

IN THE MATTER OF WILLMOTT FORESTS LIMITED (RECEIVERS AND MANAGERS
APPOINTED) (IN LIQUIDATION)
ACN 063 263 650

WILLMOTT FORESTS LIMITED (RECEIVERS AND MANAGERS APPOINTED)
(IN LIQUIDATION)
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IN ITS PERSONAL CAPACITY AND IN ITS CAPACITY AS RESPONSIBLE ENTITY OF
EACH OF THE MANAGED INVESTMENTS SCHEMES LISTED IN SCHEDULE 1 AND IN
ITS CAPACITY AS MANAGER OF THE UNREGISTERED MANAGED INVESTMENT
SCHEME LISTED IN SCHEDULES 2 AND 3
First Plaintiff

CRAIG DAVID CROSBIE
Second Plaintiff

IAN MENZIES CARSON
Third Plaintiff

PLAINTIFFS' OUTLINE OF SUBMISSIONS

A PURPOSE OF APPLICATION

1. The Plaintiffs seek orders and directions pursuant to s 511 of the *Corporations Act 2011* (**the Act**) in connection with a number of managed investment schemes for which the First Plaintiff (**WFL**) is the responsible entity. Specifically, the Plaintiffs seek orders and directions that the Second and Third Plaintiffs (**the Liquidators**):¹
 - (a) are justified and reasonable in causing WFL to exercise its power pursuant to section 601GC of the Act to amend the constitutions of the Willmott Registered Schemes (as listed in schedule 1) to empower WFL to terminate, relinquish or surrender the leases, sub-leases, forestry management agreements and other project documents between WFL and Growers (collectively, **Project Documents**) and any rights of the Growers arising from on in connection with the Project Documents (**Grower Rights**);
 - (b) are justified and reasonable in causing WFL to exercise its power to amend the investment deeds or constitutions of the Willmott Unregistered Schemes (as listed in schedule 2) which have an investment deed or constitution (**Willmott Professional Investor Schemes**) to empower WFL to terminate, relinquish or surrender the Project Documents and any Grower Rights;

¹ The Plaintiffs do not, at this stage, press for an order in the terms set out in paragraph 5 of the Originating Process [CB 2].

- (c) alternatively to (a) and (b) above, are justified in disclaiming the Project Documents of the Willmott Registered Schemes and Willmott Professional Investor Schemes as onerous; and
 - (d) are justified in disclaiming the Project Documents of the Willmott Schemes which do not have an investment deed or constitution (**Willmott Contractual and Partnership Schemes**) (as listed in schedule 3) as onerous.
2. Each of the directions and orders are sought on the basis that WFL considers that they will not adversely affect Growers' rights and Growers will be entitled to the net proceeds of sale, or any other value or consideration received for or referable to the amendment or disclaimer of the Project Documents or Grower Rights.
3. The Plaintiffs rely upon the following:
- (a) the affidavit of Craig David Crosbie sworn 11 May 2011 in this proceeding (**Third Crosbie Affidavit** [CB 8 - 386]);
 - (b) the affidavit of Craig David Crosbie sworn 26 November 2010 in proceeding VID 1019 of 2010 and exhibited at CDC-16 to the Third Crosbie Affidavit (**First Crosbie Affidavit** [CB 41 - 68]);
 - (c) the affidavit of Craig David Crosbie sworn 4 February 2011 in proceeding VID 1019 of 2010 and exhibited at CDC-16 to the Third Crosbie Affidavit (**Second Crosbie Affidavit** [CB 69 - 79]);
 - (d) the affidavit of Craig David Crosbie sworn 22 June 2011 in this proceeding (**Fourth Crosbie Affidavit** [CB 1845 - 1861]); and
 - (e) the affidavit of Bryan Webster affirmed 17 June 2011 in this proceeding (**Webster Affidavit** [CB 801 - 1331]), on behalf of the receivers and managers of WFL (**Receivers**).
4. At the outset, it is important to note the limited and *facilitative* effect of the orders presently being sought by the Plaintiffs. As Mr Crosbie deposes in his Third Affidavit:²

"63. We consider that the best possible price will be achieved by offering all the Freehold Land and the FNSW Leases (collectively the **Sale Assets**) for sale at the one time and providing interested parties with the option of bidding for part or all of the Sale Assets. We have spoken with the Receivers who have informed us that they agree with this proposition and we have therefore agreed to coordinate a joint sale process.

² at [63]-[66] [CB 28]. See also, Webster Affidavit at [33] [CB 812].

...

65. We consider that the granting of a power of sale and/or the confirmation of the liquidators' right to disclaim the Project Documents will provide sufficient comfort to potential purchasers of the ability of the liquidators to give clear title on settlement of any sale. Potential purchasers should therefore be willing to participate in the sale process and incur the costs and take the time needed to submit a binding bid. This should maximise the price obtained both for the land and trees.

66. Any sale contract will be conditional on the liquidators obtaining approval from the court to the exercise of the power of sale or right to terminate, relinquish, surrender or disclaim. It is our intention to request potential purchasers to allocate the purchase price between the land and the Trees, so that this can be used as a basis for the allocation of the purchase price between Growers and creditors. We will seek an opinion from an independent expert as to the reasonableness of any offer. If necessary, at the time of seeking approval to the exercise of the power or right, a process will be established for determining the appropriate allocation of the purchase price."

B DIRECTIONS UNDER S 511

5. Section 511 of the Act provides:

" (1) The liquidator, or any contributory or creditor, may apply to the Court:

(a) to determine any question arising in the winding up of a company; or

(b) to exercise all or any of the powers that the Court might exercise if the company were being wound up by the Court.

...

(2) The Court, if satisfied that the determination of the question or the exercise of power will be just and beneficial, may accede wholly or partially to any such application on such terms and conditions as it thinks fit or may make such other order on the applications as it thinks just."

6. This power in relation to voluntary liquidators, and its counterparts (for example s 479(3), which applies in compulsory liquidations), developed from the practice of the Court of Chancery under the general law in giving directions to those entrusted with the administration of property under the control of the Court.³ The Court has a discretion as to whether giving directions will be of advantage in the liquidation, and it would give directions where it can summarily solve a difficulty that has arisen in the liquidation in a cheap and efficient manner.⁴ A direction given under s 511 will protect the liquidator who acts in accordance with it, but does not give rise to a *res judicata* as between parties who may have competing interests affected by it.⁵ The Court does not finally determine the rights and liabilities of parties arising out of the subject-

³ *Re GB Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674, 677C.

⁴ *Dean-Willcocks v Soluble Solution Hydroponics Pty Ltd* (1997) 42 NSWLR 209, 212F.

⁵ *Meadow Springs Fairway Resort Ltd (in liq) v Balanced Securities Ltd* (2007) 25 ACLC 1433, 1441-1442 [48].

matter of the application for directions.⁶ Although in giving directions the Court will not pronounce upon the commercial prudence of a particular transaction, it will act in an appropriate case to protect insolvency practitioners from claims that they have acted unreasonably in taking certain action.⁷

C WFL'S MANAGED INVESTMENT SCHEMES

7. WFL acts as the responsible entity and manager of 8 registered (**Willmott Registered Schemes**) and 29 unregistered (**Willmott Unregistered Schemes**) managed investment schemes. WFL's rights, title and interest in respect of its role as the responsible entity of the 8 Registered Schemes and its rights and obligations as manager of 22 of 29 Unregistered Schemes, are outside the control of the Receivers.⁸
8. The Unregistered Schemes under the control of the Liquidators are broken down into the following categories⁹:
 - (a) 11 Contractual Schemes constituted between 1983 and 1995 (**the Contractual Schemes**);
 - (b) 5 Partnership Schemes constituted between 1993 and 1994 (**the Partnership Schemes**); and
 - (c) 6 Professional Investor Schemes constituted between 2001 and 2006 (**the Professional Investor Schemes**).
9. The Willmott Registered and Willmott Unregistered Schemes are operated on land which is either freehold land (approximately 62,000 hectares) owned by WFL or leasehold/third party land (over 15,000 hectares) leased or managed by WFL from third parties. Approximately 27,600 hectares of WFL's freehold land is unencumbered.¹⁰
10. The leased land is owned by Hancock Victorian Plantations Pty Ltd (**HVP**) or Forestry Commission of New South Wales.¹¹

⁶ *Re GB Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674, 679-80.

⁷ *Re Ansett Australia v Mentha* (2001) 39 ACSR 355, 371 [66].

⁸ First Crosbie Affidavit at [14]-[16] [CB 46]. Seven of the Unregistered Schemes remain in the Receivers' control.

⁹ See Third Crosbie Affidavit at schedule 2.

¹⁰ First Crosbie Affidavit at [6] [CB 44].

¹¹ First Crosbie Affidavit at [7] [CB 44].

11. Although each of the Willmott Schemes is governed by a suite of different documents, the constituent documents of all of the schemes other than the Willmott Forests Premium Timberland Fund No 1¹² include at least a lease or licence in relation to certain plantation land (**Grower Leases**) and a Forestry Management Agreement (sometimes called a Contract for Works and Services, Establishment and Maintenance Agreement or Land Sourcing and Management Agreement) (**Forestry Management Agreement**). In addition the constituent documents of many schemes includes a forestry right agreement (**Forestry Right Agreement**).¹³
12. The constituent documents for the Willmott Schemes¹⁴ generally provide that Growers' interest in the relevant scheme comprises their interest in an area described as a "Hectare" or "Woodlot" which is leased to the Growers and managed by Willmott entities. The constituent documents also generally provide that Growers either legally or beneficially own the trees located on their "Hectares" or "Woodlots".

D INSOLVENCY OF WFL AND VIABILITY OF THE SCHEMES

13. The Liquidators determined that WFL is insolvent and does not have funds available to it to:¹⁵
- (a) meet its debts;
 - (b) comply with its statutory obligations as owners or manager of the plantations and
 - (c) fulfil its obligations to Growers and third parties under the constituent documents of the Willmott Schemes.
14. As Mr Crosbie has deposed, the timber plantations require ongoing maintenance to:¹⁶
- (a) comply with the Willmott Group of Companies' statutory maintenance obligations;
 - (b) protect the Willmott Group of Companies' public liability exposure in relation to fire prevention;

¹² The Willmott Forests Premium Timberland Fund No 1 is a unit trust, with Growers holding units, rather than receiving a lease over land.

¹³ Third Crosbie Affidavit at [27] [CB 18].

¹⁴ See, Webster Affidavit at [35] [CB 51], and exhibit BW-2 [CB 844 - 1041]. See also, Fourth Crosbie Affidavit at [11] [CB 1847 - 1848].

¹⁵ First Crosbie Affidavit at [33] [CB 51].

¹⁶ First Crosbie Affidavit at [52] [CB 55].

- (c) satisfy the terms and conditions of any insurance policies such that the policies remain enforceable; and
 - (d) maintain the current condition of the plantations.
15. The Liquidators have determined that there was (and remains) insufficient cash to meet the day-to-day expenditure of the Willmott Schemes. Importantly, there is no obligation by the Growers to make additional payments. The day-to-day management expenditure of the Willmott Schemes includes fire prevention, road maintenance, insurance, weed and pest control, plantation maintenance, motor vehicle running costs, lease obligations, maintenance of accreditations, preparation of plantation condition and maintenance programs and information technology and telecommunication expenses.¹⁷
16. The Liquidators engaged Poyry Management Consulting (Australia) Pty Ltd (**Poyry**) to conduct a detailed Viability Analysis (**Poyry Report**).¹⁸ The Poyry Report concludes that, depending on the discount rate applied (11%, 13% or 15%), a number of the Willmott Schemes are not financially viable but, more importantly, that for the Willmott Schemes to be viable, further funding of \$123 million will be required.¹⁹ In particular, Poyry made the following findings:²⁰

“Poyry has estimated the present value of future plantation maintenance, overheads and administration costs for all the Willmott projects to be in the order of AUD107.1 million. This estimate includes the cost of maintaining plantation projects owned by Willmott. Poyry has assumed the growers’ contribution to be AUD 123.2 million, which is the estimated costs plus a contingency of 15%. Poyry has assumed that this funding will be available immediately for an assumed new RE to manage the plantations in order to ensure adequate funds are available to see the projects through to maturity.

...

All schemes require a large upfront contribution to cover costs. The estimated per-ha contributions required for each scheme are shown in Table S-2. The required contributions are estimated on the assumption that all growers except [sic] Willmott will contribute to the costs. If say, one third of growers by area does not contribute to costs, the required contribution per ha of the contributing growers will increase by 50%. In Poyry’s opinion, it appears likely that for younger schemes that require large contributions per-ha relative to their NPV per ha, many growers may not contribute to costs.”

¹⁷ First Crosbie Affidavit at [39]-[40] [CB 52]. See also: Webster Affidavit at [40], [43], [45], [50], [53], [56], [59], [60], [68], [71], [73], [87], [90], [91], [92], [93] [CB 814 - 826].

¹⁸ Second Crosbie Affidavit at [6] [CB 71].

¹⁹ Second Crosbie Affidavit at [6] [CB 71].

²⁰ Poyry Report, exhibit CDC-9 [CB 512-513].

17. The Liquidators and Receivers consider that the discount rate of 11% is too low.²¹ The Liquidators consider a discount rate of at least 15% is more appropriate²². If a discount rate of 15% is adopted, the viability of a number of schemes is dramatically affected.²³ This is amply demonstrated by the sensitivity analysis at page 73 of the Poyry Report.²⁴ In addition to the selected discount rate, the viability of the Willmott Schemes is also based, among other things, on the following assumptions:
- (a) the plantations have been professionally managed and maintained to date, and that any maintenance operations that may have been missed will be brought up to date in 2011;²⁵
 - (b) a new RE / manager (**New RE**) will be appointed to the Willmott Schemes;²⁶
 - (c) the New RE will not raise debt to cover costs;²⁷
 - (d) the Growers in the Willmott Schemes will contribute to estimated costs of maintenance, overheads and administration costs, and a 'safety margin' of 15% (the **Up-front Growers' Contribution**);²⁸
 - (e) the Up-front Growers' Contribution will be made in 2011;²⁹
 - (f) WFL will not contribute to the ongoing costs of the schemes in respect of which it holds interests in its own right and the costs for completing those schemes will be incurred by the remaining Growers;³⁰ and,
 - (g) the land on which the Willmott Schemes are conducted would continue to be available for use by those schemes upon the appointment of a replacement RE.

²¹ Webster Affidavit at [23] [CB 808 - 809]. Factors which Mr Webster states support a higher discount rate include: the long lead time until maturity of the plantations relating to many of the Willmott Schemes (with the plantations relating to 85% of the planted hectares within the Willmott Schemes are not expected to reach maturity until at least 2025); uncertainties associated with the species planted in respect of some of the Willmott Schemes (as to which, see paragraphs 51(a), 58, 69 and 74 of the Webster Affidavit); uncertainties associated with plantation yields for the Willmott Schemes (as to which, see paragraph 126 of the Webster Affidavit); and, uncertainties associated with markets, including eventual market pricing and the availability of markets for some species (as to which, see paragraphs 51(a), 58, 69 and 74 of the Webster Affidavit).

²² Fourth Crosbie Affidavit at [5] [CB 1846].

²³ Webster Affidavit at [40], [41], [3], [45], [50], [53], [54], [56], [59], [60], [68], [71], [72], [73], [87], [88], [90], [91], [92] [CB 814 - 826].

²⁴ First Crosbie Affidavit, CDC-9 at [CB 592].

²⁵ Poyry Report, exhibit CDC-9 [CB 511].

²⁶ Poyry Report, exhibit CDC-9 [CB 581 and 593].

²⁷ Poyry Report, exhibit CDC-9 [CB 582].

²⁸ Poyry Report, exhibit CDC-9 [CB 582 and 593].

²⁹ Poyry Report, exhibit CDC-9 [CB 582].

³⁰ Poyry Report, exhibit CDC-9 [CB 582].

18. In this regard, Poyry also made the following apposite observations:
- (a) given the relatively young age of the plantations, none of the existing projects will be viable in the absence of further and ongoing maintenance work,³¹
 - (b) in Poyry's opinion, no new RE would accept responsibility for any scheme under the current scheme structure;³² and
 - (c) with an increasing discount rate, more plantation area is deemed to be non-viable with the effect that overhead costs can be expected to increase across the remaining viable schemes.³³
19. As a result of the foregoing analysis, there is a very real question as to whether there will be any *sufficient* appetite amongst the Grower cohort and prospective replacement REs to restructure the WFL Schemes. In particular:
- (a) at present, we have only received one formal proposal for replacing WFL as the RE/Manager of the Willmott Schemes (the Primary Securities Proposal in respect of the 1995-1999 Registered Schemes),³⁴
 - (b) there is no evidence that the necessary constitutional amendments could be passed and/or the requisite number of Growers will make the significant up-front contributions required to restructure the schemes (particularly in circumstances where WFL will not contribute to ongoing costs of the schemes in respect of which it holds interests in its own rights and the cost to Growers would further increase if certain Growers elected not to participate in the restructure).
20. The lack of an appetite amongst prospective REs and Managers is exemplified by the expression of interest campaign conducted by the Liquidators. An expression of interest campaign commenced on 12 November 2010.³⁵ No unconditional offer from a new RE or manager capable of acceptance was received.³⁶ This is not unexpected. As most of the schemes are structured so that the Growers pay an up-front fee, and then no rent or other fees until termination of the project, there is very little

³¹ Poyry Report, exhibit CDC-9 [CB 511].

³² Poyry Report, exhibit CDC-9 [CB 582].

³³ Poyry Report, exhibit CDC-9 [CB 592].

³⁴ Indeed, given the operation of s601FS and s601 FT of the Act, it may be doubted as to whether there will be appetite to replace WFL as RE of the Registered Schemes. See "Insolvency of Registered Managed Investment Schemes" by RI Barrett (writing extra-judicially) at 11-12 and *Syncap Management (Rural) Australia Ltd v Lyford* (2004) 51 ACSR 223, esp 232 [48]. See also Fourth Crosbie Affidavit at [6] [CB 1846 - 1847].

³⁵ First Crosbie Affidavit at [47] [CB 54].

³⁶ Second Crosbie Affidavit at [21] [CB 74].

commercial return to be derived from acquiring the freehold land subject to the continuing operation of the schemes.³⁷ The various scheme assets have been and continue to waste. To avoid further wastage and increased fire risk, it is therefore necessary to commence the process of attempting to sell the scheme assets on an unencumbered basis, as quickly as possible.³⁸ Further, the intermingling of land between schemes³⁹ makes it desirable that the power of sale is available for all of the Freehold Land, rather than being confined to certain schemes.⁴⁰

21. The question of whether there is any appetite for a restructure of the schemes amongst Growers and replacement REs/managers and the benefits to be derived, can only be properly assessed in comparison to a concrete alternative in the form of the unencumbered asset sale. By opposing the orders sought by the Liquidators, the WGG are depriving the Growers (and the creditors) of the opportunity to make that very comparison. In contrast, the making of the orders sought does not deprive the Growers of *any* rights. The Liquidators have committed to returning to court to approve any sale and the extinguishment/disclaimer of any Growers' rights.

D PROPOSED CONSTITUTIONAL AMENDMENT

22. Section 601GC(1)(b) of the Act permits the responsible entity to modify the constitution of a registered scheme if the responsible entity reasonably considers the change will not adversely affect members' rights. The Constitutions and Investment Deeds governing the Professional Investor Schemes also provide WFL with a commensurate power of amendment.⁴¹ The power of amendment has been used regularly to effect the *de facto* winding up of distressed managed investment schemes.⁴²
23. This application concerns the exercise of power under s 601GC(1)(b). Section 601GC(1)(b) enables the responsible entity to amend the constitution of a registered scheme unilaterally if it "reasonably considers the change will not adversely affect

³⁷ Fourth Crosbie Affidavit at [7] [CB 1847].

³⁸ Fourth Crosbie Affidavit at [28] [CB 1852].

³⁹ Third Crosbie Affidavit at [32] [CB 19].

⁴⁰ Fourth Crosbie Affidavit at [21] [CB 1850 - 1851].

⁴¹ Third Crosbie Affidavit at [54] [CB 26].

⁴² See: Timbercorp forestry projects: *Re Timbercorp Securities Limited* [2009] VSC 597 (Pagone J); *Re Timbercorp Securities Limited* [2009] VSC 608 (Davies J); Timbercorp almond projects: *Re Timbercorp Securities Limited (No 2)* [2009] VSC 411 (Robson J); *Re Timbercorp Securities Limited (No 3)* (2009) 74 ACSR 626; [2009] VSC 510 (Robson J); *Re Timbercorp Securities Limited* [2009] VSC 590 (Davies J); Timbercorp olive schemes: *Re Timbercorp Securities Limited (No 4)* [2009] VSC 530 (Croft J); Timbercorp citrus projects: *Re Timbercorp Securities Limited* (2010) 77 ACSR 291, [2010] VSC 50 (Davies J); *Re Timbercorp Securities Limited* [2011] VSC 83 (Judd J); Timbercorp table grape projects: *Re Timbercorp Securities Limited (No 4)* [2011] VSC 24 (Davies J); and Great Southern olive projects: *Great Southern Managers Australia Ltd (in liq) v Thackray* [2010] WASC 138 (La Miere J).

members' rights". In *ING Funds Management Ltd v ANZ Nominees Ltd*,⁴³ Barrett J observed that three requirements must be satisfied for a constitutional amendment effected under that provision to be valid:

- (a) it is necessary to assess how the responsible entity viewed "members' rights" before the modification and the impact that the modification would have on those rights;
- (b) the responsible entity needs to have considered that, according to a comparison of "members' rights" before the modification with the changed rights that would exist after it, there would be no "adverse" affectation of those rights; and
- (c) the responsible entity needs to have formed an opinion, which it "reasonably considered", as to the absence of adverse affectation.

24. His Honour distinguished between the members' rights and their interests or the value of their rights, and regarded "rights" as much narrower.⁴⁴ In *Re Timbercorp Securities Ltd (in liq)*,⁴⁵ a case analogous to the present, Davies J expressed general agreement with the views of Barrett J about the approach to s 601GC(1)(b).

25. In the present case, the constitutional amendments, satisfy s 601GC(1)(b) and the requirements of the Professional Investor Scheme Constitutions, as:

- (a) the Liquidators have given due consideration to the effect on the Growers' rights of the proposed constitutional amendments;⁴⁶
- (b) the Liquidators have formed the view that the proposed constitutional amendments would not adversely affect the Growers' rights.⁴⁷ It is important to note that the decision has been made in the context of the insolvency of WFL. Furthermore, the power to amend is being sought on the condition that the Growers will be entitled to the net proceeds of sale or consideration received on the termination, relinquishment or surrender of the Project Documents which is referable to their rights. The Liquidators are going to seek the Court's direction before exercising this right. Thus, any opportunity to be heard on whether the power of sale *should* be exercised, is not lost by the mere granting of that power.

⁴³ (2009) 228 FLR 444, [84]-[88]

⁴⁴ *ING Funds Management* at [101].

⁴⁵ [2010] VSC 50; (2010) 77 ACSR 291, 294 [7].

⁴⁶ Third Crosbie Affidavit at [57]-[63] [CB 26 - 28].

⁴⁷ Third Crosbie Affidavit at [62] [CB 27 - 28].

- (c) It was reasonable for the Liquidators to consider that the Growers' rights would not be adversely affected by the proposed amendments. The proposed amendments are to be made in the context of WFL's inability to perform its tasks as responsible entity because of its insolvency. The amendments are not to be made in a vacuum, unconnected with the incapacity of the Schemes to continue because of the insolvency of WFL. It is quite the contrary. As Poyry note,⁴⁸ the scheme arrangements cannot continue and WFL cannot fund the significant up-front requirements of the Schemes. Further, the Liquidators have deposed that they are yet to receive an unconditional bid to become the replacement RE/Manager capable of being accepted.⁴⁹

E DISCLAIMER

26. The Contractual Schemes and Partnership Schemes do not have a constitution.⁵⁰ Nor are the Liquidators empowered to sell the WFL Assets related to those schemes.⁵¹ Thus, the disclaimer of the Project Documents⁵², including the Grower Leases, is necessary to facilitate an unencumbered sale. The general legislative intent of Division 7A of the Act is to "enable insolvency administrators to relieve themselves of ongoing liabilities which so prolong the administration and delay the dividend".⁵³ What is important is whether the Project Documents can be carried out compatibly with the Liquidators' duty to realise WFL's property and pay a dividend at the earliest possible time.⁵⁴ In the present case, it is apparent that the Project Documents require performance for over 25 years and that their performance would substantially delay the provision of a dividend to creditors.
27. By the unambiguous terms of s 568(1A) of the *Corporations Act*, the Liquidators are entitled to disclaim the Grower Leases without having to prove that those leases are onerous or unprofitable. No legislative fetter is placed on the power of a liquidator to disclaim a lease.⁵⁵ The effect of the disclaimer is to determine all of the tenant's and landlord's obligations under a lease. The leasehold estate ceases to exist.⁵⁶

⁴⁸ Poyry Report, exhibit CDC-9 [CB 582].

⁴⁹ Fourth Crosbie Affidavit at [16] [CB 1848].

⁵⁰ Third Crosbie Affidavit at [53] [CB 25 - 26].

⁵¹ *Ibid.*

⁵² The Forestry Right Agreement terminates at the same time as the lease of the relevant plantation terminate: see Third Crosbie Affidavit at [45] [CB 24].

⁵³ *Global Television Pty Ltd v Sportsvision Australia Pty Ltd (in liq)* (2000) 35 ACSR 484 at 498 [65] (per Santow J); approved by Spigelman CJ in *Sims and Anor (as liqs of Enron Australia Pty Ltd) v TXU Electricity Ltd* (2005) 53 ACSR 295 at 299 [18]. See also [16]-[17].

⁵⁴ *Global Television Pty Ltd v Sportsvision Australia Pty Ltd (in liq)* (2000) ACSR 484 at 496-497 [57]-[63] (per Santow J).

⁵⁵ As Chesterman J stated in *obiter* in *Re Real Investments Pty Ltd* [2000] 2 Qd R 555 at 559 [13]: "Ordinarily one might think that a 'lease of land' would constitute land which can only be disclaimed if

28. In any event, the terms of the Grower Leases are onerous and/or unprofitable:⁵⁷
- (a) the Grower Leases generally run for 25 years;⁵⁸
 - (b) in most cases, WFL will not receive any further rent payments during the term of the Grower Leases and thus will receive no (or very little) cashflow until the end of the schemes;⁵⁹
 - (c) continuing to run the schemes subject to the Grower Leases would delay the winding up of the Willmott Group for up to 25 years;⁶⁰
 - (d) the demised land may only be used for the establishment and maintenance of Trees in accordance with the scheme being managed by WFL⁶¹ – and the scheme can no longer be managed by WFL due to its insolvency;⁶² and,
 - (e) even if the Growers were able to enter upon the land and harvest the Trees, the exercise of that right would increase WFL's liability, would be onerous to monitor and would create serious risks.⁶³
29. Further, the Forestry Management Agreements are themselves onerous and unprofitable. In addition to being performable over the same onerous length of time and subject to the same absence of adequate revenue, the Forestry Management Agreements provide for the establishment, maintenance and harvesting of Growers'

burdened with onerous covenants (see s568(1)(a)) but the draftsman seems to have regarded leases as a species of contract, not an interest in land, and permitted that species and one other to be disclaimed without leave."

⁵⁶ *Hindcastle Ltd v Barbara Attenborough Ltd* [1997] AC 70 at 87E-F (per Lord Nicholls of Birkenhead): "Disclaimer operates to determine all the tenant's obligations under the tenant's covenants, and all his rights under the landlord's covenants. In order to determine these rights and obligations it is necessary, in the nature of things, that the landlord's obligations and rights, which are the reverse side of the tenant's rights and obligations must also be determined. If the tenant's liabilities to the landlord are to be extinguished, of necessity so also must be the landlord's rights against the tenant. The one cannot be achieved without the other. Disclaimer also operates to determine the tenant's interest in the property, namely the lease. Determination of a leasehold interest has the effect of accelerating the reversion expectant upon the determination of that estate. The leasehold estate ceases to exist."

⁵⁷ See generally: *Re Real Investments Pty Ltd* [2000] 2 Qd R 555 at 559 [14] (per Chesterman J) and *Global Television Pty Ltd v Sportsvision Australia Pty Ltd (in liq)* (2000) 35 ACSR 484 at 497 [61]-[62] (per Santow J) adopting the observations of Chesterman J in *Transmetro Corporation Ltd v Real Investments Pty Ltd (in liq)* (1997) 17 ACLC 1314 at 1318-1320 [15]-[20].

⁵⁸ Third Crosbie Affidavit at [43(a)] [CB 22]. See also exhibit BW-2 to the Webster Affidavit [CB 844 - 1041].

⁵⁹ Ibid.

⁶⁰ Third Crosbie Affidavit at [43(b)] [CB 22].

⁶¹ Consider for example the wording of the lease in Willmott Forests Project (ARSN 089 379 975): "[t]he lessee may use the land only as part of a managed investment scheme by which investors including the lessee ('Growers') participate in the establishment and maintenance of trees ('Trees'), **which scheme is managed by the lessor**" [emphasis added].

⁶² Third Crosbie Affidavit at [29(c)] [CB 18].

⁶³ Third Crosbie Affidavit at [43(h)] [CB 23 - 24].

leasehold property by WFL.⁶⁴ As stated above,⁶⁵ the Poyry report estimates that WFL would need to contribute a net present value of \$123 million or \$336.7 million in absolute terms to continue running the Willmott Schemes for the remaining life of the schemes.⁶⁶ Of course, WFL does not have the requisite funds to do so.

30. In the present case, the WGG is requiring the Liquidators to defer any attempt to finalise the affairs of WFL by disclaiming the Project Documents, with the effect that WFL will be subject to obligations of specific performance over the next 25 years. To accede to the entreaties of the WGG would be inappropriate in circumstances where it is unclear as to whether there is sufficient or any appetite amongst the cohort of Growers and potential replacement REs/Managers. As Young J held in *Dekala Pty Ltd (in liquidation) v Perth Land & Leisure Ltd*,⁶⁷ in the context of s 454 of the *Corporations Law* (the predecessor to s 568):⁶⁸

“[F]ulfilment of that contract would involve the liquidator in at least eight months of work and in taking the chance that the purchaser would obtain finance on terms and conditions that were satisfactory to it, even reading that clause subject to a proviso that the purchaser must act reasonably about that satisfaction. This would seem to me to be a contract which cannot satisfactorily be carried out by a liquidator whose interest is to realise the company's property and to pay a dividend to creditors at the earliest possible time. This would seem to me to be what is meant by an unprofitable contract: see, for example, the article by Mr Melville in (1952) 15 *Modern Law Review* 28.

I do not think that one needs to go into the various facts and figures with respect to the contract to work out whether it is profitable. If one did, my view would be that it is a matter on the structure of s 454 at the moment, that the liquidator is the person whom the Act, at least at the first instance, gives a decision as to whether the contract is profitable. There can be review of his decision under s 538. If it were otherwise a liquidator could not act quickly and commercially to terminate liabilities that he would have and it would seem that the whole purpose of the disclaimer provision is to allow a relatively quick determination of the company's liability under unprofitable contracts.”

31. Further factors in favour of granting an order justifying the exercise of a power to disclaim the Project Documents include:
- (a) the fact that the right to harvest is theoretical and cannot be exercised;⁶⁹
 - (b) the increased risk and lack of control associated with individual parties entering upon the land makes it unlikely that individual Growers will be able to obtain insurance to maintain and harvest their own trees;⁷⁰

⁶⁴ Third Crosbie Affidavit at [46] [CB 24].

⁶⁵ See paragraph [16], above.

⁶⁶ Third Crosbie Affidavit at [43(c)] [CB 23]; Poyry Report at [CB 512].

⁶⁷ (1987) 17 NSWLR 664 at 667-668.

⁶⁸ Approved by Santow J in *Global Television* at 496.

⁶⁹ Third Crosbie Affidavit at [34]-[35] [CB 20 - 21].

⁷⁰ Third Crosbie Affidavit at [37]-[40] [CB 21 - 22].

- (c) the significant funding required to continue the schemes;⁷¹
 - (d) the fact that even if the necessary funding were available, between 28% and 88% of the Willmott Schemes would still not be viable depending on the discount factor applied;⁷²
 - (e) with the effluxion of time, the value of the trees and, in turn, the viability of the Willmott Schemes (and the value to a third party purchaser), will continue to decrease, as WFL does not have sufficient funds to undertake the requisite maintenance activities and the trees are at risk of wasting and the fire risk continues to increase;⁷³ and
 - (f) at least in respect of the HVP Leases, the advanced nature of the negotiations with HVP.⁷⁴
32. Any opposition by the Growers to the granting of the power to disclaim is premature. Pursuant to s 568B(3) of the *Corporations Act*, a court's power to set aside a disclaimer under s 568 is conditioned upon satisfaction that the disclaimer would cause, to persons who have, or claim to have, interests in the property, prejudice that is "grossly out of proportion" to the prejudice that setting aside the disclaimer would cause to the company's creditors. It is of course critical that the prejudice to the Growers must not only outweigh prejudice to creditors: the prejudice must be *grossly* out of proportion to the prejudice to creditors.⁷⁵
33. Thus, if *at a later stage*, the Liquidators seek an order justifying the disclaimer of the Grower Leases and in fact exercise that power, the Growers will have an opportunity to set aside those disclaimers. For the Growers to establish the requisite prejudice, they will need show that there is realistic opportunity to restructure the schemes before the trees are materially impaired *and that* the prejudice to the Growers from

⁷¹ See paragraph [29], above.

⁷² Third Crosbie Affidavit at [43(f)] [CB 23].

⁷³ Third Crosbie Affidavit at [43(g)] [CB 23] and [47] – [50] [CB 24 - 25]. Fourth Crosbie Affidavit at [28] [CB 1852].

⁷⁴ Third Crosbie Affidavit at [68]-[81] [CB 29 - 32].

⁷⁵ In *Re Real Investments Pty Ltd* [2000] 2 Qd R 555 Chesterman J described the operation of the section as follows at 563-564 [29]-[30]: "Section 568B(3) demands a comparison between the position of the person who will lose if the disclaimer is not set aside and that of the other person who will lose if it is. Only if the prejudice to the former is 'grossly out of proportion' to the prejudice of the latter will the court be authorised to set the disclaimer aside. 'Prejudice' is a wide term, no doubt chosen deliberately. In most, if not all, cases one would expect prejudice to manifest itself in financial disadvantage. In fact two sets of comparisons are called for. The first is an examination of the relative positions of [the Growers] and the creditors, on the supposition that the agreement is ended by disclaimer. The second is the same examination on the supposition that the agreement remains in force. The contrast in position between those comparisons allows the court to make the assessment described by the section."

enabling the Liquidators to disclaim the Grower Leases is *grossly* out of proportion to the prejudice to the creditors. It would be illogical and contrary to the efficient winding up of WFL, if the Growers were able to circumvent their heavy onus under s 568B(3) of the Act at a point prior to the Liquidators of WFL even deciding to exercise the power to disclaim *and* the court determining to approve the exercise of that power.

F APPROPRIATENESS OF GIVING DIRECTIONS IN THE PRESENT CASE

34. The orders sought are appropriate and justified to facilitate the marketing and possible sale of the assets of the Willmott Schemes by provisionally indicating that the Liquidators will be able, subject to the Court's further approval, to take the necessary steps to obtain and transfer clean title to the assets of the Willmott Schemes. The orders sought and the ensuing process will also ensure that the Growers can compare (with the benefit of independent expertise) the return they are likely to receive from that sale campaign with any hypothetical return that they might receive from any proposal for the restructure and continuation of the scheme(s) in which they have an interest (if any such proposal exists).
35. The Growers lose no rights by the making of the orders sought, as they will have the right to later contend that a power of disclaimer and/or sale ought not be exercised, with the benefit of a better understanding as to existing alternatives. If the Growers succeeded in opposing the orders *now*, the scope of the benefits to be derived from an unencumbered sale will not be capable of being assessed and the orderly winding up of WFL's affairs will be substantially delayed.

Dated: 22 June 2011

JAMES D ELLIOTT

ROBERT G CRAIG

ARNOLD BLOCH LEIBLER