

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)
ACN 063 263 650

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 IN REPLY

A. CONTENTIONS MADE BY THE WGG

1. By their outline of submissions dated 22 June 2011, the Willmott Growers' Group (the **WGG**) advance the following contentions:
 - (a) the Court should not give the directions sought by the Liquidators "as they have the effect of resolving substantive matters in dispute";¹
 - (b) the Liquidators have failed to consider the differences between the various schemes;²
 - (c) addition of a power to terminate Growers' rights adversely affects Growers rights because termination will substitute Growers' rights for an undefined hope that the value of half grown timber (if any) may somehow be realised by them;³
 - (d) in assessing whether the proposed amendments adversely affect the "Grower interests", the Liquidators have not considered the viability of the respective schemes, "in a situation where some schemes are clearly more viable than others";⁴

¹ WGG Outline of Submissions dated 22 June 2011 at [6].

² WGG Outline of Submissions dated 22 June 2011 at [7]-[11].

³ WGG Outline of Submissions dated 22 June 2011 at [13].

⁴ WGG Outline of Submissions dated 22 June 2011 at [21].

- (e) the Liquidators have provided insufficient evidence to support a reasonable belief on their part that the change in the constitutions would not adversely affect Growers' rights;⁵
- (f) the Grower Leases are not onerous or unprofitable;⁶
- (g) if the Grower Leases were disclaimed by the Liquidators, title in the land would escheat to the Crown;⁷
- (h) the Growers' rights survive the disclaimer of the Grower Leases;⁸
- (i) it is arguable that Bombala Land is scheme property within the meaning of s 9 of the *Corporations Act 2001* (Cth) (**the Act**);⁹ and,
- (j) the Growers should be slow to accede to orders based on the "Timbercorp protocol".¹⁰

2. For the reasons set out below and in the Plaintiffs' Outline of Submissions dated 22 June 2011, none of the matters identified by the Growers justify the refusal of the orders sought by the Liquidators. As the Plaintiffs have already noted, if the Growers succeed 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.¹¹

B. THE WGG MISCONCEIVE THE SCOPE AND PURPOSE OF THE APPLICATION

3. The WGG contend that the Court "should not give the directions sought by the [L]iquidators as they have the effect of resolving substantive matters in dispute."¹² That contention misconceives the facilitative effect of the orders being sought by the Liquidators. As Mr Crosbie makes clear "[a]ny 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."¹³ The Growers do not lose any rights or interests by the making of the orders sought. Their opportunity to later contend that a sale or disclaimer ought not proceed is preserved.¹⁴ As the courts have often noted, the effect of an order under s 511 of the Act is not to determine

⁵ WGG Outline of Submissions dated 22 June 2011 at [22].

⁶ WGG Outline of Submissions dated 22 June 2011 at [26].

⁷ WGG Outline of Submissions dated 22 June 2011 at [27].

⁸ WGG Outline of Submissions dated 22 June 2011 at [28].

⁹ WGG Outline of Submissions dated 22 June 2011 at [40].

¹⁰ WGG Outline of Submissions dated 22 June 2011 at [47].

¹¹ Plaintiffs' Outline of Submissions dated 22 June 2011 at [35].

¹² WGG Outline of Submissions dated 22 June 2011 at [6].

¹³ Third Crosbie Affidavit at [66] [CB 28].

¹⁴ See also, Plaintiffs' Outline of Submissions dated 22 June 2011 at [35].

rights and liabilities arising out of particular transactions, but to protect liquidators from claims that they have acted unreasonably or inappropriately.¹⁵

4. If the court is satisfied that the giving of an order under s 511 of the Act would be “just and beneficial” it may accede to that request and make the desired order on such terms and conditions as it thinks fit.¹⁶ Such an order will be just and beneficial where “it will be of advantage in the liquidation”.¹⁷ It cannot be seriously contended that the orders sought will not be of advantage in the liquidation. As Mr Crosbie has already deposed:¹⁸

“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.”

5. In *BOSI Security Services Limited v Australia and New Zealand Banking Group*,¹⁹ Davies J held that because the growers in the 2005-2007 Timbercorp almond schemes held leasehold interests in the land, almond trees and capital works, those leasehold interests entitled the growers to make a claim on the sale proceeds to be measured by the value of those leasehold interests pre-extinguishment.²⁰ The value of those interests was assessed as a loss of opportunity claim, by reference to the prospect of the schemes being restructured, because the schemes were not viable in their existing form.²¹ Thus, in the present case, once the foreshadowed binding bids are obtained, the Growers will be able to assess whether the unencumbered sale of assets provides a better alternative to any *practical and realistic* opportunity of restructure.²² *At that point*, the WGG will be able to make submissions about whether

¹⁵ *Re Ansett Australia Ltd v Korda* (2002) 115 FCR 409 at 421 [44]; *Re Timbercorp Securities Ltd (in liq)* [2009] VSC 597 at [3]; *Anglican Insurance Ltd* [2008] NSWSC 41 at [38]; *Handberg v MIG Property Services Pty Ltd* (2010) 79 ACSR 373 at 377 [7].

¹⁶ Section 511(2) of the Act.

¹⁷ *Dean-Willcocks v Soluble Solution Hydroponics Pty Ltd* (1997) 42 NSWLR 209 at 212E-F. *Handberg v MIG Property Services Pty Ltd* [2010] 79 ACSR 373 at 377 [7].

¹⁸ Third Crosbie Affidavit at [65] [CB 28].

¹⁹ [2011] VSC 255.

²⁰ *BOSI Security Services Limited v Australia and New Zealand Banking Group* [2011] VSC 255 at [79].

²¹ *BOSI Security Services Limited v Australia and New Zealand Banking Group* [2011] VSC 255 at [87] and [93].

²² In *BOSI Security Services Limited v Australia and New Zealand Banking Group* [2011] VSC 255 the prospect of restructure was “wishful thinking and unfounded” and held to be merely “theoretical”: at [137].

the power of termination and/or disclaimer ought to be exercised. The Growers' concern about the Timbercorp protocol is thus misplaced.²³

C. TREATMENT OF THE SCHEMES

6. The Liquidators obtained the Poyry Report for the purpose of assessing the viability of the schemes.²⁴ All of the schemes under the control of WFL are not viable in their present form because no new RE/Manager would accept responsibility for those schemes.²⁵ Thus, until the elements necessary for a practical and realistic restructure are established,²⁶ all of the Growers have no prospect of recovering any commercial return, other than from the realisation of the scheme assets.
7. Importantly, the Liquidators have not received an unconditional offer from a prospective RE or manager which is capable of being accepted.²⁷ Further, there is no evidence that there are adequate levels of Grower support necessary to effect a restructure.
8. Accordingly, the Liquidators have acted in the best interests of all of the schemes, by seeking to obtain the power necessary to properly identify what might be recovered from the unencumbered sale of the assets used by those schemes, without in any way compromising the rights of Growers to test whether a theoretical prospect of restructure can in fact be turned into a *real* one.

D. PROPOSED CONSTITUTIONAL AMENDMENT

9. The WGG contend that the “[a]ddition of a power to terminate Growers’ rights adversely affects Growers [sic] rights because termination will substitute Growers’ rights for an undefined hope that the value of half grown timber (if any) may somehow be realised by them”.²⁸ The WGG’s contention is erroneous for two reasons. First, it conflates the provision of the right to terminate with the effect of the exercise of that power. Secondly, it fails to properly identify the context in which the power is being sought: WFL is insolvent and cannot continue to maintain the land and trees;²⁹ the Project Documents could be disclaimed under s 568 of the Act;³⁰ the schemes cannot

²³ Cf WGG’s Outline of Submissions dated 22 June 2011 at [47].

²⁴ Second Crosbie Affidavit at [6] [CB 71].

²⁵ Poyry Report, exhibit CDC-9 [CB 582].

²⁶ See Plaintiffs’ Outline of Submissions at [17] and [19(b)].

²⁷ Second Crosbie Affidavit at [21] [CB 74].

²⁸ The WGG Outline of Submissions dated 22 June 2011 at [13].

²⁹ Plaintiffs’ Outline of Submissions at [15]. First Crosbie Affidavit at [38]-[40]. See also: Webster Affidavit at [40], [43], [45], [50], [53], [56], [59], [60], [68], [71], [73], [87], [90], [91], [92], [93] [CB 814-826].

³⁰ Cf WGG Outline of Submissions dated 22 June 2011 at [15].

continue in their present form;³¹ the Liquidators have not received an unconditional offer from a prospective RE or manager which is capable of being accepted;³² and, the Liquidators will not exercise the power without court approval. In those circumstances, it cannot be seriously denied that the provision of the power to terminate is not adverse to Growers' rights. These are *precisely* the same circumstances in which Davies J held in *Re Timbercorp Securities*³³ that the liquidators were properly of the opinion that the constitutional amendments would not adversely affect Growers' rights.

10. Furthermore, it cannot be seriously contended that the Liquidators have not adduced evidence of the reasonableness of their belief as to these matters.³⁴ For the reasons set out in section C above, the assertion that the Liquidators have not considered the circumstances of each scheme is misconceived.
11. Ultimately, on the current evidence, what may be "substituted" by the *exercise* of a power of termination is an unenforceable right of no value.³⁵ Conversely, what is created by the amendment sought, is the opportunity to assess what, if any, alternative return may be obtained.

E. DISCLAIMER

12. The WGG contend that the relevant Grower Leases are neither onerous nor unprofitable.³⁶ This bald assertion fails to have any regard to the fact that the Grower Leases place obligations of specific performance on WFL for a duration of 25 years in circumstances where the specific purpose of the demise cannot be achieved and any cashflow received by WFL would be limited.³⁷ Moreover, the WGG's contention fails to have any regard to the overarching purpose of Division 7A of the Act.³⁸
13. The Grower Leases are clearly burdensome on WFL and the Liquidators. In that respect, the present case is clearly distinguishable from *Old Style Confections Pty Ltd v Microbyte Investments Pty Ltd (in liq)*,³⁹ in which Hayne J noted that the liquidators in that case did not seek to disclaim because the "dealing carries with it **burdens or**

³¹ Poyry Report, exhibit CDC-9 [CB 582].

³² Second Crosbie Affidavit at [21] [CB 74].

³³ (2010) 77 ACSR 291 at 297-298 [16].

³⁴ Cf WGG Outline of Submissions dated 22 June 2011 at [22]. See: Third Crosbie Affidavit at [58]-[62] [CB 26-28].

³⁵ Cf WGG Outline of Submissions dated 22 June 2011 at [12]-[13].

³⁶ WGG Outline of Submissions dated 22 June 2011 at [26].

³⁷ See Plaintiffs' Outline of Submissions dated 22 June 2011 at [28] and [30].

³⁸ See Plaintiffs' Outline of Submissions dated 22 June 2011 at [26].

³⁹ [1995] 2 VR 457.

obligations to the liquidators or company” but rather because the dealing would go to the balance of the accounts between the parties.⁴⁰

14. Contrary to the WGG’s contentions,⁴¹ the effect of a disclaimer of the Grower Leases is that the leasehold estate ceases to exist. As noted at footnote 56 of the Plaintiff’s Outline of Submissions, and repeated here for convenience, Lord Nicholls of Birkenhead stated in *Hindcastle Ltd v Barbara Attenborough Ltd*:⁴²

“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.”

15. The contention that the Growers’ rights as lessees survive also fails to have regard to the words “except so far as necessary in order to release the company and its property from liability” in s.568D(1) of the Act. The Growers’ rights upon disclaimer would be limited to their accrued rights⁴³ and WFL (and the demised land) would be freed from the onerous and unprofitable obligations of specific performance referred to in paragraph 12 above.
16. One might ask rhetorically, if the Growers’ rights as lessees survive, against whom would they be enforceable? The Growers attempt to answer this question by contending that title in the land would escheat to the Crown.⁴⁴ However, as the cases relied upon by the WGG make clear,⁴⁵ the doctrine of escheat is invoked upon the disclaimer of *land* as opposed to the disclaimer of a lease.⁴⁶

⁴⁰ At 466.8 [emphasis added].

⁴¹ WGG Outline of Submissions dated 22 June 2011 at [28]-[30].

⁴² [1997] AC 70 at 87E-F. See also *Sandtara Pty Ltd v Abigroup Ltd* (1996) 42 NSWLR 491, 493D-494A.

⁴³ *Sims & Anor (as liqs of Enron Australia Pty Ltd) v TXU Electricity Ltd* (2005) 53 ACSR 295 at 300-301 [23]-[24].

⁴⁴ WGG Outline of Submissions dated 22 June 2011 at [27].

⁴⁵ *National Australia Bank v New South Wales* (2009) 182 FCR 52; *National Australia Bank v Victoria* [2010] FCA 1230.

⁴⁶ *National Australia Bank v New South Wales* (2009) 182 FCR 52 at [3]; *National Australia Bank v Victoria* [2010] FCA 1230 at [3].

F. LAND AS SCHEME PROPERTY

17. It is evident that there may be a dispute as to whether the Bombala Land is scheme property within the meaning of s 9 of the Act.⁴⁷ At this stage, the WGG puts the matter no higher than “it is arguable”. Importantly, a detailed factual contest on whether the land is scheme property is not relevant to the question of whether the orders presently sought by the Liquidators ought to be made. If the Bombala Land is scheme property, this may reduce the cost of restructuring the relevant schemes on the Bombala Land because the new RE would not bear the cost of acquiring the land from WFL. However, the other structural impediments to restructure would remain. For example, will the Growers be willing to continue their investment and make the substantial up-front contribution required? In those circumstances, it is “just and beneficial” to *at the very least* advertise the sale of the Bombala Land and other intermingled land on an unencumbered basis, so that any resultant offer to purchase may be compared with a restructure (if a practical and realistic one ever materialises). Of course, if the Bombala Land is in fact scheme property (about which the Liquidators say nothing at this point as it is not relevant to the application), the value of the Growers’ rights will be preserved upon any sale by the Liquidators.
18. For completeness, reference is made to the submission of the WGG to the possibility of the creditors of WFL being subrogated to the beneficial interest enjoyed by the trustee to be indemnified.⁴⁸ It is difficult to perceive how any submission on this topic is of relevance in circumstances where the rights of the creditors cannot be any greater than the existing rights of the trustee.

G. CONCLUSION

19. For the foregoing reasons, the directions and orders sought by the Plaintiffs are just and beneficial and “in the advantage of the liquidation” of WFL. The Growers rights are preserved and the making of the orders will enable the Growers to properly assess whether “a bird in the hand is worth two in the bush”.⁴⁹

JAMES D ELLIOTT

ROBERT G CRAIG

ARNOLD BLOCH LEIBLER

⁴⁷ WGG Outline of Submissions at [40].

⁴⁸ WGG Outline of Submissions dated 22 June 2011 at [51].

⁴⁹ *Re Timbercorp Securities Limited* (2009) 74 ACSR 626 at [64].