

**IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION**

No 386 of 2011

**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**

First Plaintiff

CRAIG DAVID CROSBIE

Second Plaintiff

IAN MENZIES CARSON

Third Plaintiff

OUTLINE OF SUBMISSIONS IN REPLY OF THE RECEIVERS AND MANAGERS

1. The Receivers make these submissions¹ in response to:
 - (a) the Outline of WGG's Submissions dated 22 June 2011 (the **WGG Submissions**); and
 - (b) the application filed on behalf of WILLMOTT ACTION GROUP INC (**WAG**) for leave to be heard in the proceeding (the **WAG application**), supported by the Affidavit of Mary Ellen Bermingham made on 22 June 2011 (the **Bermingham affidavit**).
2. As explained at paragraphs 7 to 10 of the Receivers' submissions filed on 22 May 2011, the purpose of the directions sought at this initial stage is to enable the assets to be marketed on an "effectively unencumbered" basis – that is, subject to final Court approval either to exercise the power to terminate or to disclaim the Project Documents. It is only through marketing the assets in this manner that – if any viable proposals have been put forward in relation to any of

¹ Pursuant to paragraph 5 of the Order of Dodds-Streeon J made on 7 June 2011.

the Schemes – Growers in the Schemes will be able to make any meaningful comparison between:

- (a) the likely returns available through an unencumbered sale; and
 - (b) the commercial prospects and risks of any alternative proposal.
3. The Growers will therefore have an opportunity to be heard – with the benefit of that comparison (if indeed there is any alternative proposal available to consider) – before the Liquidators exercise their powers of termination or disclaimer. The Growers will not be precluded by the directions that the Liquidators now seek from continuing to develop any alternative restructuring proposals in the meantime.
4. Viewed in this way, it is difficult to see how Growers could reasonably be said to be prejudiced by the making of the preliminary directions that the Liquidators now seek.

Matters raised in the WGG submissions

5. As described at paragraphs 57 to 62 of the Affidavit of Craig Crosbie made on 11 May 2011 (the **3rd Crosbie affidavit**), the Liquidators have undertaken the required consideration of whether the proposed amendments to the constitutions of the managed investment schemes and professional investor schemes will adversely affect Growers' rights.
6. Having regard to:
- (a) the current status of each of the Schemes;
 - (b) Pöyry's opinion that none of the Schemes will be viable in the absence of ongoing maintenance work;
 - (c) the fact that no proposal has yet been advanced to enable any ongoing maintenance work to be conducted on any of the Schemes (other than the Primary Securities proposal, the current status of which is addressed in the affidavit of Bryan Webster affirmed on 24 June 2011 (the **2nd Webster Affidavit**)); and
 - (d) the safeguard against prejudice to Growers that is provided by the requirement for a further court application before any the powers of termination are exercised,

there is an ample basis for the Court to be satisfied that the Liquidators' conclusion that the making of the amendments *per se* will not adversely affect Growers' rights was reasonably arrived at in respect of each of the Schemes.

7. In this case, the fact that multiple Schemes are conducted on single, adjoining and/or nearby plantations suggests that there is a degree of artificiality to requiring the Court to consider the reasonableness of the Liquidators' conclusion exhaustively on a Scheme-by-Scheme basis at this stage. The Receivers have caused to be prepared summaries of each Scheme which are exhibited to the affidavit of Bryan Webster affirmed on 17 June 2011 (the **1st Webster Affidavit**)². **Attached** to these submissions is a chart summarising the main characteristics of each Scheme, including the location and size of the relevant plantations.
8. The analogy that WGG suggests³ with the directions that were sought in *Parbery v ACT Superannuation Management Pty Ltd* (2010) 79 ACSR 245 is misplaced: in that case, the Court declined to give directions approving pooled indemnification arrangements across multiple schemes. No suggestion may be made on this application that the Liquidators are seeking to benefit themselves at the expense of Growers of one or more of the Schemes.⁴
9. The amendments that are sought to be made do not provide an "unfettered" right to terminate the Project Documents⁵ (despite the inapposite suggestion at paragraph 82 of the 3rd Crosbie affidavit). To the contrary, the requirement for further Court approval provides a significant safeguard to ensure that Growers' rights are properly taken account of before the Liquidators are permitted to exercise their powers of termination. In this regard, WGG's statement:

*"Asserting that the liquidators will come before the Court before exercising any termination rights is no justification for providing such rights, adverse to Growers, in the first place"*⁶

² Exhibit BW-2

³ WGG submissions, [7]-[11].

⁴ Cf *Parbery* at [25].

⁵ See WGG submissions, [12].

⁶ WGG submissions, [13].

fundamentally misconstrues the basis on which the Liquidators seek the present directions.

Disclaimer

10. The Liquidators have stated that, in the event that directions in the form of paragraphs 3 and 4 of the Originating Process are given, they would only proceed to disclaim the Project Documents if required on the sale of any assets, and on condition that the proceeds of the sale be held on trust to be apportioned between Growers and creditors.⁷
11. The Receivers agree with the Liquidators' submissions that the Project Documents are unprofitable, and that the Liquidators are therefore empowered to disclaim them without leave of the Court. In any event, the Liquidators are permitted to disclaim the Grower leases, with no requirement that the leases be unprofitable: s 568(1A). Upon disclaimer, the leasehold estate is extinguished and the right to possession reverts to the lessor. No question of disclaimer of the reversion or of the freehold, or of escheat to the Crown, arises.⁸
12. WGG's argument⁹ that the interests created under the Forestry Rights Agreements would survive any disclaimer of the Grower leases is incorrect: the Forestry Rights Agreements are not unlimited in time; rather, they are coterminous with the Grower leases.¹⁰
13. In circumstances where the proceeds of sale following any disclaimer of the Project Agreements will be held on trust by the Liquidators pending apportionment, it can hardly be said that Growers' rights arising from the leases will be prejudiced. Rather than being left to rely on the s 568(9) right to seek (and prove) for damages, the Growers will be entitled to apportionment out of the sale proceeds in respect of their proprietary interests.

Land as scheme property

14. WGG now evinces a curious ambivalence – *“given the nature of the tax deductibility afforded in respect of schemes of this nature”* – on the question of

⁷ 3rd Crosbie Affidavit, [83]-[84].

⁸ Cf WGG submissions, [27]-[37].

⁹ WGG submissions, [39].

¹⁰ 3rd Crosbie Affidavit, [45].

whether the WFL's freehold land on which the schemes are conducted is scheme property. To the extent that WGG contends that the land may be scheme property, it does so in an entirely speculative manner.¹¹

15. As previously submitted, the Receivers dispute the assertion that the land constitutes scheme property. In any event, the question need not be resolved until the apportionment stage, and ought not delay the marketing of the Scheme assets.

The form of orders sought by the Receivers

16. In lieu of the proposed orders as exhibited to the 1st Webster Affidavit,¹² the Receivers now propose that the orders sought by the Liquidators be amended to provide that, on any eventual apportionment, the Growers will be entitled to “the net proceeds of sale of the Trees or any other asset owned by such members which forms part of the sale”.
17. This form of order is consistent with the manner in which orders for the apportionment of sale proceeds in the Timbercorp Almond Schemes were applied in the subsequent apportionment proceeding: *BOSI Security Services v ANZ Banking Group* [2011] VSC 255 at [30]. The WGG submissions provide no justification for departing from that approach.

The WAG application

18. At the directions hearing on 7 June 2011, Mr See, the solicitor for the WAG, indicated that the WAG:
- (a) had retained experts to provide reports in answer the Pöyry report; and
 - (b) had been conducting negotiations with prospective replacement REs, which were reaching “some sort of finality”, and about which WAG expected to provide further evidence.¹³
19. The expert report exhibited to the Bermingham affidavit is authored by David Smith, a forester, former employee of WFL and a Grower,¹⁴ and undertakes no

¹¹ WGG submissions, [45]: “Absent any other explanation, it would seem likely that Willmott purchased the land with contributions from investors in the scheme.”

¹² Exhibit BW-27.

¹³ Transcript, 7 June 2011, 10/1-35, 12/40 -13/10.

analysis of the commercial (as opposed to the silvicultural) viability of the Schemes. The conclusion of Mr Smith's report is merely that: *"The estates can be managed at varying levels of expenditure to achieve varying levels of commercial return for Growers and therefore these estates remain viable."*¹⁵ As such, it provides no meaningful "challenge" to the Pöyry analysis of the Scheme's commercial viability.

20. The Birmingham affidavit also exhibits (on a confidential basis) a report prepared by Ross Sigley (another former employee of WFL). That exhibit has not been provided to the Receivers, and there is no sound basis for the WAG seeking to maintain confidentiality as against the Receivers.
21. As to the negotiations with prospective replacement REs, the Birmingham affidavit exhibits (on a confidential basis) correspondence received prior to 7 June 2011 from (what are said to be) prospective replacement REs.¹⁶ Those exhibits have not been provided to the Receivers, and there is no sound basis for the WAG seeking to maintain confidentiality as against the Receivers. The Receivers infer that the negotiations to which Mr See referred have not reached any more advanced state of finality since 7 June.
22. Those matters aside, the Birmingham affidavit is little more than an assortment of inchoate assertions that do not assist in the resolution of the present application:
 - (a) The lists of Growers who are said to be "registered" with WAG and/or who "support" the WAG application¹⁷ is meaningless in the absence of any evidence as to how the lists were compiled, and on what basis those Growers were induced to "register" with the WAG or indicate their "support" for the present application.
 - (b) The asserted inconsistency between the Liquidators' making of the present application and the Consent Deed¹⁸ between WFL and its

¹⁴ Mr Smith was retained only on 7 June 2011, which was the date of the directions hearing in this matter: Birmingham affidavit, [72].

¹⁵ Exhibit MEB-20, pp 4 and 66 (emphasis added).

¹⁶ Confidential exhibits MEB-14 and MEB-15.

¹⁷ Exhibits MEB-4, MEB-5 and MEB-7.

¹⁸ Exhibit MEB-8.

secured lenders¹⁹ is spurious. The Liquidators are not parties to that Deed, and the Receivers' support of the present application is not inconsistent with the rights of Growers in the Schemes: to the contrary, the orders that are sought are conditioned upon an apportionment of any proceeds of sale in accordance with the Growers' property rights under the Schemes.

- (c) Bermingham's criticisms of the Pöyry report²⁰ rise no higher than unsubstantiated lay opinion. There is no basis for the assertion that the then Administrators of WFL were acting in conflict of interest in commissioning the report. The report's conclusions are expressly premised on full and immediate up-front funding of the maintenance costs for the remaining life of the Schemes. Bermingham provides no substantiation regarding any "other possible funding arrangements designed to facilitate continuation of the Schemes" that the Pöyry report is said to have overlooked.²¹
- (d) There is no substance to the asserted "deficiencies" in the Liquidators' Expressions of Interest process.²² The Liquidators' response to the WAG as recently as 3 June 2011 confirms that, notwithstanding that no satisfactory proposal was received through that process, the Liquidators continue to welcome any further proposals to take over the role of RE of the Schemes.²³
- (e) As described in the Receivers' earlier submissions, it is accepted that the Growers in most Schemes have leasehold interests (or, in some cases, licences and/or profits a prendre) in their respective timberlots, in addition to their interests in the timber produced from trees standing on those lots.²⁴ For the reasons previously described, the physical and legal limitations on the Growers' exercise of their rights individually to harvest timber standing on their lots are such that, in the current

¹⁹ Bermingham affidavit, [21]-[23].

²⁰ Bermingham affidavit, [32].

²¹ Bermingham affidavit, [32(c)].

²² Bermingham affidavit, [33]-[49].

²³ Exhibit MEB-9, pp 4-5.

²⁴ Cf Bermingham affidavit, [54]-[62].

circumstances of the Schemes, the Grower leases are commercially valueless. Moreover, they do not constitute assets which would be sold as part of a realisation via the proposed joint sale process.

23. The affidavit material on which the WAG seeks leave to be heard in this proceeding is not cogent,²⁵ and does not establish that the WAG will be in a position to assist the Court to dispose of the present application in an efficient and timely manner, by providing a useful and different contribution from the parties to the proceeding and the existing intervener.
24. The Receivers do not accept the assertion in the Bermingham affidavit that the Liquidators' purpose in pursuing the present application is to prepare the Schemes to be wound up. As outlined at paragraphs 2 to 4 above, the Receivers consider that the orders sought are required in order to enable the assets of the Schemes to be marketed on the basis most favourable to Growers and creditors, without shutting out the possibility of reconstruction proposals being developed and advanced in the meantime.
25. Addressing the matters asserted by way of conclusion in paragraph 75 of the Bermingham affidavit:
 - (a) the assertions regarding the Liquidators' conduct (in sub-paragraphs 75(b) to (d)) are unsubstantiated and incorrect;
 - (b) the question of whether any of the land on which the Schemes have been conducted is scheme property is premature, and does not alter the reality that the Schemes must either be restructured or their assets sold on the basis most favourable to Growers and creditors;
 - (c) the orders sought at this stage do not prevent the development any further proposals to restructure the Schemes under new responsible entities, until such time as the Liquidators and Receivers receive acceptable offers to purchase the assets;
 - (d) it is not the case that the Liquidators have failed to comply with the Consent Deed (to which they are not party), and nor have the Receivers; and

²⁵

Cf Transcript, 7 June 2011, page 14, line 16.

- (e) the Smith report provides no meaningful (let alone admissible expert) finding regarding the ongoing commercial viability of the Schemes.

24 June 2011

WENDY HARRIS

TOM CLARKE

Counsel for the Receivers

ALLENS ARTHUR ROBINSON

Solicitors for the Receivers

Willmott Forests Ltd (receivers and managers appointed) (in liq) - Overview of Willmott Schemes

Scheme	Scheme type	Governing instrument	RE control	Region	RE tenure	Grower tenure	Land size (Ha)	Tree type	No growers
Registered Schemes									
1989-1991 Project: 1989 Prospectus							28		
1989-1991 Project: 1990 Prospectus	MIS	Constitution, 6/2/89	WFL/Ls	Bombala	Freehold	Lease	120	Pine	76
1989-1991 Project: 1990 Prospectus (Interest Only Offer)							12		
1989-1991 Project: 1991 Prospectus							288		
Willmott Forests 1995-1999: 1995 Prospectus							967		
Willmott Forests 1995-1999: 1995 Prospectus (1996)							3		
Willmott Forests 1995-1999: 1996 Prospectus	MIS	Constitution, 13/4/95	WFL/Ls	Bombala	Freehold	Lease	1,030	Pine	691
Willmott Forests 1995-1999: 1997 Prospectus							1,288		
Willmott Forests 1995-1999: 1998 Prospectus							1,309		
Willmott Forests 1995-1999: 1999 Prospectus							876		
Willmott Forests Project: 2000 Prospectus - 20/10/99							55		
Willmott Forests Project: 2000 Prospectus (No 1)							380		
Willmott Forests Project: 2000 Prospectus (No 2)							220		
Willmott Forests Project: 2001 Prospectus							764		
Willmott Forests Project: 2002 Prospectus							101		
Willmott Forests Project: 2002 Replacement Prospectus							669		
Willmott Forests Project: 2003 Prospectus							69		
Willmott Forests Project: 2003 Replacement Prospectus (2003)	MIS	Constitution, 2/9/99	WFL/Ls	Murray Valley/ Bombala/HVP	Freehold/ Leasehold (HVP)	(Sub)Lease	1,143	Pine (86%) Silky oak (7%) She oak (7%)	4,513
Willmott Forests Project: 2003 Replacement Prospectus (2004)							53		
Willmott Forests Project: 2004 PDS							5,025		
Willmott Forests Project: 2004 PDS (2005)							4,758		
Willmott Forests Project: 2006 PDS							4,758		
Willmott Forests Project: 2007 PDS (2007)							12,334		
Willmott Forests Project: 2007 PDS (2008)							12,334		
Bioforest Dual Income Project 2006	MIS	Constitution, 1/1/06	WFL/Ls	North Coast	Freehold (BioForest Ltd)	Lease	307	Silky oak (50%) Sheoak (50%)	40
Bioforest Sustainable Timber and Biofuel Project 2007	MIS	Constitution, 8/3/07	WFL/Ls	North Coast (incl Qld)	Freehold	Lease/ Forestry Right/ Profit a prendre	4,617	Silky oak (50%) Sheoak (50%)	1,226
Willmott Forests Premium Forestry Blend Project	MIS	Constitution, June 2008	WFL/Ls	North Coast/ Bombala	Leasehold (HVP/FNSW)	Sublease/ Licence	5,236	Pine (67%) Silky oak (27%) She oak (6%)	1,428
Willmott Forests Forestry Blend Project - 2010 Project	MIS	Constitution, 11/3/10	WFL/Ls	No land acquired for this Project.	Forestry Interests		2217 (per s439A)	Pine (75%) Silky-oak (5%) Mahogany (20%)	396
Willmott Forests Premium Timberland Fund No 1	MIS (unit trust)	Constitution, 23/4/09	WFL/Ls	Northern Territory/ North Coast	Freehold/ Leasehold	Trust units	159	Mahogany	57
Unregistered Professional Investor Schemes									
Willmott Forests - Professional Investor - 2001 Project	Unreg'd, professional investor	Investment Deed, 12/6/01	WFL/Ls	Bombala	Freehold	Lease	288	Pine	5
Willmott Forests - Professional Investor - 2002 Project	Unreg'd, professional investor	Investment Deed, 5/4/02	WFL/Ls	Bombala	Freehold	Lease	266	Pine	4
Willmott Forests - Professional Investor - 2003 Project - 2003 Information Memorandum (2003)	Unreg'd, professional investor	Investment Deed, 28/8/02	WFL/Ls	Bombala	Freehold	Lease	2,173	Pine	29
Willmott Forests - Professional Investor - 2003 Project - 2003 Information Memorandum (2004)									

Data in first 7 columns sourced from individual Scheme overviews (Exh BW-2)
 Data in column 8 (land size) sourced from Bryan Webster's affidavit affirmed on 17 June 2011
 Data in last 2 columns sourced from Appendix E to s 439A report (Exh CDC-16A)

Willmott Forests Ltd (receivers and managers appointed) (in liq) - Overview of Willmott Schemes

Scheme	Scheme type	Governing instrument	RE control	Region	RE tenure	Grower tenure	Land size (Ha)	Tree type	No growers
Willmott Forests - Professional Investor - 2004 Project - 2004 Information Memorandum (2004) Willmott Forests - Professional Investor - 2004 Project - 2004 Information Memorandum (2005)	Unreg'd, professional investor	Investment Deed, 7/5/04	WFL/Ls	Murray Valley/ Bombala/HVP	Freehold/ Leasehold (HVP)	(Sub)Lease & Forestry Right	5,420	Pine	72
2005 Bioforest Wholesale Project No 2 - 2005 Wholesale Forestry Memorandum (Bioforest)	Unreg'd, professional investor	Constitution, 2004	WFL/Ls	North Coast (incl Qld)	Freehold (BioForest Ltd)	Lease, or Licence & Profit a Prendre	96	Pine	10
Willmott Forests - Professional Investor - 2006 Project	Unreg'd, professional investor	Investment Deed, 8/2/06	WFL/Ls	Murray Valley/ Bombala	Freehold/ Leasehold (HVP)	(Sub)Lease	551	Pine	13
Unregistered Contractual & Partnership Schemes									
1983 "No Project"	Unreg'd, contractual		WFL/Ls	Bombala	Freehold	Lease	114	Pine	52
1984 "No Project"	Unreg'd, contractual		WFL/Ls	Bombala	Freehold	Lease	37	Pine	20
1985 "No Project"	Unreg'd, contractual		WFL/Ls	Bombala	Freehold	Lease	78	Pine	19
1986 "No Project"	Unreg'd, contractual		WFL/Ls	Bombala	Freehold	Lease	146	Pine	40
1987 "No Project"	Unreg'd, contractual		WFL/Ls	Bombala	Freehold	Lease	125	Pine	27
1989 "No Project"	Unreg'd, contractual		WFL/Ls	Bombala	Freehold	Lease	31	Pine	1
1990 "No Project" - Interest Only Offer	Unreg'd, contractual		WFL/Ls	Bombala	Information unavailable		54	Pine	1
1991 "No Project"	Unreg'd, contractual		WFL/Ls	Bombala	Freehold	Lease	7	Pine	1
1993 McKenzie & Partners - Forestry Partnership No 1	Unreg'd, partnership		WFL/Ls	Bombala	Freehold	Lease	62	Pine	16
1994 Grimsey & Associates Pty Ltd - Forestry Partnership No 1	Unreg'd, partnership		WFL/Ls	Bombala	Freehold	Lease	170	Pine	19
1994 Grimsey & Associates Pty Ltd - Forestry Partnership No 2	Unreg'd, partnership		WFL/Ls	Bombala	Freehold	Lease	196	Pine	16
1994 Grimsey & Associates Pty Ltd - Forestry Partnership No 3	Unreg'd, partnership		WFL/Ls	Bombala	Freehold	Lease	93	Pine	18
1994 McKenzie & Partners - Forestry Partnership No 2	Unreg'd, partnership		WFL/Ls	Bombala	Freehold	Lease	39	Pine	12
1995 "No Project" (Custom)	Unreg'd, contractual		WFL/Ls	Bombala	Freehold	Lease	20	Pine	1
Sharp/Reed Plantation Project - 1998 Information Memorandum	Unreg'd, contractual		WFL/Ls	Bombala	Freehold (WFML)	Lease	136	Pine	2
2001 "No Project"	Unreg'd, contractual		WFL/Ls	Bombala	Information unavailable		40	Pine	1

Data in first 7 columns sourced from individual Scheme overviews (Exh BW-2)
Data in column 8 (land size) sourced from Bryan Webster's affidavit affirmed on 17 June 2011
Data in last 2 columns sourced from Appendix E to s 439A report (Exh CDC-16A)