

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

VID 386 of 2011

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

**WILLMOTT FORESTS LIMITED (RECEIVERS AND MANAGERS APPOINTED)
(LIQUIDATORS APPOINTED)
ACN 063 263 650**

**IN ITS PERSONAL CAPACITY AND IN ITS CAPACITY AS RESPONSIBLE
ENTITY OF EACH OF THE MANAGED INVESTMENT SCHEMES LISTED IN
SCHEDULE 1 AND IN ITS CAPACITY AS MANAGER OF THE UNREGISTERED
MANAGED INVESTMENT SCHEMES LISTED IN SCHEDULE 2
First Plaintiff**

**CRAIG DAVID CROSBIE
Second Plaintiff**

**IAN MENZIES CARSON
Third Plaintiff**

OUTLINE OF WGG's SUBMISSIONS IN REPLY

Denying the viability of some schemes

1. Both the liquidators, in their submissions dated 22 June 2011 (“**the liquidators’ submissions**”) and the receivers in their submissions dated 22 June 2011 (“**the receivers’ submissions**”) support applying the “Timbercorp protocol” because of the lack of any prospect of the schemes replacing their responsible entity and restructuring the scheme:
 - (a) “there is a real question as to whether there will be any sufficient appetite amongst the Grower cohort and prospective replacement REs to restructure the WFL schemes” - paragraph 19 of the liquidators’ submissions;
 - (b) “The lack of appetite amongst prospective REs and Managers is exemplified by the expressions of interest campaign conducted by the Liquidators” - paragraph 20 of the liquidators’ submissions;
 - (c) “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 by the Liquidators, the WGG are depriving the Growers (and the creditors) of the opportunity to make that very comparison” - paragraph 21 of the liquidators’ submissions;

- (d) “...in circumstances where it is unclear as to whether there is sufficient or any appetite amongst the cohort of Growers and potential replacement RE/Managers” - paragraph 30 of the liquidators’ submissions;
 - (e) “...until any viable restructuring proposal emerges and is approved, the plantations are wasting”, - paragraph 17 of the receivers’ submissions;
 - (f) “No proposal has been advanced that would require full up-front payment of the maintenance and administration costs required over the remaining life of the schemes. No alternative RE or Manager has come forward for most of the schemes” - paragraph 18 of the receivers’ submissions;
 - (g) “particularly given the absence of any restructuring proposal on terms similar to those assumed by Poyry, the schemes are plainly no longer commercially viable when assessed globally” - paragraph 21 of the receivers’ submissions;
 - (h) “Accordingly, having regard to: the absence of any restructuring proposal on terms comparable to the Poyry assumptions” - paragraph 24.1 of the receivers’ submissions.
2. The liquidators and receivers make these assertions notwithstanding they sought and obtained an interim injunction on 21 June 2011 in the Supreme Court of Victoria before Beach J to restrain the meeting of Growers of the 1995-1999 Project to have been held at 10am on Thursday 22 June 2011 to vote to replace the responsible entity and restructure the 1995-1999 Scheme.
 3. The liquidators’ and receivers’ submissions are replete with statements that Willmott Forests Limited is hopelessly insolvent. WGG has never put that fact in dispute.
 4. WGG agrees that Willmott is insolvent, but disputes that all the schemes for which Willmott is responsible entity are hopeless. The liquidators and receivers approach is intent on suggesting “all the schemes” are not viable, despite the viability of particular schemes as indicated by the Pöyry Report. Further, if a

scheme replaces its responsible entity, the viability of that scheme will no longer be a concern of the liquidators or the receivers.

Dealing with the schemes as a whole

5. The liquidators and receivers continue to focus on the Willmott schemes as a whole, an approach which not only distorts the assessment of viability and the opportunities for restructure of one or more of the schemes, but constitutes a failure to provide comprehensive information to the Court pursuant to s 511 of the Act and to act in the best interests of the members of each separate scheme: see *Parbery v ACT Superannuation Management Pty Ltd* (2010) 79 ACSR 425. Assessing viability by a “region-by-region” basis, as performed in the Webster affidavit and endorsed in the fourth affidavit of Mr Crosbie, adds nothing and ignores the fact that the Pöyry report considers the schemes on a scheme by scheme basis.
6. In his affidavit dated 20 November 2010, Mr Crosbie states at paragraph 42 that the liquidators intend to categorise each of the Willmott Schemes into three categories, being *Long Term Viable Insolvent Schemes*, *Potentially Viable Insolvent Schemes* and *Long Term Non-Viable Insolvent Schemes* (despite the fact that it is Willmott that is insolvent, not the schemes). Although the Pöyry Report commences this analysis, the liquidators make no use of its information in putting their proposal and assessing whether the liquidators consider themselves justified in extinguishing Growers’ interests and rights. The Receivers simply criticise, through Mr Webster’s affidavit, Pöyry’s opinion that the appropriate discount rate for the projects is 11%. The basis for Mr Webster’s views is discussed in Mr Bland’s third affidavit dated 22 June 2011. Otherwise, the only substantive reference to the Pöyry Report is to criticise the 11% discount rate in the liquidators’ and receivers’ submissions.
7. Mr Crosbie’s assertion in his fourth affidavit dated 22 June 2011 that the general propositions set out in paragraphs 26 to 50 of his Third affidavit are applicable to all Willmott schemes, neglects to acknowledge the propositions relate only to schemes that cannot or will not replace their responsible entity. Once a new responsible entity is appointed, those “propositions” become

matters for the new responsible entity. Such propositions do not apply to the 1995-1999 Project and may not apply to several other schemes. Mr Crosbie clarifies in his fourth affidavit at paragraph 25 that the issues he raises regarding access to lots was in respect of individual Grower lots. Therefore, if a scheme was to replace their responsible entity, access between Growers' "Hectares" would be a matter for the scheme's new responsible entity.

8. At paragraph 21 of the receivers' submissions, they state that "the schemes are plainly no longer commercially viable when assessed globally". They presumably say this because the same cannot be said of the schemes looked at separately and because it does not suit its appointor that the 1995-1999 Scheme should endure.
9. There is a repeated sliding in the submissions from reference to the viability of the schemes separately, to consideration of the schemes simply as a whole. For example, at paragraph 16 of the liquidators' submissions:

*"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."*

(emphasis added)

Assertion Growers better off with a sale of assets

10. The Receivers assert that Growers will be better off under the liquidators' proposal. Mr Webster states (subject to cross-examination) at paragraph 32 of his affidavit dated 17 June 2011:

*"Notwithstanding [the WGG] proposal, I am of the view that the best course available to Growers and other stakeholders of **all the Willmott Schemes** is the immediate sale of the assets of the Willmott Schemes on an unencumbered basis. In my opinion, even if a replacement RE or manager was identified for the Willmott Schemes, Growers would be likely to receive a superior return on their investment via a sale of the assets of the Willmott Schemes on an unencumbered basis on the open market as..."*

(emphasis added)

11. There is little doubt that the secured creditors will be better off with a sale of the assets unencumbered, as it will ultimately provide them with access to the value

in the freehold land. The termination of the schemes will also enable Willmott to call in all the loans to Growers that are otherwise repayable at harvest. The loan book is a substantial asset subject to the control of the Receivers.

12. When the receivers submit at paragraph 24 of the receivers' submissions "that a more favourable, more certain and more immediate return can be obtained for creditors and Growers if orders are made that would permit the marketing and sale of the plantation properties on an unencumbered basis", the receivers are considering the benefit of the loan book to creditors, whilst ignoring the burden the early repayment of loans places on Growers.
13. The NPV of the eventual harvest, calculated on the Pöyry assumptions, is irrelevant to the Liquidators' proposal under which Growers would only receive the (as yet neither quantified nor even estimated) value of the woodchips derived from the presently half-grown timber. It is significant that the Receivers do not underwrite the NPV as the amount that Growers might expect to receive from an application of the Timbercorp protocol. The liquidators' proposal will leave Growers with the current value of the felled immature timber; cf. *Re Environinvest Ltd (No 4)* (2010) 81 ACSR 145; [2010] VSC 549.
14. Although it depends on each Grower's personal financial arrangements, in light of:
 - (i) the findings in *BOSI Security Services Limited v Australia New Zealand Banking Group Limited & Ors* [2011] VSC 255;
 - (j) that many Growers likely have immature trees; and
 - (k) any requirement for a Grower to repay a loan now instead of at harvest, for many Growers, the termination of their scheme is more likely to be their least preferred option.

Disclaimer

15. Both the liquidators and receivers are incorrect when they assert that the effect of the lessor disclaiming a lease is to "extinguish the tenant's leasehold estate" and that the "leasehold estate ceases to exist". Both the liquidators and the receivers cite *Hindcastle Ltd v Barbara Attenborough Ltd* [1997] AC 70 at 87E-

F. The passage in the judgment referred to by the liquidators and the receivers commences:

*“The simplest case is of a landlord **and an insolvent tenant.**”*

(emphasis added)

16. The Growers, tenants, are not insolvent. The landlord, Willmott, is insolvent. The reference to a lease in s.568(1A) can only sensibly be to a lessee’s interest under a lease. (It is not necessary to go so far in these submissions, but it would be beyond the power of the Commonwealth to authorise a liquidator to expropriate valuable tenure from a solvent tenant).
17. Willmott can disclaim its own property rights or it can disclaim the lease contract. In either case, the lessee retains its *in rem* rights, its estate in land. Willmott can disclaim its own *in rem* rights, but cannot disclaim the lessee’s *in rem* rights.
18. As has been discussed in our previous submissions, the disclaimer is not to affect other person’s rights and liabilities except so far as necessary in order to release the company from liability. Extinguishing the lessee’s *in rem* rights is not necessary to release the company from any liability, but simply gives Willmott creditors a windfall.

Constitutional amendment

19. The proposition that because orders to approve the power of amendment under s 601GC(1)(b) have been made in other proceedings (being the Timbercorp proceedings), that such orders should therefore be made in this proceeding, is not a strong one.
20. As the receivers rightly point out, there are no written reasons to assist in respect of the orders given by Finkelstein J in the Timbercorp forestry project and by Robson J in the Timbercorp almond project. Further, Davies J indicates at [16] of *Re Timbercorp Securities (in liq)* (2010) 77 ACSR 291 that there was no contradictor in the earlier decisions of Finkelstein J and Robson J.

21. However, in *Re Timbercorp Securities (in liq)* Davies J did provide written reasons and there was a contradictor. There are a number of matters to bear in mind in respect of those reasons.
22. Davies J rejected the submissions of a grower group and found that the factual context is part of the material which the court not only may, but should, consider in determining whether the liquidators' view that the amendments would not adversely affect Grower's rights was reasonably based. If that be so, the relevant factual context in this proceeding is:
 - (a) Growers in at least one registered scheme wish to continue their scheme with a new responsible entity;
 - (b) the liquidators purport to intend to terminate Growers' leases, thus extinguishing Growers *in rem* rights;
 - (c) as pointed out previously, the liquidators cannot disclaim the Growers' *in rem* rights;
 - (d) some schemes are viable; and
 - (e) the many schemes being considered have different circumstances.
23. In *Re Timbercorp Securities (in liq)* Davies J, when making findings at [18], commences the paragraph with "In the circumstances of this case". It is therefore essential to note not only the factual context referred to above, but also:
 - (a) in *Re Timbercorp Securities (in liq)* the amendment to the Constitution was to enable the termination of licence rights, not a lease;
 - (b) Davies J was dealing with **only** one scheme, being the 2005 Timbercorp Citrus Project, rather than 8 registered schemes and 29 unregistered schemes;
 - (c) that scheme involved horticulture, not forestry (where the trees themselves are the crop);
 - (d) although grower groups were represented, it appears that there were no existing or pending proposals by a growers' group to replace the responsible entity;

- (e) Davies J noted at [8] that there was a trigger under the Constitution for the formal winding up of the Citrus Scheme in the event the purpose of the scheme could not be accomplished;
- (f) at [16] Davies J noted that the liquidators decided to make the constitutional amendment after they became aware that the Solora property was up for sale.
24. Therefore, contrary to paragraph 28 of the receivers' submissions, the factual context is not materially the same.
25. In considering the decision of Davies J, it is worth referring back to Barrett J's decision in *ING Management Fund Ltd* [2009] NSWSC 243. At [94] Barrett J, in considering the meaning of "members rights", said:
- "Young J [in Smith v Permanent Trustee (1992) 10 ACLC 906] accepted a submission that the "rights of unitholders" referred to "the contractual and equitable rights conferred on unitholders by the deed". This was consistent with the earlier decision of J D Phillips J in Eagle Star Trustees Ltd v Heine Management Lt (1990) 3 ACSR 232 where, in circumstances similar to those now before me, the right of unitholders to have their units repurchased was seen as a central component of the "rights of unitholders"..."*
(emphasis added)
26. The effect of the amendments proposed by the liquidators is to terminate the Growers' leases. As previously noted, the liquidator is unable to disclaim the Growers' *in rem* rights. Therefore, an amendment to the Constitution that enables the liquidator to terminate the *in rem* rights Growers have through their leases, clearly adversely affects Growers' rights. The conclusions in paragraph 62 of Mr Crosbie's third affidavit dated 11 May 2011 are incorrect.
27. Further, Barrett J in *ING Management* discusses "reasonably considers" as follows at [102] - [103]:
- "The requirement is twofold: first, that the relevant belief or opinion be actually held by the responsible entity; and second, the facts exist that are sufficient to induce the belief or opinion in a reasonable person. This is the approach indicated by Gummow J, Hayne J, Heydon J and Kiefel J in Gypsy Jokers Motorcycle Club Inc v Commissioner of Police [2008] HCA 4; (2008) 234 CLR 532 at [28]. Their Honours referred with approval to George v Rockett [1990]*

HCA 26; (1990) 170 CLR 104 where all seven members of the High Court said (at 112):

“When a statute prescribes that there must be ‘reasonable grounds’ for a state of mind – including suspicion and belief – it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person.”

It is not sufficient, the High Court said (at 113), for the decision-maker to act “parrot-like” upon the bald assertion of an informant. The decision-maker must be “satisfied that there are sufficient grounds reasonably to induce the state of mind.””

28. The claim by the liquidators that the leases can be disclaimed is a bald assertion. The liquidators have not sufficiently or correctly considered the rights of members to enable them to “reasonably consider” that the amendments will not adversely affect members’ rights.

Pöyry analysis

29. The Pöyry Report speaks for itself and, unfortunately, is not properly utilised by the liquidators. The receivers’ and liquidators’ rejection of Pöyry’s opinion as to the appropriate discount rate lacks expert support and betrays a motive to advance the interests of creditors, particularly the receivers’ appointor, ahead of investors (notwithstanding s.601FD).
30. The liquidators would have been better served by using the material in the Pöyry Report, particularly table S-2, rather than joining in with the receivers in undermining the report: see paragraph 5 of Mr Crosbie’s fourth affidavit dated 22 June 2011.

Syncap and the debts of the outgoing RE

31. In footnote 34 of the Liquidators’ Submissions, it is suggested that Primary RE as proposed replacement RE of the 1995-1999 Scheme would be saddled with WFL’s debts under ss 601FS and 601FT of the *Corporations Act*. This suggestion is untenable.
32. First, the Bombala Land is unencumbered. The company charge expressly excludes it and there is no mortgage. (We put to one side Mr Fernandez’s asserted lien).

33. Secondly, no debt is identified as a debt that would novate to an in-coming RE.
34. Sections 601FS states that (emphasis added):
- (1) *If the responsible entity of a registered scheme changes, the rights, obligations and liabilities of the former responsible entity **in relation to the scheme** become rights, obligations and liabilities of the new responsible entity.*
 - (2) *Despite subsection (1), the following rights and liabilities remain rights and liabilities of the former responsible entity:*
 - ...
 - (d) ***any liability for which the former responsible entity could not have been indemnified out of the scheme property if it had remained the scheme's responsible entity.***
35. Section 601GA states that:
- “ ...
 - (2) *If the responsible entity is to have any rights to be paid fees out of scheme property, or to be indemnified out of scheme property for liabilities or expenses incurred in relation to the performance of its duties, those rights:*
 - (a) *must be specified in the scheme's constitution; and*
 - (b) *must be available only in relation to the proper performance of those duties;**and any other agreement or arrangement has no effect to the extent that it purports to confer such a right.*
 - (3) *If the responsible entity is to have any powers to borrow or raise money for the purposes of the scheme:*
 - (a) *those powers must be specified in the scheme's constitution; and*
 - (b) *any other agreement or arrangement has no effect to the extent that it purports to confer such a power.*
 - ... ”
36. Sub-Articles 8.4, 8.5 and 8.6 of the scheme's constitution provide for indemnity in respect of “any liability incurred by it in properly performing or exercising any of its powers or duties in relation to the Project”.
37. Those sub-articles must be read down in accordance with s 601GA(2). The issue is whether the debt was incurred by WFL ‘*in relation to the proper performance of [WFL's] duties*’.

38. In an extra-judicial publication *‘Insolvency of Registered Managed Investment Schemes’*, Banking and Financial Services Law Association Queenstown, New Zealand, July 2008, Barrett J wrote that:

“In the case of a registered scheme, it is provided, as already noted, that the responsible entity’s right of indemnity out of scheme property must be available only in relation to the “proper performance” of the responsible entity’s duties. It seems to me that this “proper performance” test is likely to take its content from the general law approaches.”

39. In *Jacobs Law of Trusts* (7th ed, 2006), the authors consider the trustee’s right of indemnity from trust assets and state that (at [2104], p 567):

“...the question of authorisation is crucial. If the trustee’s activities were not authorised by the trust instrument, prima facie no right of indemnity can arise; if they were, prima facie a right of indemnity does arise.¹”

40. The *‘proper purpose’* test has received some criticism in recent years, in particular by the New South Wales Court of Appeal in *Gatsios Holdings Pty Ltd v Nick Kritharas Holdings Pty Ltd (in liq)* (2002) ATPR 41-864.

41. In *Nolan v Collie* (2003) 7 VR 287, Ormiston JA, with whom Batt and Vincent JJA agreed, reviewed the authorities and recent debate on the test for recovery by a trustee from trust assets, including *Gatsios Holdings*, and held that (omitting footnotes):

“[53] ... I would therefore hesitate to agree with the restated tests in Ford and Lee which require that every properly incurred liability has to satisfy the triple test stated above. The negative test is the relevant test, that is to allow indemnification for what has not been shown to have been improperly incurred. Thus it may be shown that a particular act is either outside the relevant power, done in bad faith, or exercised with an absence of the care and diligence that a person of ordinary prudence should exercise.”

42. His Honour was referring in that passage to the three tests set out in Ford and Lee, which are summarised by the Court as:

“[49] ... They now formulate, in slightly revised terms, the necessary conditions for satisfying a court that liabilities have been properly incurred by requiring that the trustee must have acted (a) within

¹ *R W G Management Ltd v Commissioner for Corporate Affairs* [1985] VR 385 at 396-7.

power; (b) with the degree of care and diligence that a person of ordinary prudence would exercise in the conduct of her or his affairs; and (c) in good faith. ...”

43. Accordingly, neither the Liquidators nor the Receivers can point to any debt incurred by WFL:
- (a) within power as RE of the 1995-1999 Scheme;
 - (b) with the degree of care and diligence that a person of ordinary prudence would exercise in the conduct of her or his affairs; and
 - (c) in good faith.
44. Sub-Article 6.1 grants the RE all the powers it could exercise as if the scheme property were its own personal property; however, the scheme constitution does not expressly permit the RE to borrow, execute a guarantee or otherwise raise money against scheme property. On any view, in the context of a MIS, the provision of a guarantee of a loan by an RE must be considered to be “raising money” for the purposes of s 601GA(3). In particular:
- (a) the phrase “*raising money*” is used after the word “*borrowing*”, suggesting that raising money means something other than borrowing;
 - i. the phrase has not been relevantly judicially considered; and
 - ii. if it can be said that guarantees were given “*in relation to*” the schemes, then it must follow that those guarantees relate to “*raising money*” for the schemes.
 - (b) there is no evidence of the Growers having consented to or otherwise approved the borrowing of funds or provision of a guarantee by WFL.
45. As to “care and diligence”, a useful analogy can be found in the case of *Doneley v Doneley* [1998] 1 QdR 602, a decision of de Jersey J (as he then was) in the Queensland Supreme Court. In that case, the Court considered a family trust in which the mother was a trustee of farm land held on trust for her two sons. The mother and father conducted an unsuccessful farm on the land, paying rent of \$1. The bank took a mortgage over the land to secure loans to the family business. The Court found that there was clear evidence that the business was

unsuccessful and that it was unlikely that the loan would ever be repaid. One issue considered by the Court was whether the trustee was complying with her duties to the beneficiaries when she encumbered the trust land. The Court held (at 608) that:

“For various reasons Mrs Doneley should be regarded as having committed a breach of trust. First, it was speculative and hazardous to offer the trust lands as security for the increased debt owed to the bank by (in all probability) Mr and Mrs Doneley themselves (Learoyd v. Whiteley (1887) 12 App.Cas. 727, 733). Second, in conveying a beneficial interest in the trust property to the Bank in order to secure her own debt to the Bank, Mrs Doneley breached the “self-dealing rule” (Snell’s Equity, (29th ed., (1990), p. 249, Tito v. Waddell (No. 2) [1977] Ch. 106, 240). Third, and along similar lines, Mrs Doneley did by this transaction impermissibly profit personally from her position as trustee (Bray v. Ford [1896] A.C. 44, 51). I will now briefly elaborate on those three matters.”

46. The Court then developed those points between 608 and 610 of the reported reasons. In response to the suggestion that the trustee treated the family and its business as a single unit and proceeded on the basis that ‘*what is good for the family is good for the boys*’, the Court held that:

“In taking that approach, she failed properly, as trustee, to address the separate interests of the boys as beneficiaries, focusing rather on the interests of the family as a whole — and to that end, the best way of running the aggregation profitably. (I note, in passing, my own conclusion from the evidence that while the profitable operation of portion 9 was greatly assisted by use in conjunction with the trust lands, the reverse proposition was probably not true.) Mrs Doneley was not obliged, as trustee, to ignore the wider picture. But she should have considered this question: were the risks involved in granting the securities justified by the prospect that the parents’ farming operation would go beyond generating enough profit to discharge their debt, and in addition lead to appreciable enhancement in the value of the trust lands? Properly considering the interests of the beneficiaries, she should clearly have answered “no” to that question, for the reasons I earlier expressed.”

47. The decision of R D Nicholson J in *Syncap Management (Rural) Australia Ltd v Lyford* (2004) 51 ACSR 223 is also cited by the Liquidators in their footnote 34. However, it can be distinguished in a number of important respects. In that case, a land owning company had granted a lease to the responsible entity of an agricultural managed investment scheme. The responsible entity had, in turn, granted sub-leases over part of that land to investors in the scheme. The land

owning company borrowed a sum of money from an external lender and granted a charge to it. The responsible entity also provided to the lender a guarantee. The debt was assigned to another lender and, when the responsible entity was on the brink of collapse, the head lease was assigned to Syncap, a replacement responsible entity. The lenders sought to appoint receivers and managers to Syncap and judicial advice was sought from the Federal Court. The parties' submissions and the Court's reasoning are found at paragraphs [49] to [57].

48. In determining that Syncap was liable under the guarantee provided by the outgoing responsible entity pursuant to s 601FS(1), and that the exception contained in s 601FS(2)(d) did not apply, R D Nicholson J held that:

"[55] There is the preliminary question of fact concerning the basis upon which FPA acted when it entered into the FPA charge. Mr Lloyd's affidavit evidence is that the further funding obtained by the landowner from NAB was required to develop the orchard, construct a packing and storage shed and to meet the costs associated with setting up the scheme, that is to provide working capital. He further stated that the funds were in fact applied for those purposes. This evidence is not contradicted. I agree with the defendants' submissions that there is a notable absence of evidence from Mr O'Brien and that an inference should be drawn from that to the effect that his evidence would not have assisted the plaintiff's case. I therefore find that the FPA charge was entered into by FPA for the benefit of the farmers in the scheme and that FPA did so in good faith. In any event, the plaintiff does not put in issue the question of good faith.

[56] It follows that I cannot accept the plaintiff's submission that the FPA charge was not entered into in performance by FPA of its duties as the responsible entity. The fact that the security was described in the notice of appointment as having been entered into solely as security for the loan obtained from the second defendant by the landowner does not affect that conclusion. The reason is that the evident purpose of the loan being obtained by the landowner was that he sought thereby to serve the interests of the scheme.

[57] It also follows that I agree with the defendants' submission that as the right to indemnity exists, the exclusion in ss 601FS(2)(d) and 601FT(2) does not apply. Neither of them can therefore affect the primary application of s 601FS(1)."

49. The Court's reasoning appears to be based on uncontradicted evidence that the loan was taken for the benefit of the investors (see [55]). There is no such evidence here.

Land as scheme property

50. Robson J found in *Re Timbercorp Securities Ltd (in liq)* (2009) 74 ACSR 626 that until the growers' rights are identified it is not appropriate according to law to fairly assess the value of the rights being surrendered on behalf of the growers, applying *Re Hazelton Air Charter Pty Ltd v Mentha* (2002) 41 ACSR 472; [2002] FCA 529.
51. Paragraph 40 of the receivers' submissions states that the issue of land as scheme property is not appropriate for determination at this stage but at the stage of apportioning proceeds of sale. However, the approach of deferring analysis of Growers' rights and their value resulted in investors in Timbercorp, following the decision in *BOSI Security Services Limited v Australia New Zealand Banking Group Limited & Ors* [2011] VSC 255, receiving nothing out of the fund created from the sale of Timbercorp Almond assets for \$128 million.
52. The urgency referred to in *Re Timbercorp Securities Ltd (in liq)* (2009) 74 ACSR 626, that is the offer of Olam Orchards, does not apply here.

Conclusion

53. The liquidators may be eager to go to the market with unencumbered assets, however, they have not been able to show they are yet able to do so pursuant to s 601GC(1)(b) or s 568 of the *Corporations Act* and, consequently, that they are justified in doing so. Therefore, in our submission the Court should not provide the directions pursuant to s 511 in the form sought by the liquidators or the receivers.

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CLARENDON LAWYERS

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24 June 2011