

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMERCIAL AND EQUITY DIVISION  
COMMERCIAL COURT

List E  
SCI 2011 3155

IN THE MATTER OF THE WILLMOTT FORESTS 1995-1999 PROJECT  
ARSN 089 598 612

BETWEEN:

WILLMOTT FORESTS LIMITED (RECEIVERS AND MANAGERS APPOINTED)  
(LIQUIDATORS APPOINTED) ACN 063 263 650 (IN ITS CAPACITY AS A MEMBER OF  
THE SCHEME) AND OTHERS

Plaintiffs

and

GRIMSEY FINANCIAL SERVICES PTY LTD ACN 113 911 247  
AND OTHERS

Defendants

**AFFIDAVIT OF MARK ALBERT BLAND**

---

Date of Document:	22 June 2011
Filed on behalf of:	the Defendants
Prepared by Clarendon Lawyers Level 17, Rialto North Tower 525 Collins Street Melbourne VIC 3000	Solicitors Code: 101294 Tel: (03) 8681 4400 Fax: (03) 8681 4499 Ref: MAB:DXM:1100238 dan.mackay@clarendonlawyers.com.au

---

I, **MARK ALBERT BLAND**, of Level 17, Rialto North Tower, 525 Collins St Melbourne, Victoria, solicitor, affirm and say as follows:

1. I am a director of Clarendon Lawyers.
2. Clarendon Lawyers are solicitors for the defendants in this proceeding.
3. I have care and conduct of this matter on behalf of Clarendon Lawyers and am authorised to make this affidavit on behalf of the defendants.
4. I make this affidavit in opposition to the relief sought by the plaintiffs in the originating process dated 21 June 2011 filed in this proceeding on their behalf (**Originating Process**).
5. I make this affidavit from information within my own knowledge except where otherwise stated.



6. I have read:

- a. the affidavit of Bryan Webster affirmed 21 June 2011 and filed in this proceeding (**Webster Affidavit**) and viewed the exhibits referred to therein; and
- b. the outline of submissions of the plaintiffs dated 21 June 2011 (Plaintiff's Submissions).

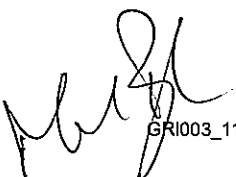
7. Any references in this affidavit to the:

- a. **Exit Option** is a reference proposed mechanism whereby Growers could elect to withdraw from the Scheme following implementation of the WGG Proposal as detailed in WGG's letter to Growers dated 9 June 2011;
- b. **Liquidators** is a reference to Messrs Ian Carson and Craig Crosbie in their capacity as joint and several liquidators of the Willmott Group of Companies;
- c. **Primary** is a reference to Primary Securities Limited;
- d. **Receivers** is a reference to the second to fourth plaintiffs;
- e. **Scheme** is a reference to the Willmott Forests 1995-1999 Project ARSN 089 598 612;
- f. **WFL** is a reference to the first plaintiff, Willmott Forests Limited ACN 063 263 650;
- g. **WGG** is a reference to the third defendant the Willmott Growers Group Inc (Reg No A0055077L);
- h. **WGG Proposal** is a reference to the proposal for the replacement of the first plaintiff, WFL, as responsible entity of the Scheme and the continuation of the Scheme developed by WGG in conjunction with other parties including Primary.

**Late service of plaintiffs' application and evidence in support**

8. I refer to paragraphs 66-68 and 72-74 of the Webster Affidavit and exhibits BW-41 to BW-44.

9. No explanation has been provided in the Webster Affidavit as to why the plaintiffs waited 9 days following receipt by them on 10 June of the letter from WGG to Growers dated 9




June 2011 (exhibit BW-41) which detailed the Exit Option, before sending the 20 June Letter (exhibit BW-42).

10. I refer to paragraph 74 of the Webster Affidavit and exhibit BW-44 referred to therein. That letter was forward by email by Dan Mackay of Clarendon Lawyers sent at 2:55pm.
11. At 4:28pm on 21 June 2011 an email from Matthew McCarthy was received by Clarendon Lawyers advising as follows:

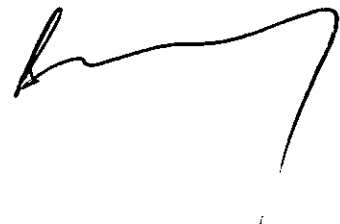
*We are currently filing an application in relation to the Growers' meeting in the Supreme Court of Victoria, which we understand will be heard by his Honour Justice Beach at 10:30 am tomorrow. We will send you a copy of the originating process and affidavit in support as soon as possible this afternoon.*

12. At 5:46pm on 21 June 2011 a further email was received by Clarendon Lawyers from Matthew McCarthy attaching copies of the plaintiff's originating process and the Webster Affidavit. The plaintiff's outline of submissions were received at approximately 9.55pm.
13. As a result of that delay, the plaintiffs' application and material in support thereof have been served late on the defendants' after business hours on the evening preceding the return date of that application. This late service has prejudiced the defendants' preparation in this matter.

#### **General observations regarding the Webster Affidavit**

14. I refer to paragraph A of the Originating Process and note that the only ground for relief advanced by the plaintiff is that 'the amendments to the Scheme's constitution proposed by resolution 2 would effect a fraud on the minority of members of the Scheme'.
15. There are a number of matters of opinion and alleged fact deposed to in the Webster Affidavit and/or stated or referred to the Plaintiff's submissions with which the defendants take issue.
16. In particular, and by way of example, I refer to paragraph 14 of the Plaintiff's Submissions which states (in apparent reliance upon paragraphs 36 to 37 of the Webster Affidavit) that:

*As permitted by s 601FG of the Act and cl 7.1 of the Constitution, Willmott Forests is a Grower in the Scheme, holding approximately 29.9% of Hectares (comprised of owned holdings and assigned interests).*

17. The defendants consider that statement mischaracterises and overstates the nature of WFL's interests in the interests assigned by them to growers.
18. I refer to paragraph 36(b) of the Webster Affidavit. The defendants consider that certain Growers' agreement to assign a percentage of their interest in the trees at harvest to WFL in exchange for a deferment as detailed in paragraph 36(b) does not give WFL an interest in the Hectares subject of that conditional assignment, but that agreement merely amounts to a conditional agreement to assign a future chose in action.
19. I refer to BW-17 which is a copy of a sample deed of assignment, deferment and variation pursuant to which executed the relevant assignment (**Grower Assignment Deed**).
20. Pursuant to recital A of the Grower Assignment Deed, the "effective date" of the assignment is when the trees are "cleared and felled". The agreement to assign is also conditional upon various factors set out in clause 1 of the Grower Assignment Deed as at the effective date.
21. As an interest in a chose in action, it is likely to be at best an interest in an interest in the scheme, a concept recognised in s764(1)(b) of the Corporations Act 2001 (the **Act**).
22. A member is defined as a person with a direct interest in the scheme (s9 of the Act). The scheme register records WFL as holding only 8% of Hectares. I believe such Hectares were purchased from Growers following snow damage affecting those particular Hectares.
23. Moreover, I am informed by the fourth defendant and believe, that on 23 January 2002 WFL assigned its "conditional interest" in the trees at harvest relating to approximately 308.3 Hectares to Grimsey & Associates Financial Services Pty Ltd ACN 056 610 167.
24. Now produced and shown to me marked **MAB-1** is a true copy of the deed of assignment pursuant to which WFL assigned its "conditional interest" as outlined in the preceding paragraph.
25. The Webster Affidavit provides no detail of this on-assignment.
26. In addition, there is certain relevant correspondence and communications between Clarendon Lawyers and the solicitors for the plaintiffs omitted from the materials referred to and exhibited to the Webster Affidavit.



27. This correspondence and communication, and the matters referred to at paragraph 14 above, are not relevant to the plaintiff's present application on the ground advanced, and accordingly the defendants do not intend to address those matters in this proceeding nor include in this affidavit material responding to those matters not relevant to the Court's consideration of the present application, but reserve their right to do so if necessary in this or any subsequent application.

#### **Uncertainty of the Liquidator's Proposal for Growers**

28. I refer to paragraph 51 of the Webster Affidavit, and the Liquidators' approval application and Liquidators' realisation proposal, as defined therein.

29. I also refer to exhibit BW-31 to the Webster Affidavit, being a copy of the Originating Process and supporting affidavit of Craig Crosbie sworn on 11 May 2011 filed by the Liquidators (**Crosbie Affidavit**) in the Liquidators' approval application (Federal Court proceeding VID 386 of 2011) which is listed for hearing on 28 June 2011.

30. The second plaintiff, Mr Webster, affirmed an affidavit on 17 June 2011 and in general support of the orders sought by the Liquidators, which has been filed on behalf of the Receivers in the Liquidators' approval application.

31. WGG has been granted leave to intervene in those proceedings pursuant to Order 6 Rule 17 of the Federal Court Rules.

32. WGG has filed, or will file, the following material in opposition to the orders sought by the Liquidators (to the extent those orders include or effect the Scheme and certain unregistered managed investment schemes of which WFL is manager):

- a. An affidavit affirmed by me on 3 June 2011 and the exhibit thereto;
- b. An affidavit of Paul Robert Challis sworn 20 June 2011 and exhibit thereto;
- c. A second affidavit affirmed by me on 20 June 2011 and the exhibit thereto;
- d. An affidavit of Ian Richard Bond sworn 21 June 2011.

33. I refer to paragraphs 63-67 of the Crosbie Affidavit contained in exhibit BW-31, which detail the Liquidators' realisation proposal.

34. The Crosbie Affidavit provides no detail of any independent evaluation and process of reasoning having been undertaken in respect of each of the managed investment



schemes to which the Liquidator's realisation process relates. Rather, it appears that the only consideration that has been undertaken by the Liquidators is general in nature across the various schemes of which WFL is responsible entity. The process adopted by the Liquidators fails to treat each scheme separately and consider the particular circumstances and prospects of each scheme individually, and the specific rights and interests of Growers in the respective schemes in light of those particular circumstances. Rather, their approach has been centred upon the insolvency of the responsible entity and is designed to prepare the schemes for winding up and the assets of the scheme for sale.

35. WGG considers that a number of the schemes, including the Scheme, are viable. As such, WGG does not consider Growers in the Scheme's sole remaining right to be receipt of distributions in a winding up, but considers it currently has all of its rights, including but not limited to the rights set out in paragraph 59 of the Crosbie Affidavit.

36. I refer to paragraph 62 of the Crosbie Affidavit in particular the following statement:

*Under the proposed amendments, the risk of disclaimer other than for value is removed and replaced with an entitlement to receive value for the termination of their rights. We consider that this position is more favourable for the Growers than the current position of uncertainty and risk. Therefore, we consider the proposed amendments will not adversely affect Growers' rights.*

37. The Crosbie Affidavit does not detail what value Growers will receive, if any, for the "termination of their rights".

38. Further, it does not detail the respective rights of the Growers in the various schemes and whether they are proprietary in nature.

39. Nor does it identify the schemes that are "viable" or distinguish between the schemes on that basis. It is unclear and uncertain what "rights" the Growers are giving up to enable the Liquidators to obtain value on the sale of all assets, including scheme assets. The application appears to proceed on an assumption that the Growers have no rights, therefore, they are giving up nothing.

40. The Liquidators realisation proposal provides no certainty to Growers as to what outcome they may achieve upon winding-up of the schemes, or what value to them that outcome may be.



## The Exit Option

41. I refer to paragraphs 69 to 74 of the Webster affidavit which addresses the Exit Option amendment to the WGG Proposal.
42. The WGG amended the proposal to include an Exit Option in response to the Receivers' complaints about the impact on the WGG Proposal on WFL, in its capacity as a Grower that would not make contributions to the Scheme.
43. In the 30 May Letter (as defined in the Webster Affidavit, and marked BW-35), they complained (at pages 3 and 11) that the dilution of interests of non-contributing growers (Dilution Mechanism) "is unfair and unnecessarily prejudicial" to Growers who could not or would not pay contributions under the WGG Proposal. They requested (at page 4) that the WGG Proposal be amended to provide an "exit mechanism" whereby "the RE will buy-back their interests for a fair and reasonable price."
44. The WGG is an entirely Grower funded proposal. There are no entities of financial substance underwriting or funding the proposal. Accordingly, the only funders of any buy-back would be other Growers. The WGG believes that it is not fair and reasonable that funds raised from Growers be used to compensate other Growers who do not wish to contribute funds to salvage the Scheme.
45. The Exit Option is described in the letter from WGG to Growers dated 9 June 2011 (**WGG 9 June Letter to Growers**) (BW-41) as follows:

### "A. EXIT OPTION

- The Receivers' Letter requests that the WGG Proposal be amended to include an exit mechanism whereby Growers can elect to withdraw from the Project.
- In the interests of fairness to Growers that will not or cannot pay contributions under the WGG Proposal, the WGG Proposal has been amended to include a facility for those Growers to sell their interests prior to any reduction of proportional interests (Hectares Market).
- The responsible entity currently has approval from ASIC to operate a low volume market for 10 managed investment schemes for which it is responsible entity. There is a limit to the number of transactions permitted (100 transactions with a total value of \$500,000 within a 12 month rolling period). On appointment as responsible entity an application will be made to ASIC to add the Project to the list of schemes for which the responsible entity may operate a low volume market.




- It is proposed that the Hectares Market will be operated by Primary as responsible entity. In doing so, Primary would:
  - maintain an electronic register of persons wishing to buy or sell interests in the Project;
  - provide the sellers' register to potential buyers of interests in the Project;
  - match potential buyers and sellers based on buyers' purchase interest forms and sellers' interests forms;
  - provide transfer forms of deeds of assignment and any other necessary document approved by Primary; and
  - handle settlement money - payment is to be made to Primary and this money will then be forwarded to the seller.
- This process would be preceded by a report from the responsible entity containing the result of an independent assessment of the plantations to assist parties in forming offers or bids in relation to specific Hectares. Primary may seek the permission of Poyry to utilize its data for this purpose.
- If for some reason, Primary was unable to operate the Hectares Market, Primary will facilitate sales of Hectares by issuing a Product Disclosure Statement for the benefit of those Growers wishing to sell."

46. The Constitutional amendments to facilitate the Exit Option are set out on page 11 and 12 of the WGG 9 June Letter to Growers as follows:

(b) "Insert new clause 3(b) as follows:

(b) Subject to all legal and regulatory requirements:

- (i) The Responsible Entity will, before any reduction of Growers' Proportional Share, and provided the Responsible Entity has been authorised by ASIC to do so, arrange for Growers who wish to withdraw from the Project to sell their Hectares to new purchasers through a low volume market in accordance with *Corporations (Low Volume Financial Markets) Exemption Notice 2003* operated by means of:
- (A) the maintenance of an electronic register of persons wishing to buy or sell Hectares;
  - (B) provision of the sellers register to potential buyers of Hectares;
  - (C) matching potential buyers and sellers based on buyers purchase interest forms and sellers interest forms;
  - (D) provision of transfer forms of deeds of assignment approved by the responsible entity; and
  - (E) the Responsible Entity handling settlement monies as payment is to be made to the Responsible Entity which will forward such monies to the seller.

("the transaction")

- (ii) Should the Responsible Entity for any reason not be able to operate a low volume market, the Responsible Entity will issue a Product Disclosure Statement for the benefit of Growers wishing to sell their Hectares.

[This amendment will insert the exit option outlined on page 2 of this Additional Information for Growers. This is a new amendment to the constitution.]

- (c) Insert the following words at the end of clause 10.6 (sss) of the constitution (which provides for reimbursement of costs and liabilities of any Product Disclosure Statement issued for a reconstruction):

“or to facilitate the sale of Hectares by Growers wishing to sell or for any other reason”.

- (d) Insert the following new paragraph (ttt) in clause 10.6 of the constitution and re-lettering the existing paragraph (ttt) as (uuu):

“operating any low volume market”.

47. Primary, and the rules of its low volume financial market, appear at item 63 in the Register of entities under the *Corporations (Low Volume Financial Markets) Exemption Notice 2003 (Exemption Notice)* which was issued pursuant to s791C of the Act and is kept by the Australian Securities & Investments Commission (**ASIC**).

48. Now produced and shown to me marked:

- a. **MAB-2** is a true copy of the Register I refer to in paragraph 47 above; and
- b. **MAB-3** is a true copy of the Exemption Notice I refer to in paragraph 47 above.

49. Section 9 of Part 3 of the Exemption Notice permits a person to operate up to two markets under Exemption Notice.

50. I have been informed by Rob Garton Smith, director of Primary, and believe that in respect of the first market operated by Primary under the Exemption Notice:

- a. as at 7 June 2011 Primary had processed approximately 6 sales totalling around \$20,000 under the Exemption Notice; and
- b. 3 further sales were anticipated in the short term for a total of approximately \$150,000.

51. To give certainty to Growers that an Exit Option would be provided by Primary, the WGG Proposal and associated Constitutional amendments were amended to include the

requirement that Primary facilitate the sale of Hectares and, if it is not able to do so under the low volume market, will issue a Product Disclosure Statement (PDS) to facilitate this process.

### **Dealings with ASIC**

52. The WGG has engaged in ongoing communication with ASIC in relation to the WGG Proposal, via Clarendon Lawyers.
53. ASIC raised queries in relation to the WGG Proposal between 30 May 2011 and 8 June 2011, but made no criticism or other mention of the lack of an Exit Option or compensation for non-contributing Growers until 20 June 2011, notwithstanding the receipt by ASIC of the Receivers' 30 May Letter.
54. On 20 June 2011, Raelene Harrison of our office and I had a teleconference with Paul Eastment and Ray Merrick of ASIC in relation to the Proposal and recent disclosures to Growers.
55. ASIC raised the Exit Option and asked why WGG included it in the proposal. I explained that it had been done in response to the Receivers' complaints. I noted that no other Grower funded reconstruction of failed agricultural scheme in recent years which contained similar dilution mechanisms included any sale option for non-participating Growers.
56. ASIC asked for an explanation about how the Exit Option would operate under a PDS.
57. I explained that the PDS option was disclosed in general terms because there are licensing and disclosure implications associated with whether the Exit Option under this mechanism would be characterised as an issue of interests or a sale of interests, and the level of involvement of Primary in any sale. I explained that a PDS may or may not be required by Primary or the Grower in these circumstances, but a PDS would ensure that offers were open to the general public and not just members of the Project. We also discussed how offers and bids might be facilitated through the PDS and Application form and how this intersected with provisions relating to the issue of interests in the Project Constitution.
58. At the conclusion of the discussion, ASIC did not require any further disclosure to Growers or explanation of the Exit Option for the purpose of the meeting.



59. I am not aware of any outstanding issues ASIC has with the Exit Option or the WGG Proposal generally.

### **Balance of Convenience**

60. In the current circumstances, the Willmott Schemes (including the Scheme) have a responsible entity in liquidation, being WFL.

61. WGG represents the interests of Growers in various managed investment schemes of which WFL is responsible entity, and in particular the Scheme.

62. The WGG is satisfied based on evidence adduced in other proceedings involving the Willmott Group (notably Exhibit CDC-9 to the Second Affidavit of Craig David Crosbie dated 4 February 2011 filed in Federal Court Proceeding No VID 1019 of 2010 and Exhibit BW-2 to the Affidavit of Bryan Webster filed in Federal Court Proceeding No VIC 386 of 2011), information concerning the findings of the Poyry Report relating to viability (which the Liquidators refuse to allow the WGG to publish to Growers – see BW-37 at 2.4) and their own enquiries that certain of those schemes, including the Scheme, are viable subject to an injection of capital through Grower contributions.

63. However, the Liquidators of WFL have applied to the Federal Court for orders which may have the effect of nullifying any residual value that the Growers of viable schemes, including the Scheme, have in their interests in those schemes. To the extent that the Growers' interests are not nullified or reduced, it is unclear what level of return the Growers can obtain if the liquidator exercises its powers of sale in winding up the Willmott Schemes as the Liquidators' and Receivers' affidavit material does not disclose evidence of any kind of returns, or the likely apportionment of returns to Growers.

64. WGG has worked with Primary in formulating the WGG proposal to replace the insolvent WFL as responsible entity and inject necessary funds in order for Primary to perform its functions as responsible entity and continue the Scheme. Such funding would occur upon replacement of the RE and on an annual basis. I refer to the Explanatory Memorandum at Exhibit BW-33 of the Affidavit of Bryan Webster dated 17 June 2011 filed in this proceeding.

65. However, the value of the Growers' interests in the Scheme is currently deteriorating. I refer to the Affidavit of Craig David Crosbie dated 25 November 2010 which provides at paragraph 59 that the Willmott Group is without funds to pay for any maintenance of the plantations.



66. I further refer to paragraphs 89 and 91 of the Affidavit of Bryan Webster dated 17 June 2011, where Mr Webster deposes that WFL has only one staff member in the Bombala region and that maintenance works are in his opinion urgent due to, among other things, spirex wood wasp infestations and snow and hail damage to trees.
67. WGG issued notices of meeting proposing to replace the responsible entity and continue the Scheme.
68. WGG's solicitors, Clarendon Lawyers, corresponded with the Receivers' solicitors, Allens Arthur Robinson about WGG's proposals. As a consequence, the proposed meeting has been adjourned on several occasions. I refer to Exhibits BW-23 to 30, BW-32, BW-34 to 35, BW-37 to 44 of the Affidavit of Bryan Webster dated 17 June 2011.
69. To the extent that the Receivers' solicitors identified legitimate issues, these were properly addressed. For instance, an Exit Option was introduced to provide for a liquidity element to allow Growers unwilling or unable to make further contributions to sell their interests in a secondary market. I refer to Exhibit BW-41 of the Affidavit of Bryan Webster dated 17 June 2011.
70. In WGG's view, sufficient notice has been provided on the resolutions to be voted on at the 23 June 2011 meeting and the WGG and the Growers it represents are entitled to challenge the continuation of WFL in its role as responsible entity in circumstances where WFL is unable to perform its functions, and WFL's inaction is causing continued deterioration of scheme interests in circumstances where there is evidence that the Scheme is viable.
71. Delaying the meeting further, in circumstance where it is far from clear that any amendments to the existing proposal short of dispensing with the dilution mechanism altogether, will overcome the plaintiff's numerous objections, will lead to the incurring of additional cost by WGG in intervening period before the meeting is held. WGG is funded by Grower contributions and therefore, any unnecessary or increased expenditure is directly felt by Growers.
72. Further delay will lead to significant additional legal and other costs associated with reconvening the meeting (including postal costs for the despatch of notices to Growers without an email address) and adversely affect the capacity and ability of any replacement responsible entity to revive the Scheme and remedy any deterioration that has already occurred. Furthermore, further deterioration may occur. The WGG Proposal has reached a point where members are ready to consider the WGG Proposal

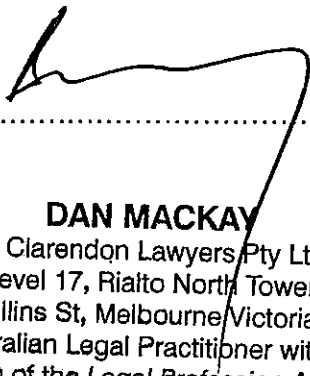


and the resolutions for its implementation and determine the future of the Scheme, and the risk of further loss of Grower value should be minimised by allowing the members meeting to proceed.

AFFIRMED by the said )  
**MARK ALBERT BLAND** )  
at Melbourne in the State of Victoria )  
this 22<sup>nd</sup> day of June 2011 )



Before me:.....



**DAN MACKAY**  
of Clarendon Lawyers Pty Ltd  
Level 17, Rialto North Tower  
525 Collins St, Melbourne Victoria 3000  
an Australian Legal Practitioner within the  
meaning of the *Legal Profession Act 2004*

**SCHEDULE OF PARTIES**

**WILLMOTT FORESTS LIMITED (RECEIVERS AND MANAGERS APPOINTED)  
(LIQUIDATORS APPOINTED) ACN 063 263 650 (IN ITS CAPACITY AS A MEMBER OF  
THE SCHEME)**

First Plaintiff

**BRYAN WEBSTER**

Second Plaintiff

**MARK ANTHONY KORDA**

Third Plaintiff

**MARK FRANCIS MENTHA**

and

**GRIMSEY FINANCIAL SERVICES PTY LTD  
ACN 113 911 247**

First Defendant

**REDISLAND AUSTRALIA LIMITED  
ACN 104 555 455**

Second Defendant

**WILLMOTT GROWERS GROUP INC (VIC)  
ABN 34 287 512 211**

Third Defendant

**PAUL ROBERT CHALLIS**

Fourth Defendant