him on 23 November 2020 than the experts on whose opinions GetSwift relied.

86 ASIC summarised Mr Sullivan’s responses in its written submissions as follows:

7. First, subject to the further points below, any judgment obtained by ASIC against GetSwift, or a judgment obtained against HoldCo requiring it to comply with the HoldCo indemnity, could, prima facie, be enforced through an action in British Columbia founded upon those judgments or possibly through reciprocal enforcement pursuant to the Court Order Enforcement Act (British Columbia) (see Sullivan Report at [16], [45]-[51]).
8. Second, however, any judgment obtained by ASIC against GetSwift would likely be characterised by a British Columbia court, or another court in Canada, as penal in nature and unenforceable (see Sullivan Report at [15], [38]-[43]).
9. Third, further, it is unlikely that a British Columbia court, or another court in Canada, would enforce any judgment obtained by ASIC requiring HoldCo to comply with the HoldCo indemnity or requiring specific performance of that undertaking as such a judgment would likely be characterised as seeking to enforce an order for specific performance pertaining to a judgment that is penal or public in nature (see Sullivan Report at [25]-[35]).
10. Fourth, the undertakings proffered in the Deed Polls, do not affect any of the above conclusions. This is because the undertakings in the Deed Polls are “expressly personal” to GetSwift and HoldCo, the doctrine of privity of contract remains in full effect under Canadian law and therefore a British Columbia court would be reluctant to give weight to the Deed Polls in a proceeding brought by ASIC or by any other non-party to the Deed Polls (see Sullivan Report at [19], [70]-[72]).
11. Further, the parties cannot confer by their agreement jurisdiction on a British Columbia court that it would not otherwise have, and, accordingly, the parties are not at liberty to alter the penal character of the debt that underlies the enforcement of the Deed Polls, and counsel would have an ethical duty to make full disclosure of the underlying facts giving rise to the debt to be enforced (see Sullivan Report at [19], [72]-[75]).
12. It follows from Mr Sullivan QC’s opinion that it is unlikely, or there is significant doubt, that any judgment obtained by ASIC as against GetSwift that is sought to be enforced through the HoldCo indemnity or Deed Polls would be able to be enforced as against HoldCo in British Columbia. This is essentially because of the penal character of the debt that would underlie the enforcement of the indemnity or the enforcement of the undertaking upon which it is based.

87 Mr Halley submitted that Mr Sullivan's evidence demonstrates that there is a real or practical risk, as opposed to a theoretical risk, that as a result of the implementation of the scheme ASIC and the Commonwealth as contingent creditors will be materially prejudiced in relation to the receipt of any amounts to which they may become entitled in the ASIC proceeding. Given that the primary monetary relief that ASIC seeks in the ASIC proceeding is the imposition and payment to the Commonwealth of pecuniary penalties, ASIC and the Commonwealth would be in a materially different, and prejudiced, position if the scheme were approved and implemented.

88 The Court raised with Mr Halley the fact that even if ASIC's capacity to recover any pecuniary penalty was prejudiced, the regulatory purpose of bringing the ASIC proceeding would be served having regard to the specific and general deterrent effect of court imposed fines, as recognised by Beach J in *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liquidation) (No 4)* [2020] FCA 1499.

89 Mr Halley made the following oral submissions.

90 First, the specific and general deterrence effect of any penalties the Court might impose for breaches of the continuous disclosure regime would be substantially reduced if companies (and especially companies in their start-up phase or companies whose businesses are not yet fully matured) can effectively avoid the penalty by the expedient of re-domiciliation by means of schemes approved by the Court. That is relevant to the question of whether approval of the scheme would be inconsistent with the due administration of justice.

91 Second, it has been put to the Court that Mr Sheahan has been instructed that there is no avoidance purpose in the scheme proposal. Undertakings and deed polls have been proposed by GetSwift with an intention to, as much as possible, ensure that a judgment is something that still could be enforced if the scheme is implemented so that the decision to move the "economic entity" to Canada should not be a matter of concern for contingent creditors. Those steps have accommodated a number of concerns and it is for that reason that Mr Webb no longer objects to the proposed scheme on the basis that members of the class he represents can no longer claim to be materially worse off if the scheme is implemented. But pecuniary penalties fall into a different category and the proposal to implement the scheme arose during the ASIC proceeding.

92 Third, commercial imperative for Holdco to maintain GetSwift's solvency will fade as time goes by and capital raised by Holdco is employed in the expansion of its business outside Australia so that GetSwift may effectively "wither on the vine". In that regard it is relevant that it may be some time, between one and two years, before judgments are delivered in the Webb proceeding and on penalty in the ASIC proceeding. Under s 553B of the *Corporations Act*, any penalty or fines imposed by a Court "in respect of an offence against a law" is not admissible to proof against an insolvent company. ASIC understands the impact of s 553B of the *Corporations Act* to be that, if GetSwift became insolvent, ASIC would not be entitled to prove in its liquidation for any pecuniary penalty imposed in the ASIC proceeding.

93 ASIC is being asked to accept that GetSwift either itself or through a receiver or liquidator might be able to put ASIC in the same position it would be in had it been able to enforce against an economic entity that remained on-shore. ASIC accepts that, if GetSwift, as an Australian listed company, went into liquidation and its shareholders therefore lost all of their interest in it, it would not be able to recover a pecuniary penalty. But ASIC submits that, in those circumstances, there is a significant incentive on those controlling GetSwift to ensure that it is conducted and structured in such a way that it will be able to meet any penalty ultimately awarded and that incentive is not present where GetSwift is a proprietary company.

94 Fourth, although GetSwift has laid the criticism that ASIC has not assisted the Court by providing guidance on the likely amount that might be imposed by way of pecuniary penalty and costs in the ASIC proceeding, it is not possible for ASIC to provide guidance on the likely amount of any pecuniary penalty before ASIC receives judgment in the liability phase of the proceeding. In this case the alleged contraventions relate to fundraising of \$99 million involving the highest levels of management so that the alleged contraventions are serious. While imposition of the maximum possible penalty \$20 million may be unlikely, in other serious cases the Court has been prepared to impose the maximum penalty: see *Australian Securities and Investments Commission v Westpac Banking Corporation (No 3)* [2018] FCA 1701 at [130].

95 Fifth, at the end of the day, if the scheme is implemented with the undertakings and deed poll in place, ASIC may still have to go off-shore to enforce judgment on the deed poll in order to recover a pecuniary penalty of (say) \$10 million to \$15 million, even if GetSwift is otherwise able to pay its debts as they fall due without the pecuniary penalty. ASIC remains concerned that there is no incentive to Holdco to bring assets on-shore to meet the penalty. This introduces

a whole new layer of complexity with which ASIC would not need to engage if the scheme is not implemented.

96 Sixth, while the scenario 1 deed poll focuses more broadly on GetSwift's ability to pay its debts as they fall due, if GetSwift is allowed to "wither on the vine", then it may be very clear that the only debt that it could not pay is the pecuniary penalty. ASIC queried why any receiver appointed to enforce in Canada any judgment debt arising from enforcement of the deed poll in New South Wales would not have to disclose to courts in Canada that the underlying debt is a pecuniary penalty. In Mr Sullivan's view, the deed polls may well be construed as indirect enforcement of a penalty and there would be a real and not theoretical risk that a Canadian court will look at it that way. At [74]-[75] of his report, Mr Sullivan draws the conclusion that Canadian counsel seeking to enforce a judgment obtained in New South Wales under the deed polls will have an ethical duty to advise the Canadian court of the legal issues concerning enforcement of foreign penalties so that the deed poll would not be enforceable in Canada and that cannot be overcome by provisions such as cl 2.1(b) and (c) of the deed polls.

97 Seventh, GetSwift's obligation under the GetSwift undertaking is to "take all reasonable and practical steps" to enforce GetSwift's rights under the deed poll. If GetSwift knows that Holdco does not have funds to meet a pecuniary penalty, what is GetSwift's incentive to take additional steps? While it might be possible to ensure that a receiver is appointed, it would be necessary to take into account the cost and delay of enforcement, there is also the question of who would pay the receiver's costs. There would be uncertainty as to whether a judgment obtained in New South Wales would be regarded as indirect enforcement of the pecuniary penalty. None of the experts can rule out that prospect. The fact that the undertakings and deed polls are made in a context of securing the Court's approval to a scheme is only one aspect and it might not override a characterisation of the judgment debt obtained by a receiver of GetSwift's rights under a scenario 1 deed poll as indirect enforcement of the pecuniary penalty.

### **GetSwift's submissions**

98 Mr Sheahan made the following submissions on 26 November 2020 on behalf of GetSwift.

99 First, the proposed undertakings and deed polls address any remaining marginal risk to which Mr Webb and ASIC, as contingent creditors, might be exposed as a result of implementation of the scheme; they are essentially belt and braces. The contingent creditors are exposed to no more than a theoretical risk that they would not be paid if they obtain judgments in the Webb proceeding or the ASIC proceeding. That is because, as previously submitted:



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- (a) The scheme does not involve a reduction of capital or any change in the location or quantum of GetSwift's assets. The only relevant change is to GetSwift's capacity to raise capital, which will now reside in Holdco.
  - (b) Holdco has every incentive to keep GetSwift solvent and keep its global business alive even if it raises capital and invests outside Australia. All of the operating assets reside in the GetSwift Group. GetSwift's insolvency will remove Holdco's access to US\$45 million of committed funding under the LDA Agreement.
  - (c) There is typically an enormous disparity between the theoretical maximum penalty arising from a number of contraventions of a particular kind and the penalty that ASIC even seeks, much less is imposed by the court. It is striking that ASIC declined to give the Court any assistance on that question when it is clear that it is unlikely that those maximum penalties would be imposed: see for instance *Australian Securities and Investments Commission v National Australia Bank Limited* [2020] FCA 149.

100 Second, Mr Sheahan accepted that it may be 12 months or more before final judgment in either the Webb proceeding or the penalty phase of the ASIC proceeding and "things could change" in that time so that it is appropriate for GetSwift and Holdco to provide some assurance to Mr Webb and ASIC. Having said that, the very existence of the deed polls, especially under scenario 1, provide further incentive to Holdco to maintain GetSwift's solvency because the deed poll would remain enforceable if a liquidator were appointed to GetSwift and the result of Holdco failing to maintain GetSwift's solvency would be to incur additional costs of the liquidator. The deed poll could also be enforced by the appointment of a receiver of GetSwift who may obtain judgment against Holdco in the Federal Court of Australia or the Supreme Court of New South Wales for specific performance or a money judgment. Professor Pitel's expert evidence is that such judgments would be enforced in British Columbia and they would not be regarded as indirect enforcement of a penalty (as to which see further below).

101 Third, ASIC's concern that it would not be able to prove for a civil penalty obtained in the ASIC proceeding in GetSwift's liquidation because of s 553B of the *Corporations Act* is ill-founded. The liquidator is able to rely on the scenario 1 deed poll to enforce Holdco's obligation to discharge all of GetSwift's debts and s 553D contemplates that ASIC could prove for a penalty as long as GetSwift is not then insolvent. While admittedly in a different context, in *Commonwealth of Australia in the matter of Leahy Petroleum – Retail Pty Ltd (subject to a deed of company arrangement v Leahy Petroleum – Retail Pty Ltd (subject to a deed of*

*company arrangement*) [2005] FCA 1422; (2005) 55 ACSR 353 at [16], Finkelstein J found that the Commonwealth would be able to enforce its debt for a penalty if the admitted debts were paid in full and there was a surplus.

Fourth, implementation of the scheme does not result in GetSwift moving beyond the veil of accountability; being wound up would be a form of accountability. ASIC's submissions treat every possibility in isolation, but these things must be considered together:

- (a) GetSwift's Australian directors will continue have all of the usual duties imposed on them under the *Corporations Act*, including the duty imposed by s 180 and the risk of personal liability for insolvent trading.
- (b) Holdco will be a listed public company and it should not be assumed that it would lightly provide the second Holdco undertaking or enter into the scenario 1 deed poll in connection with a court approved scheme of arrangement. Holdco would sacrifice commercial credibility everywhere if it were to seek to walk away from those obligations. In such circumstances, it would likely be difficult to have prospective commercial counter-parties be willing to deal with Holdco.
- (c) ASIC has suggested that Holdco might raise capital elsewhere and be willing not to take advantage of the LDA Agreement under which it is an event of default if GetSwift becomes insolvent or is wound up. It appears to have suggested that Holdco might enter into other arrangements which would jeopardise payment of any penalty imposed in the ASIC proceeding. But it is not realistic to suggest that Holdco would go to such lengths just to avoid liability for what might be a few million dollars.

Fifth, in light of all the steps that GetSwift and Holdco have been willing to undertake to address the concerns raised by ASIC and Mr Webb, the appropriate inference for the Court to draw is that the scheme is not proposed for any avoidance purpose; it is not simply a matter of instructions to Mr Sheahan. The people whose interests are really at stake are GetSwift's shareholders who have overwhelmingly voted in favour of the scheme. GetSwift is not fleeing the jurisdiction, it is following commercial imperatives to align itself with its customers and investors in North America and that will benefit contingent creditors by increasing the group's capital-raising ability.

Sixth, while GetSwift does not criticise Mr Sullivan's failure to address the real issues concerning the deed polls in light of the very short time he had to consider them, the Court should note that ASIC did not seek more time for him to do so. Unfortunately, Mr Sullivan

addressed the wrong question – what the attitude of the Canadian courts would be if ASIC were to be the enforcer, whereas the real question is what would happen when GetSwift is the enforcer. Having regard to the expert opinions obtained by GetSwift, the Court ought not conclude that any of ASIC’s remaining concerns are material.

105 GetSwift relied on two expert reports in relation to the enforceability of the deed polls and undertakings in Canada. Mr Sheahan submitted that those opinions do deal with the practicality of GetSwift enforcing the deed polls.

106 The first expert report is dated 24 November 2020 and authored by Stephen GA Pitel, a professor of law at Western University in London, Ontario, Canada. Among other things, Professor Pitel has co-authored three books on conflict of laws: *Conflict of Laws*, 2d ed (2016), *Private International Law in Common Law Canada*, 4th ed (2016) and *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* (2012). He notes that the latter book concerns aspects of the private international law of three Canadian provinces, one of which is British Columbia. The Court is satisfied that Professor Pitel is qualified to provide the opinion he has given.

107 Professor Pitel was asked to address the following questions:

Question 1 – In respect of Scenario 1, assuming that GetSwift (in liquidation) were to succeed in obtaining a judgment against Holdco in respect of the Proposed Indemnity under the Deed Poll, would GetSwift or a liquidator of GetSwift be able to enforce the judgment in the courts of British Columbia, Canada? Please explain your reasoning and the steps that would need to be taken to enforce any such judgment in British Columbia.

Question 2 – In respect of Scenario 2, assuming that GetSwift were to succeed in obtaining a judgment against Holdco in respect of the Limited Indemnity under the Deed Poll, would GetSwift be able to enforce the judgment in the courts of British Columbia, Canada? Please explain your reasoning and the steps that would need to be taken to enforce any such judgment in British Columbia.

Question 3 – Does anything contained in Mr Sullivan’s report alter the opinions that you have expressed in answer to Questions 1 and 2 set out in our Supplementary Letter? If so, how?

Question 4 – Do any of the proposed changes to clauses 2.1(a) and 3.2 in the draft Deed Polls as shown in mark-up above cause you to change any of the conclusions you have expressed in relation to Questions 1, 2 and 3 set out in our Letters of Instruction?

108 GetSwift’s written submissions noted these features of Professor Pitel’s evidence:

28 Prof Pitel’s report steps out concepts which will be familiar to Australian lawyers, including the right to enforcement under common law or statute, in this case the Court Order Enforcement Act. Prof Pitel notes that, at common

law, the Courts of British Columbia will not enforce a foreign judgment which is a tax or penalty (again a concept familiar to Australian lawyers). Similar considerations arise under the *Court Order Enforcement Act*.

29. Prof Pitel sets out from [8.6]ff his opinion as to whether a judgment against Holdco in Australia by reason of the indemnity provided by Deed Poll is penal in nature. Mr Pitel concludes that, whilst there is no direct authority of which he is aware, he considers it is more likely than not that the Court in British Columbia would not characterize any judgment against Holdco pursuant to an indemnity as penal. He reaches this view for a range of “aggregated” factors, viz:
- (a) the judgment is not in the name of a foreign state or state agent;
  - (b) the judgment is not being enforced against any entity that has committed any wrongdoing such as a regulatory offence;
  - (c) the judgment does not arise from a state exercising its sovereign power, rather it is based on private commercial obligations entered into voluntarily by Holdco;
  - (d) the proposed indemnity (Scenario 1) is not specifically or narrowly limited to the judgment in the ASIC Proceeding (this is why this form of indemnity may be preferable to the indemnity limited to any judgment in favour of ASIC);
  - (e) payment of any judgment goes to the liquidator of GetSwift in a larger insolvency process (such that creditors may share in the outcome);
  - (f) the penal exclusion is likely to be narrowly interpreted.
30. Prof Pitel draws comfort as to his opinion from certain additional matters. First, Holdco has agreed to undertake not to oppose enforcement of any judgment. If the common law route of enforcement is chosen, it is the judgment creditor that bears the onus of proof in trying to defend enforcement on the grounds that the judgment is penal. Moreover, if the enforcement route chosen by the putative GetSwift liquidator is the Court Order Enforcement Act then the registration of a foreign judgment is largely procedural and is unlikely to lead to any Court adjudication. In short, in the absence of Holdco raising an issue that the judgment is a penalty, then the Court is unlikely to raise any issue on its own motion.

109 The second expert report is an opinion authored by the Hon Edward Chiasson QC dated 24 November 2020. Mr Chiasson has been a civil litigation lawyer for over 40 years and was appointed directly to the Court of Appeal in British Columbia in September 2006. He retired from that Court in December 2015.

110 Mr Chiasson was asked the following questions:

Question 1 – In respect of Scenario 1, assuming that GetSwift was in liquidation and by its liquidator GetSwift were to succeed in obtaining a judgment against Holdco in respect of the Proposed Indemnity under the Deed Poll and GetSwift, or a liquidator of GetSwift, sought to enforce the judgment in the courts of British Columbia, Canada:

- (a) Would Holdco’s undertaking set out in paragraph 25(b) above (and clause

2.1(c) of the Deed Poll) – being the undertaking by Holdco not to allege, submit or seek to characterise in any proceedings that any of its obligations under the Deed Poll involve direct or indirect enforcement of a penalty – be enforceable by GetSwift, or a liquidator of GetSwift, in the courts of British Columbia?

- (b) What is the likelihood that a court of British Columbia may, despite the undertaking, proceed to consider, of its own volition, whether the enforcement of a judgment of this nature could be said to be the direct or indirect enforcement of a penalty?

Question 2 – in respect of Scenario 2, assuming that GetSwift were to succeed in obtaining a judgment against Holdco in respect of the Limited Indemnity under the Deed Poll, and GetSwift sought to enforce the judgment in the courts of British Columbia, Canada:

- (a) Would Holdco’s undertaking set out in paragraph 29(c) above (and clause 2.1(c) of the Deed Poll) – being the undertaking by Holdco not to allege, submit or seek to characterise in any proceedings that any of its obligations under the Deed Poll involve direct or indirect enforcement of a penalty – be enforceable by GetSwift in the courts of British Columbia?

Question 3

On 24 November 2020, ASIC filed and served an expert report of Mr James Sullivan, QC in the Proceeding. A copy of Mr Sullivan’s report was enclosed with the letter.

Please, consider Mr Sullivan’s report carefully and address the following additional question in the preparation of your Opinion:

Does anything contained in Mr Sullivan’s report alter the opinions that you have expressed in answer to Questions 1 and 2 set out in our Initial Letter? If so, how?

111 GetSwift summarised Mr Chiasson’s conclusions in relation to the application of cl 2.1(b) and (c) of the deed polls in its written submissions as follows:

32. ... Mr Chiasson concludes that Holdco’s undertaking not to challenge enforcement would itself be enforced by the British Columbia Court because “to fail to do so would undermine aspects of the scheme of arrangement approved by the Australian Court applying its law”
33. Mr Chiasson also considers that the public policy exclusion in sec 29(6) Court Order Enforcement Act would be narrowly construed and that “a money judgment obtained by GetSwift or its liquidator against Holdco based on the enforcement of an undertaking does not offend Canadian [views] of basic morality – it is an ordinary common cause of action.” He is also not aware of any authority which holds that a judgment based on an indirect penal order would not be registered by the Court in British Columbia [or that it] would [be] set aside on public policy grounds under sec 29(6) of the Court Order Enforcement Act.

## Consideration

112 The only contingent creditor of GetSwift which now opposes approval of the scheme is ASIC on behalf of the Commonwealth in relation to possible prejudice to the recovery of any

pecuniary penalties which might be imposed on GetSwift in the ASIC proceeding and on ASIC's own behalf in relation to any award of costs if it is successful in that proceeding and investigation costs which might be recovered under s 91 of the *ASIC Act*.

In *Re CSR Limited* at [51], Keane CJ and Jacobson J found that the particular content of "commercial morality" and "public policy" relevant to the exercise of the discretion in s 411(1) of the *Corporations Act* is to be discerned from the text and subject matter of that Act, relying on *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at [69]–[70] and *Attorney-General for the Commonwealth of Australia v Alinta Limited* [2008] HCA 2; (2008) 233 CLR 542 at [147].

In *Re CSR Limited*, the proposed scheme of arrangement involved a reduction of capital and Keane CJ and Jacobson J found (at [54]) that ss 256B(1)(b), 1324 and 1324(1B) of the *Corporations Act* provided clear guidance as to how far that Act goes in insisting that the capital of a company must be preserved and that those provisions were concerned with the interests of both shareholders and creditors.

Even though schemes involving re-domiciliation generally do not involve reductions of capital, Courts have typically considered the following matters before exercising discretion to make orders under s 411(4)(b):

- (a) Whether the scheme complies with the law, including relevant procedural requirements;
- (b) Whether the scheme was approved by shareholders acting in good faith and for proper purposes;
- (c) Whether there has been an accurate and comprehensive disclosure of the details of the scheme and its effect to those voting on it;
- (d) Whether there is any suggestion of oppression of any minority;
- (e) Whether there is evidence that any third parties will be disproportionately adversely affected by the operation of the scheme;
- (f) Whether the scheme offends against any aspect of public policy; and
- (g) Whether all matters that could be considered relevant to the exercise of the Court's discretion have been drawn to its attention. Typically, that will include whether all conditions precedent to the scheme have been satisfied or waived.

See *Re Amcor Limited (No 2)* at [8]-[14]. The Court notes that most of those matters (other than those referred to in (e) and (f) and the conditions precedent referred to at [46] above) have been satisfactorily addressed by reason of the matters set out at [40]-[44] above.

116 In deciding whether to grant approval under s 411(4)(b), the Court will properly take into account not only the direct effects of the scheme upon the those who will be bound by them but also consequential effects upon others who have an interest in the broader context in which the scheme will operate. Effects, both direct and consequential, will be judged by comparing circumstances as they will exist if the scheme takes effect with circumstances as they will exist if the scheme does not take effect. Consideration of questions of what the position would, could or might have been if some different scheme had taken effect is to be left out: see *In the matter of Centro Properties Limited and CPT Manager Limited in its capacity as responsible entity of Centro Property Trust* [2011] NSWSC 1465; (2011) 86 ACSR 584 at [32] (Barrett J).

117 Part 9.4B of the *Corporations Act* sets out the civil consequence of contravening civil penalty provisions, including contraventions based on the failure to observe continuous disclosure obligations imposed by s 674(2). This is an important pillar of the regulation of the conduct of Australian listed public companies. Section 674(2) reflects a policy that trading of securities issued by listed companies should be conducted in transparent markets informed by the prompt disclosure of information material to the decision of an investor whether or not to buy or sell those securities, subject only to carve-outs prescribed in relevant listing rules. To secure compliance with the obligations imposed under s 674(2), Parliament has determined that contraventions of that provision should expose listed companies and those involved in a listed companies' contravention of s 674(2) to consequences that include the imposition of substantial pecuniary penalties.

118 Consistently with *Re CSR Limited* at [51] and *Re Centro* at [32], in my opinion it is relevant to the exercise of the Court's discretion to approve a scheme effecting the re-domiciliation of an Australian listed company whether there is a real risk that the implementation of the proposed scheme would frustrate ASIC's capacity to recover a pecuniary penalty in proceedings extant at the time the Court is called upon to approve the scheme both because ASIC is a contingent creditor and because it would be inimical to the administration of justice in the manner which Parliament has determined.

119 GetSwift placed emphasis on the fact that there is no reduction of capital in the proposed scheme and submitted that it is a threshold issue that contingent creditors have no “right” to the proceeds of any future capital raising. However, having regard to:

- (a) The fact that GetSwift has not made a profit in the five years of its existence,
- (b) The rate of the cash burn over the past three years and the likelihood of its continuation having regard to GetSwift’s most recent Appendix 4C disclosure to ASX and the decline in its cash reserves; and
- (c) The independent expert’s observation that, as an “early stage technology company”, GetSwift may need to raise additional capital to fund research and development activities and its global expansion plans,

it is a relevant contextual matter in considering whether contingent creditors will be disproportionately adversely affected by the implementation of the scheme that GetSwift will, upon implementation of the scheme, lose its capacity to raise equity as a listed company and the direct benefit of the LDA Agreement, which provides access to US\$45 million until March 2023. The LDA Agreement will be novated to Holdco. That is hardly surprising since that agreement relates to put options over listed shares.

120 It is also relevant that Holdco will be free to invest any moneys it raises in developing business outside Australia and it may be accepted that that investment will increase over time. Theoretically, Holdco could allow GetSwift to “wither on the vine”. While the scheme booklet contains the disclosures set out in section 6.5, ASIC is correct in saying that section 6.5 contains statements of current intent and those intentions include review of GetSwift’s businesses. Further, the courts and the relevant statute in British Columbia adopt the principle of private international law that a court will not recognise judgments of foreign courts which are penal in nature.

121 However, the Court has formed the view that if the conditions precedent to the scheme are satisfied, it would be appropriate to make orders approving the scheme under s 411(4)(b) for the following reasons.

122 First, the proposition that any increase in a contingent creditor’s level of risk of non-payment is unacceptable was specifically rejected in *Re CSR Limited* at [48]. To be relevant, the adverse impact of any risk must be shown to be real and practical, not merely theoretical.



123 Second, the interests of GetSwift shareholders must also be taken into account. Even if the  
interests of Messrs Macdonald and Hunter are excluded, the shareholders who voted on the  
scheme voted in favour of it by a substantial majority.

124 The independent expert found that the scheme was in the best interests of GetSwift  
shareholders because re-domiciliation to Canada is likely to facilitate access to deeper capital  
markets with investors who have an appetite for investment in early to mid-stage technology  
companies, a facility which the GetSwift Group needs while it continues to experience cash  
burn. Further, North America is where GetSwift is currently acquiring customers and there is  
said to be benefit to the GetSwift Group in cost savings arising from re-domiciliation so that  
its corporate structure, business and the bulk of its customers and investors are all aligned.

125 Holdco having greater access to the North American markets and such costs savings should  
also benefit GetSwift's contingent creditors by enhancing Holdco's capacity to perform its  
obligations under the scenario 1 deed poll.

126 Third, the evidence before the Court is that the scheme has not been proposed for an avoidance  
purpose. The scheme does not require that GetSwift ceases to exist or (save for the novation  
of the LDA Agreement to Holdco) dispose of its assets. To the contrary, GetSwift and Holdco  
have offered undertakings to the Court and to enter into a scenario 1 deed poll for the purpose  
of ameliorating the impact of the scheme on the interests of contingent creditors. The scenario  
1 deed poll provides for Holdco to ensure that GetSwift remains solvent until judgment in the  
Webb proceeding and the ASIC proceeding have been satisfied. Mr Webb has ceased to  
oppose the scheme on the basis that those undertakings and a scenario 1 deed poll is executed.

127 ASIC has observed that Holdco could employ all of the capital it raises outside Australia and  
not through any of GetSwift's subsidiaries and that its commercial incentive to maintain  
GetSwift's solvency will fade over time. While it is true that GetSwift's prominence in the  
group may fade over time, GetSwift and its subsidiaries have established businesses. Absent  
evidence of an avoidance purpose, there is no reason to believe that Holdco will not support its  
existing businesses as well as develop new ones. Further, while it is theoretically true that  
GetSwift could abandon the LDA Agreement and therefore the impact of its requirement that  
Holdco's subsidiaries remain solvent, absent an avoidance purpose, ASIC has not established  
why it would make sense for Holdco to give up access to US\$45 million in committed capital  
under the LDA Agreement or that any other lender of equity investor would not impose similar  
conditions.

128 There is also considerable force to GetSwift's submission that were GetSwift and Holdco to go back on the undertakings to the Court and fail to observe obligations under the scenario 1 deed poll, it is likely that there would be an adverse impact on the willingness of counter-parties to deal with them. That likelihood is a disincentive to non-compliance with the undertakings and the deed poll. Further, if it could be proved that GetSwift and Holdco did not have the intention of observing their obligations under the proffered undertakings or they wilfully do not observe those obligations, those who authorise such conduct may expose themselves to sanctions imposed for contempt of this Court.

129 Fourth, ASIC is correct to say that the incentive on Mr Macdonald and Mr Hunter to maintain GetSwift's solvency is strong while it is a listed public company. However, GetSwift is also correct that whether or not GetSwift is a listed entity, its directors have obligations to avoid trading while insolvent and to perform their duties which include, but are not limited to, the duties imposed by s 180 of the *Corporations Act*.

130 Fifth, while there may remain some risk that a court in British Columbia might find that a judgment obtained in a New South Wales Court in enforcement of the scenario 1 deed poll constitutes indirect enforcement of a penalty imposed in a foreign jurisdiction, the Court prefers Professor Pitel's evidence which is summarised at [108] above that a court in British Columbia would enforce such a judgment and Mr Chiasson's conclusions concerning the enforceability of clause 2.1(b) and (c) of the scenario 1 deed poll.

131 It also should be understood that enforcement of the deed poll in British Columbia is a fall-back position. While it is true that both Mr Webb and ASIC have sought information which the Court understands that GetSwift has not been willing to provide concerning the exact nature of its assets in Australia, ASIC is entitled to enforce any judgment for a pecuniary penalty against GetSwift's assets in Australia. Insofar as ASIC complains that the enforcement of the scenario 1 deed poll involves complexity, enforcement of a pecuniary penalty is also likely to involve some complexity if GetSwift were either unable or unwilling to pay the penalty because GetSwift has foreign subsidiaries through which much of its business is currently conducted.

132 The Court also notes that:

- (a) The purpose of the scenario 1 deed poll is to maintain GetSwift's solvency until any adverse judgment in the ASIC proceeding and the Webb proceeding has been satisfied. That is a factor that weighed heavily with Mr Webb as is evident from the material at

[80] above. If Holdco performs its obligations under the deed poll, s 553B of the *Corporations Act* will have no impact on ASIC, since GetSwift will not be insolvent, a precondition to the operation of that section.

- (b) The Court accepts the proposition put by GetSwift concerning the impact of s 553B of the *Corporations Act* at [101] above.

Further, as discussed, the object of a civil penalty is not fundraising for the Commonwealth even though it has that effect by contributing to the consolidated revenue. The object is general and specific deterrence. It is for that reason that Australia's commercial regulators sometimes seek declarations and the imposition of penalties on insolvent companies.

While it is true that, if there were a pattern of start up companies avoiding having to pay penalties through the mechanism of "top hat" schemes effecting re-domiciliation outside Australia, that may have some impact on both specific and general deterrence. However, each case must be considered on its own merit and there is no evidence before the Court of any such pattern.

In this case, GetSwift and Holdco have proffered undertakings and Holdco has indicated that it will enter into a scenario 1 deed poll for GetSwift's benefit in relation to ensuring its solvency during ASIC's proceeding until any adverse judgment has been satisfied and it has agreed to submit to the jurisdiction of this Court and the Supreme Court of New South Wales for the purpose of enforcement of the deed poll.

Sixth, ASIC has not provided the Court with any estimate of the amount of any pecuniary penalty, its costs and the costs of investigation that it might recover under s 91 of the *ASIC Act*. While the Court accepts that it may be difficult for ASIC to accurately suggest the amount of any pecuniary penalty which might be imposed in the ASIC proceeding where the presiding judge is currently reserved in his decision concerning liability, it was entirely possible for ASIC to provide the Court with its estimate of its costs to date and investigation costs. Accordingly, ASIC has provided little to no basis for the Court to determine what its actual exposure as a contingent creditor is. Having regard to the dimension of other parties' costs it would not be difficult to assume that ASIC's costs to date would be in the order of several million dollars. The Court does not accept that it is likely that a \$20 million pecuniary penalty would be imposed on the basis that, even if GetSwift were found to be liable on all of the alleged 20 contraventions there may be discounts applied and it may be that the Court would find that some or all of the contraventions form part of one or more courses of conduct which would

have the effect of limiting the maximum penalty. Assuming that GetSwift's liability was, in aggregate, in the order of \$10 million or \$15 million, ASIC has not established to the Court's satisfaction that it is likely that GetSwift would risk its commercial reputation (perhaps affecting the willingness of equity investors to invest in GetSwift) and access to the US\$45 million LDA Agreement for the sake of that amount.

137 Having regard to these factors, the Court is not satisfied that ASIC would be disproportionately prejudiced in relation to the payment of any pecuniary penalty or any other amount to which it may become entitled pursuant to the ASIC proceeding or in relation to ASIC's investigation costs by reason of the implementation of the scheme.

### CONCLUSION

138 Save for the fact that two conditions precedent to the scheme have not yet been satisfied and subject to no other material matter arising that is not currently before the Court, the Court is satisfied that it would be appropriate to make orders under s 411(4)(b) approving the scheme.

139 The question of whether any order as to costs should be made is reserved.

I certify that the preceding one hundred and thirty-nine (139) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Farrell.

Associate:



Dated: 1 December 2020