

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

**IN THE MATTER OF THE WILMOTT FORESTS 1995–1999 PROJECT
ARSN 089 598 612**

LIST E
No. S CI 2011 3155

BETWEEN

**WILMOTT FORESTS LIMITED (RECEIVERS AND MANAGERS APPOINTED)
(IN LIQUIDATION) (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

DEFENDANTS' OUTLINE OF SUBMISSIONS

Date of document:	22 June 2011
Filed on behalf of the respondent	The Defendants
Prepared by:	
Clarendons Lawyers	Tel: 03 8681 4400
Level 17, Rialto Tower	Fax: 03 8681 4499
525 Collins Street	Solicitors Code: 101294
Melbourne VIC 3000	Ref: MAB: 1100238

INTRODUCTION

1. By a notice dated 20 May 2011 (“**Notice**”) together with an accompanying Explanatory Memorandum, the First and Second Defendants called a meeting of the members of the Wilmott Forests 1995–1999 Project (“**Scheme**”) pursuant to s. 252D of the *Corporations Act 2001* (Cth) (“**Act**”) which is now scheduled to be held at 10:00am on 23 June 2011 (“**Meeting**”).
2. The Notice proposed four resolutions for the Meeting. Resolution 1 proposed to approve a specified restructure of the Scheme (referred to as the “WGG Proposal”). Resolution 2 proposed certain changes to the Scheme constitution to give effect to the WGG Proposal. Resolutions 3 and 4 proposed replacement of the First Plaintiff as responsible entity (“**RE**”) of the Scheme as part of the WGG Proposal.
3. By their originating process dated 21 June 2011, the Plaintiffs’ seek interlocutory, interim and/or final injunctions prohibiting the holding of the Meeting and/or restraining the Defendants from procuring, causing or acquiescing in resolutions 1

and/or 2 as set out in the Notice or any resolutions to substantially the same effect to the Meeting or any subsequent meeting of the members of the Scheme.¹

4. The gravamen of the Plaintiffs' claim is that the proposed amendments to the Scheme constitution the subject of resolution 2 set out in the Notice would not be made for a proper purpose and would be unfair and oppressive to the First Plaintiff and any other insolvent members in the Scheme.²

AMENDMENT POWERS

5. The Scheme constitution provides at clause 20 for "Amendments to this constitution" as follows:³

20.1 Subject to the Corporations Law, the Manager may by deed amend this constitution.

20.2 If the Corporations Law or any relief from the provisions of the Corporations Law granted by the ASIC requires that this constitution contain certain provisions, then those provisions are deemed to be incorporated into this constitution at all times at which they are required to be included and prevail over any other provisions of this constitution to the extent of any inconsistency. Clause 20.1 does not apply to provisions deemed by this clause 20.2 to be incorporated in the constitution.

6. For the purposes of clause 20.2, s. 601GC of Act provides at s 601GC(1):

The constitution of a registered scheme may be modified, or repealed and replaced with a new constitution:

- (a) by special resolution of the members of the scheme: or
- (b) by the responsible entity if the responsible entity reasonably considers the change will not adversely affect members' rights.

7. Special resolution is defined in s. 9 of the Act in relation to a registered scheme as a resolution of which notice has been given as set out in s. 252J(c) and that has been passed by at least 75% of the votes cast by members entitled to vote on the resolution.

FRAUD ON THE MINORITY

Applicability of *Gambotto* principles

8. The Plaintiffs' claim is based on the principles in *Gambotto v WCP Ltd.*⁴ However, the prevailing view is that principles in *Gambotto* do not necessarily apply to trusts (ie.

¹ See Plaintiff's Originating Process at [1]; see also Plaintiff's Outline of Submissions at [1(b)]

² See Plaintiff's Originating Process; see also Affidavit of Bryan Webster, exhibit "BW-46", at [31]

³ See Affidavit of Bryan Webster, exhibit "BW-8", at p. 14

⁴ (1995) 182 CLR 432

such as the Scheme arrangement). In considering submissions based on the principles in *Gambotto*, Hely J stated in *Cachia v Westpac Financial Services Ltd*:⁵

Gambotto was concerned with expropriation by a majority, of the minority's shares in a company. The court held that a company's articles of association could not be amended to confer such a power simply for the purpose of aggrandising the majority. Such a power can be taken only if:

- it is exercisable for a proper purpose
- its exercise will not operate oppressively in relation to minority shareholders.

While in a commercial sense, ownership of units in a trust may be similar to ownership of shares in a company, in a legal sense there is a fundamental difference between a unit held under a trust deed such as the present and a share in a company: *Charles v Federal Cmr of Taxation* (1954) 90 CLR 598 at 609.

...The present is a trust case in which company law principles such as fraud on the minority play no part: see K S Jacobs, *Law of Trusts in Australia*, 6th ed, [316]. The rights and obligations of the trustee, the manager and unitholders are not to be determined by reference to company law principles, but rather by the terms of the trust deed, and the law of trusts.

9. The view taken by Hely J regarding the application of the principles of *Gambotto* to trusts was supported by Young CJ in Eq in *King Network Group Pty Ltd v Club of the Clubs Pty Ltd*.⁶ However, elsewhere, *Gambotto* principles have continued to be discussed in cases relating to trusts.
10. Despite not rejecting the view taken by Hely J, Barrett J in *Re Australand Holdings Ltd*⁷ considered the application of *Gambotto* and Austin J's view in *Arakella v Paton*.⁸ Barrett J stated at [11]-[13]:

This matter was the subject of comprehensive analysis by Austin J in *Arakella v Paton* (2004) 60 NSWLR 334. Based on that analysis, there are two factors about the present case which indicate the inapplicability of the *Gambotto* principle.

The first point of importance is that there is no discrimination in this case. It is not a case of a pre-existing and distinct majority using its power to dispense with or dispossess a minority. The decision makers with respect to expropriation or compulsory redemption of units of AWPT4 and AWPT5 will be in each case the general body of unit holders and the mechanism will be a special resolution under s 601GC upon which all have an opportunity to vote and under which all alike will be affected in exactly the same way. The affected group as a whole will thus decide its own fate and will be free, if it so chooses, to decline to succumb to the expropriation.

As Austin J pointed out in *Arakella Pty Ltd v Paton*, above, a similar situation of equal and non-discriminatory treatment was assessed, from the *Gambotto* viewpoint, in *Heydon v NRMA Ltd* (2000) 51 NSWLR 1; 36 ACSR 462; [2000] NSWCA 374. Two members of the Court of Appeal in that case (Malcolm AJA and Ormiston AJA) were of

⁵ (2000) 170 ALR 65 at [85]-[87]

⁶ (2008) 69 ACSR 172 at [257]

⁷ (2005) 54 ACSR 687

⁸ (2004) 60 NSWLR 334

the opinion that there was no expropriation susceptible to objection on *Gambotto* grounds when the membership rights of all members of a company were extinguished by action taken by the general body of members; and that this was so despite the fact that some members of the body might cast negative votes. Austin J's conclusion on the matter was summarised as follows:

[148] Clearly the scope of the ratio in *Gambotto* is open to further consideration in Australian appellate courts. Sitting at first instance, however, and bearing in mind the views expressed by other judges at first instance, I should apply what seems to me to be the clear majority opinion in *Heydon* – namely that the ratio in *Gambotto* (and in particular, the requirement to distinguish between an amendment for the purpose of promoting the interests of the commercial entity and the general body of corporators, from an amendment to avoid detriment or harm to the company) has no application where the proposed amendment will replace all interest with another species of property in a manner that treats the interest-holders equally, at any rate where (as here) there is no “majority” voting bloc. Consequently my view is that the *Gambotto* principles are inapplicable to the present case on this ground.”

11. Here, where the WGG proposal is not discriminatory and that all growers may, if they chose, decline to succumb to the expropriation by contributing funds, it is submitted that the *Gambotto* principles are not applicable.

Purpose of WGG proposal

12. First, the Plaintiffs' allege that the proposed amendments to the Scheme constitution the subject of resolution 2 are not or have not been shown to be necessary in order to secure the Scheme from significant detriment or harm.⁹ However, as explained in the Explanatory Memorandum, the purpose of the WGG proposal is to carry the Scheme forward to harvest as intended by each original prospectus in response to the liquidation of the First Plaintiff. The Defendants' submit that such a purpose is plainly one for which the powers of amendment were conferred.
13. The Introductory Letter at page 6 of the Explanatory Memorandum summarises the purpose of the proposal as follows:¹⁰

It is WGG's view that, with the collapse of Willmott Forests Limited (WFL), the Project is no longer being adequately managed. In order to restore the Project as close as possible to its original status, it is necessary to appoint a new responsible entity and also to provide a mechanism whereby ongoing and future maintenance and management costs will be funded by Growers. Converting the Project to a contributory scheme is the basis of the WGG Proposal.

14. The Background to resolution 1 at page 8 of the Explanatory Memorandum further explains the purpose of the proposal as follows:¹¹

⁹ See Affidavit of Bryan Webster, exhibit “BW-46”, at [31]

¹⁰ See Affidavit of Bryan Webster, exhibit “BW-33”

¹¹ See Affidavit of Bryan Webster, exhibit “BW-33”

It is important to note that the Project itself is not in receivership, administration or liquidation. However, the Project is currently unfunded and the purpose of the WGG Proposal is to rectify this position.

15. The Defendants' submit this is a proper, logical and convincing intention or purpose behind the WGG proposal, whatever personal interests, motivations and financial circumstances each Grower or groups of Growers may have.
16. Page 17 of the Explanatory Memorandum provides a further list of the reasons why the preparers of the Notice consider the WGG proposal is in the best interest of the Growers. It stated:¹²

Why should Growers support the WGG Proposal

In our view, the WGG Proposal offers the following:

- The WGG Proposal is the only proposal for the continuation of the Project.
 - If the Growers do not approve the WGG Proposal, it is possible that the Project will be wound up and the Growers' forestry interests sold by the Liquidators together with the other assets of WFL.
 - If the project is wound up, the prospect of any value being returned to Growers is uncertain.
 - Primary is an experienced RE, having previously taken over other distressed forestry schemes.
 - Growers will retain a right to receive proceeds from the harvest of their Trees. It gives Growers the best opportunity to see a return with an annual cost in the region of 2% of their original expenditure.
 - If the WGG Proposal is not implemented and the project is instead wound up by the Liquidator, it is likely that the Receivers will seek to call in the Growers' loans.
17. It is apparent that the Plaintiffs' disagree with preparers' view about the prospects of a better return to Growers under the WGG proposal viz the Liquidators' informal winding up. However, such a difference of opinions is no basis for restraining the holding of the Meeting. Indeed, it is the very reason why the Meeting should be allowed to proceed to allow the Growers to meet, debate and resolve the issue.
 18. The Plaintiffs complaint is that preparers' view was "entirely speculative".¹³ However, the preparers acknowledged in the Explanatory Memorandum that the WGG proposal by its very nature contains a number of uncertainties (at page 4) is subject to a number of risks, including at that the information contained in the Explanatory Memorandum is incomplete or inaccurate because the preparers' access to relevant information is

¹² See Affidavit of Bryan Webster, exhibit "BW-33"

¹³ See Plaintiff's Outline of Submissions at [39(a)]

limited (at page 18). The mere existence of such uncertainty does not mean that the WGG proposal is being proposed for a collateral purpose.

19. Apart from anything else, as explained in the Affidavit of Mark Bland dated 22 June 2011,¹⁴ the Liquidators proposal for informal winding up of the Scheme is at least equally uncertain in terms of return to Growers, but that has not prevented the Liquidators and Receivers from apparently forming the view that it is in the best interests of the members.

Fairness of WGG proposal

20. Secondly, the Plaintiffs' allege that the proposed amendments to the Scheme constitution are not fair as it is inevitable that Growers who are unwilling or unable to pay the new fees will have their interests in the Scheme expropriated for no consideration.¹⁵ However, the Plaintiffs are not in a position to show the proposed "exit option" (incorporated in the WGG proposal and explained in the Supplementary Memorandum dated 6 June 2011) will not result in any sale of relevant Growers' interests. The "exit option" will establish a market for the relevant grower's interests and will facilitate a sale of the interests into that market.
21. Moreover, the Defendants submit that market sale process facilitated by the "exit option" is a fair process in any event. If (as alleged) the process results in the growers ultimately receiving little or no consideration for expropriation of their interests, that will be a function of the market value of their interests, rather a result of any unfairness in the process. Further, as explained in the Affidavit of Mark Bland dated 22 June 2011,¹⁶ Clarendons have discussed the "exit option" with ASIC and ASIC has not raised any objection to it.
22. The Plaintiffs' complaint is that the "exit option" is effectively a mechanism to implement a "fire sale" of Scheme interests. However, any such outcome is no different to the Liquidators' proposed informal wind up of the Scheme which the Plaintiffs are apparently prepared to support. As such, the relevant growers may ultimately receive little or no consideration for expropriation of their interests under the Liquidators' proposal in any event.

¹⁴ At [28]-[40]

¹⁵ (2009) 72 ACSR 418

¹⁶ At [28]-[40]

BALANCE OF CONVENIENCE

Let the Meeting proceed

23. While the issues in this case may be sufficiently contentious to give rise to a serious question to be tried, as Dowsett J found in *City Pacific Ltd v Bacon*, the balance of convenience in this case strongly favours the holding of the Meeting with any remaining questions to be resolved once the outcome of the Meeting is known and with the benefit of further evidence about the proposals.
24. In *City Pacific Ltd* (a case in which a responsible entity attempted to enjoin a meeting convened under section 252D to pass a resolution for its removal), Dowsett J said:

[31] The question, then, is whether or not the balance of convenience favours preventing the meeting from considering the resolution of which notice has been given. I have expressed reservations as to two aspects which may affect the validity of the meeting. No doubt, members will be invited to take those matters into account. Hopefully, appropriate legal advice will be available to them as to the extent to which my concerns may be justified. The decision for the members is largely a commercial one. They can be acquainted with the dangers of a change of responsible entity at this stage, as well as the advantages. It is for them to weigh up those matters and to decide upon the course to be followed. The balance of convenience favours my leaving the members to determine the matter. In those circumstances, the application for injunctive relief will be dismissed.¹⁷

Value of Scheme

25. Further, as there is presently no maintenance work being done on the plantations, any delay in the appointment of a new RE could have a further deleterious effect on the value of the Scheme. This is explained further in the Affidavit of Mark Bland dated 22 June 2011.¹⁸

Ongoing costs

26. Further, there will be ongoing costs incurred by the Liquidators at the expense of the Scheme if the Meeting is further delayed.

Delay

27. Further, the Plaintiff's have delayed in raising the complaints which ultimately led to the commencement of this proceeding. The Plaintiffs' first raised alleged unfairness to non-contributing Growers in their letter of 30 May 2011.¹⁹ On 10 June, the Plaintiffs

¹⁷ See also *Westralia Property Management Ltd v Davison* [2006] WASCA 203, [23]

¹⁸ At [60]-[65]

¹⁹ See Affidavit of Bryan Webster at [55]

received the Defendants' response noting meeting to be adjourned to 23 June and outlining the "exit option".²⁰ The next relevant communication from the Plaintiffs was on 20 June 2011 when they gave the Defendants until yesterday to agree to adjourn meeting of face application.²¹ No explanation of inaction between 10 and 20 June 2011 has been provided.

No Evidence of and prejudice to the plaintiffs

28. The plaintiffs in their submission on balance of convenience rely entirely on the consequences of the change of responsible entity. However, the receivers' appointment in respect of WFL's right title and interest its role as RE was terminated in September 2010²². The liquidators are not before the court. In the circumstances, the alleged prejudice to the plaintiffs relied is entirely illusory.

DATED: 22 June 2011

E.W WOODWARD
N.P. DE YOUNG

CLARENDONS LAWYERS
Solicitors for the Defendants

²⁰ See Affidavit of Bryan Webster at [66]

²¹ See Affidavit of Bryan Webster at [68]

²² See Affidavit of Bryan Webster at [11]