



Australian Government

Takeovers Panel

**Reasons for Decision
Gascoyne Resources Limited
[2021] ATP 10**

Catchwords:

Decline to conduct proceedings – scheme of arrangement – lock-up device – fiduciary out – superior proposal – jurisdiction – disclosure

Corporations Act 2001 (Cth), section 602

Mungana Goldmines Limited 01R [2015] ATP 7

Interim order	IO undertaking	Conduct	Declaration	Final order	Undertaking
NO	NO	NO	NO	NO	NO

INTRODUCTION

1. The Panel, Denise McComish (sitting President), Bruce McLennan and Rory Moriarty, declined to conduct proceedings on an application by Westgold in relation to the affairs of Gascoyne. The application concerned (among other things) certain aspects of a Scheme Implementation Deed entered into between Gascoyne and Firefly in relation to their proposed merger by way of a Firefly scheme of arrangement, including a ‘fiduciary out’ to the no talk restriction on Gascoyne and the lack of a right for Gascoyne to terminate the Scheme Implementation Deed in the event it received a superior proposal. The Panel considered that there was no reasonable prospect that it would declare the circumstances unacceptable.
2. In these reasons, the following definitions apply.

Firefly	Firefly Resources Limited
Firefly Scheme	The scheme of arrangement whereby Gascoyne would acquire 100% of the fully paid ordinary shares in Firefly, with Firefly shareholders to receive 0.34 Gascoyne shares for each Firefly share
Gascoyne	Gascoyne Resources Limited
Gascoyne Superior Proposal	has the meaning given in paragraph 5
Gascoyne 13 October 2021 Announcement	has the meaning given in paragraph 15
NBIO	has the meaning given in paragraph 9

Takeovers Panel

Reasons - Gascoyne Resources Limited [2021] ATP 10

SID	The Scheme Implementation Deed entered into between Gascoyne and Firefly in relation to the Firefly Scheme dated 15 June 2021
Westgold	Westgold Resources Limited
Westgold Offer	has the meaning given in paragraph 12

FACTS¹

3. Gascoyne is an ASX listed mining company (ASX code: GCY) focussing on gold exploration and development.
4. On 16 June 2021, Gascoyne announced that it had agreed to merge with Firefly by way of the Firefly Scheme and released the SID.² The SID contained mutual exclusivity provisions including 'no talk' restrictions. The 'no talk' restriction on Gascoyne was subject to a fiduciary exception which applied:
"in relation to an actual, proposed or potential Gascoyne Competing Proposal if the Gascoyne Board determines acting in good faith that:
 - (a) *after consultation with its advisers, such actual, proposed or potential Gascoyne Competing Proposal is a Gascoyne Superior Proposal or could reasonably be expected to become a Gascoyne Superior Proposal; and*
 - (b) *after receiving written legal advice from its external legal advisers, compliance with that clause would, or would be reasonably likely to, constitute a breach of any of the fiduciary or statutory duties of the directors of Gascoyne,³...*"
5. In order for a "Gascoyne Competing Proposal" to be a "Gascoyne Superior Proposal" (**Gascoyne Superior Proposal**) (in summary):
 - (a) it must be bona fide
 - (b) it must not result from a breach by Gascoyne (or certain persons associated with Gascoyne) of its deal-protection obligations and
 - (c) the Gascoyne Board must, acting in good faith, and having first received both written external legal advice and written financial advice, determine that:
 - (i) the Gascoyne Competing Proposal is reasonably capable of being valued and completed in a reasonable timeframe and
 - (ii) would, if completed substantially in accordance with its terms, be more favourable to Gascoyne shareholders (as a whole) than the Firefly Scheme,

¹ This factual summary includes events up to and including 22 October 2021 (being the date of the Panel's decision), noting there have been subsequent developments.

² In connection with the Firefly Scheme, Gascoyne and Firefly also intend to undertake a demerger of certain of their assets. The proposed demerger is not relevant for present purposes.

³ Provided that *"the actual, proposed or potential Gascoyne Competing Proposal was not directly or indirectly brought about by, or facilitated by, a breach of"* the no shop obligation in the SID and *"Gascoyne immediately notifies Firefly of each action or inaction by it, any of its Related Bodies Corporate or any of their respective Related Persons in reliance on"* the fiduciary exception.

Takeovers Panel

Reasons - Gascoyne Resources Limited [2021] ATP 10

taking into account the terms and conditions and other aspects of the relevant “Gascoyne Competing Proposal” and of the Firefly Scheme.

6. There is a termination right under the SID for the benefit of Firefly in respect of a Gascoyne Competing Proposal. Broadly, such a right will exist where, prior to 8.00am on the Second Court Date:
 - (a) a Gascoyne director makes a public statement indicating that he or she recommends, supports or endorses a Gascoyne Competing Proposal or
 - (b) Gascoyne enters into any legally binding agreement, arrangement or understanding in relation to a Gascoyne Competing Proposal.⁴
7. There is no equivalent right of termination under the SID for the benefit of Gascoyne in respect of a Gascoyne Competing Proposal.
8. The SID also contains mutual break fee provisions. Relevantly, Gascoyne must pay the break fee (\$500,000 (excluding GST)) to Firefly if Gascoyne announces (in summary) a Gascoyne Competing Proposal that is publicly recommended, promoted or otherwise endorsed by the Gascoyne Board or a Gascoyne director on the basis that the Firefly Scheme not proceed.⁵
9. On 17 August 2021, Westgold delivered a confidential non-binding indicative offer to acquire 100% of the shares in Gascoyne (**NBIO**) to the Chair of Gascoyne. The NBIO provided that Westgold would offer 1 Westgold share for every 4 Gascoyne shares and included conditions, including a 90% minimum acceptance condition.
10. On 24 August 2021, Gascoyne wrote to Westgold advising receipt of the NBIO and that following consultation with its advisers, that the Gascoyne Board had unanimously determined that the Westgold proposal contained in the NBIO was not a Gascoyne Superior Proposal (as defined in the SID).
11. On 7 September 2021, Gascoyne announced that on 6 September 2021 the Supreme Court of Western Australia had made orders approving the despatch of the scheme booklet in relation to the Firefly Scheme and had ordered the convening of the scheme meeting for 2pm (WST) on 21 October 2021.
12. On 30 September 2021, Westgold announced its intention to make an off-market takeover offer for the issued shares in Gascoyne, offering 1 Westgold share for every 4 Gascoyne shares (**Westgold Offer**).
13. The Westgold Offer is conditional on, among other things, the Firefly Scheme not proceeding.
14. Also on 30 September 2021, Gascoyne announced the receipt of the Westgold Offer, stating (among other things) that the Board was not yet in a position to make a formal recommendation to shareholders.

⁴ See clause 13.1(c) and (e) of the SID.

⁵ See clause 12.2(h) of the SID. Clause 12.7 of the SID in effect limits liability under the SID to the Reimbursement Fee, except “in the case of any payment required to be made by a party for a Claim arising from wilful misconduct designed to frustrate or delay the Transaction or fraud”.

Takeovers Panel

Reasons – Gascoyne Resources Limited [2021] ATP 10

15. On 13 October 2021, Gascoyne released an announcement titled ‘Updated Business Plan and REJECT Westgold Offer’ (**Gascoyne 13 October 2021 Announcement**), which included its recommendation to Gascoyne shareholders that they reject the Westgold Offer, stating that the Westgold Offer:
 - (a) *“undervalues Gascoyne shares and does not represent a superior alternative for Gascoyne shareholders when compared to the Scheme”*
 - (b) *“is opportunistic in its timing and made at a time when material information was not available to Gascoyne shareholders”* and
 - (c) *is “not a Superior Proposal as contemplated by the SID”*.
16. The Gascoyne 13 October 2021 Announcement also stated that Gascoyne’s largest shareholder, *“Deutsche Balaton AG, which holds approximately 22.1% of Gascoyne has stated that it does not intend to accept the Westgold Offer in the absence of a superior proposal”*.
17. On 15 October 2021, Firefly announced that it had released supplementary disclosure in relation to the Firefly Scheme and that the scheme meeting had been postponed to 2pm (WST) on 27 October 2021.
18. On 18 October 2021, Westgold made an announcement attaching a copy of its bidder’s statement and noting that it had lodged its bidder’s statement with ASIC on 15 October 2021.
19. Also on 18 October 2021, Gascoyne released an ASX announcement noting the lodgement of Westgold’s bidder’s statement and stating that it continues to recommend that shareholders reject the Westgold Offer.

APPLICATION

Declaration sought

20. By application dated 13 October 2021, Westgold sought a declaration of unacceptable circumstances.
21. Westgold submitted (among other things) that:
 - (a) the ‘fiduciary out’ to the exclusivity provisions in the SID is *“ultimately illusory and does not achieve what it is intended to achieve (i.e. an ability for the Gascoyne Board to support a superior offer to the Scheme which requires the Scheme to not proceed)”*, in particular Gascoyne *“has no express contractual ability of its own volition to in fact terminate the Scheme and instead would need to argue that there exists some form of implied right of termination where such termination would be in accordance with their equitable fiduciary obligations to Gascoyne Shareholders”*
 - (b) *“an entity that wishes to acquire a stand-alone or pre-merger Gascoyne is practically prevented from doing so”* and
 - (c) Gascoyne shareholders *“are being denied any opportunity to consider the Westgold Offer within a reasonable time period and with reasonable Board recommendation and disclosure”*.

Takeovers Panel

Reasons – Gascoyne Resources Limited [2021] ATP 10

22. Westgold also made submissions in relation to the Gascoyne 13 October 2021 Announcement, including (in summary) that:
- (a) the statement “*the Westgold Offer is opportunistic in its timing and made at a time when material information was not available to Gascoyne shareholders*” was difficult to understand, “*given that at the time of making the Westgold Offer, Westgold (nor anyone other than Gascoyne for that matter) could not have possibly known that Gascoyne was in the possession of further material information*” and
 - (b) the statement “*Gascoyne major 22% shareholder Deutsche Balaton AG states its intention not to accept the current Offer from Westgold in the absence of a superior proposal*”, when read in the absence of other statements made by certain Gascoyne shareholders in support of the Westgold Offer, is “*misleading by omission and [has] caused the acquisition of control of Gascoyne to occur in an uninformed market*” and “*omits to disclose that Deutsche Balaton AG is a substantial shareholder (approx. 7%) in Firefly and that they have a nominee on the Gascoyne Board*”.
23. Westgold submitted that the effect of the circumstances was (in summary) that, contrary to the principles in sections 602(a) and (c)⁶, the SID has “*acted as an unacceptable lock-up device of Gascoyne and operates to stifle any auction for control for the pre-merger Gascoyne.*”

Interim orders sought

24. Westgold sought interim orders including that the scheme meeting in relation to the Firefly Scheme then scheduled for 2pm (WST) on 21 October 2021 be adjourned, deferred, or postponed until a date not less than 14 days after the conclusion of the Panel proceedings the subject of its application.

Final orders sought

25. Westgold sought final orders to the effect that:
- (a) the SID be amended to include a termination right for Gascoyne in the event of a Gascoyne Superior Proposal and
 - (b) the scheme meeting in relation to the Firefly Scheme be adjourned, deferred, or postponed until a date that is not less than 14 days after the date of the Gascoyne target’s statement in response to the Westgold Offer.

DISCUSSION

26. Gascoyne and Firefly made preliminary submissions.
27. In its preliminary submission, Gascoyne referred to the Gascoyne Board having determined that the Westgold Offer was not a Gascoyne Superior Proposal (as contemplated by clause 11.8 of the SID) and submitted (among other things):

⁶ Unless otherwise indicated, all statutory references are to the *Corporations Act 2001* (Cth) and all terms used in Chapter 6 or 6C have the meaning given in the relevant Chapter (as modified by ASIC)

Takeovers Panel

Reasons – Gascoyne Resources Limited [2021] ATP 10

“Irrespective of whether or not a termination right should exist in such circumstances, the simple position is that in the present circumstances the Gascoyne Board has determined that it wishes to proceed with the Firefly transaction and the need for any termination right in respect of the SID does not arise.”

28. We did not on first view understand the utility of Gascoyne having a fiduciary out to a no talk restriction in the SID with no corresponding termination right. It appeared that if a Gascoyne Superior Proposal emerged which Gascoyne wished to pursue instead of the Firefly Scheme, Gascoyne was reliant on Firefly exercising its own termination right under the SID. We considered this unusual and were concerned that it had the potential to impact the ability of a rival bidder for Gascoyne to be successful if Firefly decided not to exercise its termination right. We were also concerned about how the market interpreted Gascoyne’s ASX announcements in light of this.
29. While the circumstances of this matter gave us some pause, we consider that in light of the Gascoyne Board having determined that the Westgold Offer was not a Gascoyne Superior Proposal for the purposes of the SID (and Gascoyne’s fiduciary out thus not being enlivened), there was no reasonable prospect that we would make a declaration of unacceptable circumstances.
30. We also consider that the matters Westgold has raised in relation to the Gascoyne 13 October 2021 Announcement are of a nature that can be clarified by Westgold in its own disclosure,⁷ noting that Westgold has already done so in relation to one of these matters in its bidder’s statement, by disclosing the following at page 29:

“Westgold notes that the Gascoyne announcement 13 October 2021 advised that 22.1% shareholder Deutsche Balaton has indicated its intent to “reject the Westgold Offer in the absence of a superior proposal”. Gascoyne shareholders should be aware that Deutsche Balaton is also a major shareholder in Firefly, and with a nominee on the board of Gascoyne.”

DECISION

31. For the reasons above, we do not consider that there is any reasonable prospect that we would make a declaration of unacceptable circumstances. Accordingly, we have decided not to conduct proceedings in relation to the application under regulation 20 of the *Australian Securities and Investments Commission Regulations 2001* (Cth).
32. Given that we have decided not to conduct proceedings, we do not (and do not need to) consider whether to make any interim or final orders.
33. Firefly made a preliminary submission that “[t]he Takeovers Panel has shown a reticence to become involved in applications concerning proposed schemes applications in respect of which are before the Federal or Supreme Courts.”
34. We considered that we did have jurisdiction, including because it would be outside the Court’s typical role to consider issues relating to Gascoyne shareholders when deciding whether to approve the Firefly Scheme. However, having regard to the

⁷ See *Mungana Goldmines Limited 01R* [2015] ATP 7 at [27].

Takeovers Panel

Reasons - Gascoyne Resources Limited [2021] ATP 10

advanced progress of the Firefly Scheme we would likely have reached the view that we ought not intervene in this instance.

35. Gascoyne and Firefly also made preliminary submissions that the application had been made out of time for the purposes of section 657C and that we should not exercise our discretion to allow a longer period under section 657C(3)(b). Given that we have decided not to conduct proceedings, we do not (and do not need to) address this matter.

Denise McComish

President of the sitting Panel

Decision dated 22 October 2021

Reasons given to parties 16 November 2021

Reasons published 19 November 2021

Takeovers Panel

Reasons - Gascoyne Resources Limited
[2021] ATP 10

Advisers

Party	Advisers
Westgold Resources Limited	HopgoodGanim Lawyers
Gascoyne Resources Limited	Herbert Smith Freehills
Firefly Resources Limited	HWL Ebsworth Lawyers