

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

LIST E

S CI 2011 6762

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 CAPACITY AS RESPONSIBLE ENTITY OF THE  
MANAGED INVESTMENT SCHEMES LISTED IN SCHEDULE 2 AND IN ITS CAPACITY AS  
MANAGER OF THE UNREGISTERED SCHEMES LISTED IN SCHEDULE 3  
AND ORS ACCORDING TO SCHEDULE 1

Plaintiffs

AFFIDAVIT OF BRYAN WEBSTER

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Date of document: 22 December 2011

Filed on behalf of: the Receivers

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I, BRYAN WEBSTER of 333 Collins Street, Melbourne, in the State of Victoria, Accountant, do solemnly and sincerely affirm:

1. I am a Registered Liquidator, Certified Practising Accountant and a partner of KordaMentha Pty Ltd (*KordaMentha*).
2. On 6 September 2010, I was appointed joint and several receiver and manager of the assets of Willmott Forests Limited (Receivers and Managers Appointed) (In Liquidation) (ACN 063 263 650) (*WFL*) and its wholly owned subsidiaries (together, the *Willmott Group*), along with my partners Mark Anthony Korda and Mark Francis Xavier Mentha. Where I refer in this affidavit to the *Receivers*, I am referring to myself and each of Mr Mentha and Mr Korda (as applicable) in our capacities as joint and several receivers and managers of the relevant charged assets of WFL. I am authorised to make this affidavit on behalf of the Receivers.

*h*  
*Ans*

3. I have previously affirmed an affidavit in Federal Court of Australia proceeding number VID 386/11 on 17 June 2011 (*my First Affidavit*). A copy of my First Affidavit (without exhibits) is exhibited as exhibit CDC-1 to the affidavit sworn by Craig David Crosbie on 13 December 2011 in relation to this proceeding (the *Crosbie Affidavit*). I have defined a number of terms in my First Affidavit and I adopt those definitions in this affidavit.
4. I make this affidavit from my own knowledge, except where otherwise stated. Where I state matters on the basis of information provided to me, I believe such information to be true.

#### **Personal background and experience**

5. I am a Certified Practising Accountant, a Registered Liquidator and a member of the Insolvency Practitioners Association of Australia. I have been practising in the area of corporate insolvency and financial reconstructions for over 15 years.

#### **Purpose of this affidavit**

6. This affidavit is provided in support of an application dated 13 December 2011 filed by Craig David Crosbie and Ian Menzies Carson in their capacity as liquidators of the Willmott Group (the *Liquidators*) seeking orders and directions in relation to the sale of 13,338 hectares of land situated in Victoria which is leased or sub-licensed from Hancock Victorian Plantations Pty Limited (*HVP*) or Grand Ridge Plantations Pty Ltd (*GRP*) (the *HVP Land*). Unless otherwise indicated, references to HVP in this affidavit should be taken to include GRP. The HVP Land is "encumbered" by certain managed investment schemes conducted by WFL (the *HVP Schemes*). The HVP Schemes are:
- (a) two registered management investment schemes of which WFL is the responsible entity, being the:
- (i) Willmott Forests Premium Forestry Blend Project (ARSN 131 549 589); and
- (ii) Willmott Forests Project (ARSN 089 379 975), but only in respect of the following 'sub-projects' within that scheme:
- (A) 2006 Product Disclosure Statement;
- (B) 2007 Premium Forestry Blend; and
- (C) 2007 Product Disclosure Statement.
- (together, the *HVP Registered Schemes*); and
- (b) two unregistered schemes of which WFL is the manager, being the:
- (i) Willmott Forests – Professional Investor – 2004 Project; and



- (ii) Willmott Forests – Professional Investor – 2006 Project  
(together, the **HVP Unregistered Schemes**).

7. The application seeks, inter alia, the following orders and directions:
- (a) a direction that the Liquidators are justified in procuring WFL, as responsible entity of the HVP Registered Schemes and manager of the HVP Unregistered Schemes, to terminate or surrender each of the Project Documents (as defined in the Crosbie Affidavit) in respect of the property the subject of the Final Implementation Deed (as defined in the Crosbie Affidavit and to which I refer at paragraphs 74 to 75 below);
  - (b) a direction that the Liquidators are justified in apportioning the Consideration (as defined in the Crosbie Affidavit and to which I refer at paragraph 40 below) between the Liquidators and the Receivers in the following shares:
    - (i) 30% to the Liquidators; and
    - (ii) 70% to the Receivers; and
  - (c) a direction that the Liquidators are justified in procuring WFL, as responsible entity of the HVP Registered Schemes and as manager of the HVP Unregistered Schemes, to hold the Liquidators' Consideration (less any expenses incurred by the Liquidators in realising the HVP Assets (as that term is defined in the Crosbie Affidavit)) on trust until it can be pooled and distributed with the proceeds of sale from the realisation of other assets of the respective HVP Registered Schemes and the HVP Unregistered Schemes, or until further order.
8. The Receivers support the relief sought by the Liquidators.

#### **Appointment of Receivers and Managers to the Willmott Group**

9. I refer to paragraphs 9 to 15 of the Crosbie Affidavit and 7 to 13 of my First Affidavit which set out details of:
- (a) the Receivers' appointment;
  - (b) the appointment of Messrs Carson and Crosbie as joint and several voluntary administrators of the Willmott Group and subsequently as the Liquidators; and
  - (c) the scope of the Receivers' appointment.
10. The assets over which the Receivers are appointed include:
- (a) freehold land located in the Murray Valley and North Coast regions of New South Wales, and in the Katherine region in the Northern Territory;

- (b) WFL's rights and interests as lessee of land located in Victoria and New South Wales, including the HVP Land;
  - (c) WFL's interests in farming equipment and inventories; and
  - (d) interests held by WFL in its own right in the managed investment schemes operated by WFL.
11. The exclusions to the assets over which the Receivers are appointed include the following:
- (a) any land located within a radius of approximately 150 kilometres around the township of Bombala, New South Wales (the **Bombala Land**);
  - (b) any 'Excluded Trust Property', being:
    - (i) any application monies received by WFL in its capacity as trustee or custodian in respect of the managed investment schemes operated by WFL;
    - (ii) any money or property which, in respect of any managed investment scheme operated by WFL, is scheme property for the purposes of the Corporations Act including, without limitation:
      - (A) insurance claim proceeds in respect of a Scheme;
      - (B) proceeds of:
        - (I) harvesting or divestment of trees referable to a Scheme;
        - (II) carbon sequestration rights in respect of trees referable to a Scheme, which in each case are held in a separate identified bank account in the name of the WFL in its capacity as trustee or responsible entity of a Scheme, or in the name of an agent of the WFL in such capacity;
    - (iii) forestry rights held by WFL in its capacity as trustee or custodian in respect of the managed investment schemes operated by WFL; and
    - (iv) any other property held by WFL in its capacity as trustee or custodian and notified to the Security Trustee from time to time and consented to by the Security Trustee; and
  - (c) (following the partial termination of the Receivers' appointment) the responsible entity / manager function described in paragraph 10 of my First Affidavit.

#### Viability of the HVP Schemes

12. Upon my appointment, the Receivers instructed WFL staff in preparing a model to assist in analysing the cash flows for each of the managed investment schemes conducted by WFL on the assumption that they had been able to continue to term (the **WFL Scheme Cash Flow Model**). The WFL Scheme Cash Flow Model has the ability to:
- (a) model the estimated cash flows for the individual managed investment schemes conducted by WFL;
  - (b) model the estimated cash flows within a Scheme on a region by region basis; and
  - (c) model the estimated cash flows for any combination of the above two options providing estimated cash flow summaries for any combination of the Willmott Schemes and limit same to the cash flows within a specified region.
13. Now produced and shown to me marked **BW-1** is a summary of the estimated cash flows (produced using the WFL Scheme Cash Flow Model) for the HVP Schemes.
14. By way of summary of the estimated cash flows for the HVP Schemes, the WFL Scheme Cash Flow Model estimates that:
- (a) \$45,496,292 is required to manage and maintain the trees located on the HVP Land; and
  - (b) the responsible entity / manager would suffer a loss of \$20,668,977 in maintaining the trees located on the HVP Land.
15. Accordingly, based on:
- (a) the funding requirement identified in paragraph 14(a);
  - (b) the loss that would be suffered by any replacement responsible entity / manager identified in paragraph 14(b);
  - (c) the insolvency of the current responsible entity / manager of the HVP Schemes; and
  - (d) the failure of the members of the relevant schemes to contribute additional liquidity or propose an alternative responsible entity / manager,

I am of the opinion that the HVP Schemes are insolvent, unviable and have no prospect of achieving their purpose.

#### **Contractual arrangements**

16. I refer to paragraphs 29 to 35 of the Crosbie Affidavit, in which Mr Crosbie outlines the relevant contractual arrangements between WFL, HVP and GRP.



17. In summary, WFL operates the HVP Schemes on the HVP Land pursuant to leases or sub-licences granted by HVP and/or GRP (collectively, the **HVP Leases**). In addition to acting as landlords, HVP and GRP provide ongoing management services to WFL in relation to the forestry plantations located on the HVP Land.
18. The arrangements between WFL and HVP or GRP are governed by overarching Relationship Agreements and a number of other agreements, in particular:
- (a) A relationship agreement dated 22 March 2006 between WFL, HVP and GRP as varied by a deed of amendment dated 14 May 2008 (**Relationship Agreement**);
  - (b) A second relationship agreement dated 7 June 2010 between GRP, HVP, WFL and Willmott Forests Investment Management Pty Ltd (**WFIM**) (**Second Relationship Agreement**);
  - (c) Leases between HVP or GRP (as Landlord) and WFL (as Tenant);
  - (d) Forest Property Agreements between HVP or GRP (as Grantor) and WFIM (as Grantee, as agent for the growers in the HVP Schemes (**Growers**)); or
  - (e) Sub-Licence agreements between HVP (as Sub-Licensor) and WFL (as Sub-Licensee); and
  - (f) Forestry Management Agreements between GRP or HVP (as Provider) and WFL (as Recipient).
19. Copies of these agreements (with the exception of the Sub-Licence agreements) are exhibited to the Crosbie affidavit as exhibit CDC-12. Now produced and shown to me and marked **BW-2** is a copy of an example of a Sub-Licence agreement which relates to Tranche 4.1C of the HVP Land.
20. In general terms, the Relationship Agreements set out the terms under which HVP agrees to provide land and forestry management services to WFL during the relationship term. In terms of the provision of land, the Relationship Agreements provided a 'Release Schedule' (contained in Schedule 1 to those agreements) pursuant to which HVP made available specified land in a series of tranches over the term of the Relationship Agreements.
21. Where HVP is the registered proprietor of the land, the parties entered into a Lease and a Forest Property Agreement. Where the subject land is land to which HVP has the right to access, occupy and use, pursuant to a licence granted under the *Victorian Plantations Corporations Act 1993 (Vic)* (**Licensed Land**), the parties enter into a Sub-Licence and Grant of Forestry Rights under which HVP (sub-licensor) grants a sub-licence to WFL (as sub-licensee), without a Forestry Right (defined in the Forestry Property Agreement) or

Forest Property Agreement. In respect of each grant of land, the parties enter into a Forestry Management Agreement.

22. The Leases between HVP and WFL govern the terms of the rental and occupation of the forestry land, while the Forestry Management Agreements govern the forestry management services provided by HVP to WFL. Pursuant to the Forest Property Agreements, HVP (as owner of the relevant land) vests ownership of the 'Forest Property' (i.e. the trees) in WFIM as agent on behalf of the Growers under the relevant project. Similarly, in respect of Licensed Land, under the Sub-Licence and Grant of Forestry Rights agreements, HVP vests ownership of the 'Forest Property' in WFL, to whom authorisation is given to sub-sub-license to WFIM as agent, nominee or trustee on behalf of the Growers under the project. Depending on the tranche, 'project' may refer to a specific scheme or project, or it may refer generally to each managed investment scheme agreed between HVP and WFIM from time to time.
23. As I refer to at paragraph 10(b) above, WFL's rights and interests in relation to the HVP Leases and Sub-Licences fall within the scope of the Receivers' appointment.

#### **The Upfront Rent**

24. Under the HVP Leases, WFL was obliged to pay rent for the term of the HVP Leases in two tranches: one prior to the commencement of the lease term and one in arrears from the proceeds of the harvest of the Trees. The majority of the rent owed to HVP under the HVP Leases was the subject of the upfront component paid by WFL at the commencement of the term (the **Upfront Rent**).
25. In order to determine the amount of rent paid upfront by WFL, I instructed WFL's accounts staff to identify all payments made by WFL to HVP and, more specifically, to identify those payments made to HVP for the specific purpose of the upfront rent (the **HVP Rent Payments**). According to my staff's calculations, as at 6 September 2010, the total amount of rent paid by WFL in respect of the HVP Leases totalled \$34,192,063.75, all of which was paid at the commencement of the term (the **Total Upfront Rent**). Now produced and shown to me and marked **BW-3** is a copy of the analysis conducted by my staff.
26. Based on the assumption that the leases would generally have a term of 30 years (being the stated lease term in the HVP Leases exhibited as CDC-12 to the Crosbie Affidavit), my staff then identified the percentage of the lease that fell between the payment date and 6 September 2010. This percentage was then applied to each of the individual HVP Rent Payments in order to calculate the total amount of rent which could be said to have been 'used' or applied in respect of WFL's occupancy of the land as at 6 September 2010.



According to this analysis, the amount of rent which could be said to have been 'used' as at that date is \$2,485,001.65. Accordingly, the amount of rent paid upfront by WFL which the Receivers consider could be said to be unused is \$31,707,062.09 (the **Unused Upfront Rent**). This amount represents between 24 to 28 years of unused upfront rent for 13,338 hectares of agricultural land.

27. I note that the analysis produced by my staff values the Unused Upfront Rent at a figure which is substantially the same as that referred to at paragraph 32(d) of the Crosbie Affidavit based on the Directors' Report as to Affairs dated 6 September 2010. The difference of \$35,591.97 between the two valuations is likely attributable to differences in the calculation of the total amount of rent which could be said to have been 'used' or applied in respect of WFL's occupancy of the HVP Land.
28. In the event the HVP Leases had been terminated by HVP, the Receivers would have sought to obtain a refund of the amount of the Unused Upfront Rent from HVP, or sought appropriate protective orders from the Court which may have included, as we informed HVP, orders for relief against forfeiture (see paragraph 31 below). The Receivers' position in this regard was communicated to Mallesons Stephen Jaques (**Mallesons**), solicitors for HVP and GRP, in my letter to Ms Joanne Cameron dated 21 September 2010. Now produced and shown to me and marked **BW-4** is a copy of that letter.
29. As I refer to at paragraph 10(b) above, WFL's rights and interests as lessee of the HVP Land fall within the scope of the Receivers' appointment. As such, the Receivers were faced with two options to realise the value associated with the HVP Leases:
  - (a) obtain a refund of the Unused Upfront Rent from HVP and payment in respect of the surrender of voluntary surrender of the HVP Leases; or
  - (b) include WFL's rights and interests under the HVP Leases as part of the greater sale process for the land and forestry assets of the Willmott Group.
30. I refer to paragraphs 47-51 of the affidavit of Craig Crosbie dated 25 November 2010 and paragraphs 17-19 of the affidavit of Craig Crosbie dated 4 February 2011 filed in Federal Court of Australia proceeding VID 1019 of 2010 (the **Federal Court Affidavits**). Copies of these affidavits are exhibited as exhibits CDC-1 to the affidavit of Craig Crosbie dated 13 December 2011 filed in Supreme Court of Victoria proceeding S CI 2011 6816. As deposed by Mr Crosbie in the Federal Court Affidavits, the Liquidators commenced an expressions of interest campaign from November 2010 seeking expressions of interest in assuming the obligations of responsible entity and/or manager for all or any of the Willmott managed investment schemes, a restructure of the Willmott Group's affairs or its business,

or a recapitalisation of the Willmott Group (the *Liquidators' EOI Campaign*). I understand from my discussions with Mr Crosbie on or about 15 February 2011 that HVP submitted the only binding offer in response to the Liquidators' EOI Campaign. It emerged from this process that HVP was interested in obtaining unencumbered title to the HVP Land. This led to the negotiations referred to at paragraphs 32 to 49 below. As a result, WFL's rights and interests as lessee of the HVP Land were not included in the sale campaign which I describe in my affidavit affirmed on 15 December 2011 in relation to Supreme Court of Victoria Proceeding S CI 2011 6816 (the *Joint Sale Campaign*).

31. If an agreement had not been reached with HVP, the Receivers would have sought to include the HVP Leases in the Joint Sale Campaign, or a standalone sale campaign, or to negotiate with HVP a payment in respect of a voluntary surrender of the HVP Leases and release of the claim for Unused Upfront Rent. Alternatively, should HVP have sought to terminate the HVP Leases, the Receivers would have had no option but to commence proceedings on behalf of WFL and seeking appropriate protective orders from the Court in order to preserve the value of WFL's rights and interests under the HVP Leases. As referred to at paragraph 28 above, I indicated the Receivers' position in this regard to Mallesons and HVP in my letter to Ms Cameron dated 21 September 2010 (exhibited above as BW-4). In the event that HVP succeeded in terminating the HVP Leases, the Receivers would have sought a refund of the Unused Upfront Rent.

#### The HVP Offer

32. As referred to at paragraph 30 above, I was informed by Mr Crosbie on or about 15 February 2011 that HVP had expressed interest in obtaining unencumbered title to the HVP Land.
33. On 22 February 2011, I instructed my solicitors, Allens Arthur Robinson (**AAR**), to send a letter to Ms Cameron of Mallesons and Ms Jane Sheridan of Arnold Bloch Leibler (**ABL**), solicitors for the Liquidators, which indicated that the scope of the Receivers' appointment included WFL's rights under any leases, sub-leases, licences and sub-licences with third party land owners, including HVP. The letter advised that, on that basis, it would be necessary for the Receivers to agree to the terms of any proposed surrender of the leases between HVP and WFL and for the Receivers to execute any deeds of surrender on behalf of WFL. Now produced and shown to me and marked **BW-5** is a copy of the letter dated 22 February 2011 sent by AAR to Mallesons and ABL.
34. I am informed by Matthew Whittle, a partner of AAR, and believe that on 3 March 2011, AAR had not received a response to its letter dated 22 February 2011. On 3 March 2011, I instructed AAR to send a follow up letter to ABL seeking confirmation that the Liquidators

would include the Receivers in all future negotiations with HVP. Now produced and shown to me and marked **BW-6** is a copy of the letter dated 3 March 2011 sent to ABL.

35. I am informed by David Sherwood, an employee of KordaMentha, and believe that on 4 March 2011, Mr Sherwood received an email from Barry Wight of PPB Advisory attaching a letter from HVP to the Liquidators dated 16 February 2011. In that letter, HVP made an offer to the Liquidators (at that stage voluntary administrators) for the purchase of all the trees occupying the HVP Land, together with the full surrender of the associated leases, subleases and the termination of the sub-licences and sub-sub-licences (the **Preliminary HVP Offer**). The Preliminary HVP Offer was expressed to expire on 15 March 2011. I had not received a copy of the Preliminary HVP Offer until 4 March 2011. I note that a copy of the Preliminary HVP Offer is exhibited to the Crosbie Affidavit as Confidential CDC-18. Now shown and produced to me and marked **Confidential BW-7** is a copy of the email from Mr Wight to Mr Sherwood dated 4 March 2011 attaching the Preliminary HVP Offer.
36. By letter to AAR dated 4 March 2011, ABL stated that "*the intention is that the negotiations will be conducted between the Administrators, the Receivers and Managers and HVP*". Now produced and shown to me and marked **BW-8** is a copy of the letter dated 4 March 2011 sent to AAR. On that same date, I instructed AAR to send a response to ABL indicating that the Receivers had only received a copy of the Preliminary HVP Offer that afternoon and requesting that ABL provide any materials relating to the Liquidators negotiations with HVP. Now produced and shown to me and marked **BW-9** is a copy of AAR's letter to ABL dated 4 March 2011.
37. On 11 March 2011 I was informed by Mr Wight that HVP had agreed to extend the deadline for acceptance of the Preliminary HVP Offer to 22 March 2011. Now produced and shown to me and marked **BW-10** is a copy of an email dated 11 March 2011 I received from Mr Wight.
38. On 13 March 2011, I instructed AAR to send a letter to ABL which confirmed that the Receivers' appointment has at all times included the HVP Leases. Now produced and shown to me and marked **BW-11** is a copy of the letter dated 13 March 2011 sent by AAR to ABL.
39. On 23 March 2011, I instructed AAR to send a letter to Mallesons regarding the negotiations between the Liquidators and HVP. In that letter, AAR referred to their earlier letter to Mallesons of 22 February 2011 and need for the Receivers to be involved in ongoing discussions with HVP and the Liquidators. AAR noted that despite the Receivers' request to be included in such negotiations, it appeared HVP and the Liquidators were party to ongoing discussions without the involvement of the Receivers, including the negotiation

of the proposed terms of a surrender of the HVP Leases. AAR's letter re-iterated the Receivers' position that:

- (a) no surrender of the HVP Leases could take place without the Receivers' consent;
- (b) the Receivers' appointment has at all times included the HVP Leases; and
- (c) any payment to be made by HVP could only be characterised as a payment in consideration of a surrender of the leases (and, as a result, HVP's right to re-enter the land), particularly given the significant amount of upfront rent held by HVP in respect of the HVP Leases.

AAR's letter also indicated that the Receivers considered that the appropriate course of action was for the Receivers and HVP to engage in bilateral negotiations regarding the surrender of the HVP Leases and that neither the Liquidators nor HVP should take further steps to negotiate, execute or carry out the terms of any 'Implementation Deed' pursuant to the Preliminary HVP Offer. Now shown and produced to me and marked **BW-12** is a copy of the letter sent by AAR to Mallesons on 23 March 2011.

40. By letter from the Liquidators dated 25 March 2011, I was informed that on 21 March 2011, discussions between the Liquidators and HVP had led to a revised offer from HVP (the **HVP Offer**). A copy of the HVP Offer is exhibited to the Crosbie Affidavit as Confidential CDC-19. Under the terms of the HVP Offer, HVP was to pay an increased amount for the Trees together with a full surrender of the HVP Leases (the **Consideration**). I was informed that the HVP Offer contemplated the execution of a final agreement referred to as the 'Implementation Deed' under which the parties would agree to implement the HVP Offer. Now produced and shown to me and marked **Confidential BW-13** is a copy of the letter dated 25 March 2011 enclosing a copy of the HVP Offer which I received from the Liquidators. I consider that this letter should be kept confidential (except to the extent referred to in this affidavit) as it encloses, and refers to, the HVP Offer which is itself a confidential exhibit to the Crosbie Affidavit.
41. I noted that the purpose of the Implementation Deed was to provide a clean exit for the parties and the Growers from the (then) arrangements in relation to the HVP Land. Under the proposed terms of the Implementation Deed, WFL, WFIM, Growers, the Receivers, the Liquidators, the secured creditors and the Grower financiers would be required to provide releases (and supporting consents) such that HVP and/or GRP would become the absolute owner or, in the case of licensed land, licensee, free and clear of all competing rights and interests in the HVP Land. Under the terms of the proposed Implementation Deed, WFL,

WFIM and Growers were to receive value for relinquishing, releasing, discharging and/or extinguishing their rights and interests in the HVP Land.

42. I understood that the terms of the proposed Implementation Deed would require the Receivers both to surrender the HVP Leases and to provide releases of any claims WFL had in respect of or in connection with the HVP Leases (including the claim for reimbursement of Unused Upfront Rent). As already noted, the Receivers were not prepared to provide such surrender and releases without appropriate compensation, as these were one of only two (mutually exclusive) means available to the Receivers to realise value in respect of the HVP Leases.
43. I am informed by Mr Whittle and believe that on 1 April 2011, AAR received a letter from Mallesons in response to AAR's letter of 23 March 2011. In that letter, Mallesons indicated that HVP's position during the course of its negotiations with the Liquidators was that any agreement would be conditional upon releases being obtained from the Receivers. Mallesons also indicated that HVP considered the issue of whether or not the Receivers' appointment extended to the HVP Leases was a matter to be resolved between the Liquidators and the Receivers. Now produced and shown to me and marked **BW-14** is a copy of Mallesons' letter to AAR dated 1 April 2011.
44. I sent a letter to Mr Crosbie dated 11 April 2011 which stated the Receivers' position that the Receivers would not agree to provide a surrender of the HVP Leases in the absence of an acceptable payment in consideration of any such surrender. Now produced and shown to me and marked **BW-15** is a copy of the letter dated 11 April 2011 I sent to Mr Crosbie.
45. As of 14 April 2011, I had received no response from the Liquidators in relation to my letter of 11 April 2011. Accordingly, I instructed AAR to send a letter to Mallesons reiterating the Receivers' request to meet with representatives of HVP to progress negotiations regarding the surrender of the HVP Leases. Now produced and shown to me and marked **BW-16** is a copy of AAR's letter to Mallesons dated 14 April 2011.
46. I am informed by Mr Whittle and believe that on 18 April 2011, AAR received a letter from Mallesons which indicated that HVP considered the appropriate course was for the Liquidators and Receivers to continue their discussions without further input from HVP. Now produced and shown to me and marked **BW-17** is a copy of Mallesons' letter to AAR dated 18 April 2011.
47. On 19 April 2011, I instructed AAR to send a letter to Mallesons reiterating that the Receivers would not agree to provide a surrender of the HVP Leases in the absence of an

acceptable payment in consideration of any such surrender. Now produced and shown to me and marked **BW-18** is a copy of the letter dated 19 April 2011 from AAR to Mallesons.

48. I understand that on 19 April 2011, the Liquidators and HVP executed an Implementation Deed which purported to set out the terms upon which HVP would come to hold the HVP Land as absolute owner or licensee, free of the HVP Leases, in exchange for a payment of the Consideration by HVP to WFL (the *First Implementation Deed*). As I depose at paragraph 114 of my First Affidavit, and referred to at paragraph 55 of the Crosbie Affidavit, the Receivers were not a party to the First Implementation Deed and had not agreed nor consented to the terms of the First Implementation Deed.
49. I have read the First Implementation Deed and note that it was a condition precedent of that deed that the Receivers and the secured creditors provide releases and a surrender of the HVP Leases to HVP. Pursuant to clause 4.5 of the First Implementation Deed, the release to be given by WFL included, without limitation, any claim in respect of any payments made by WFL under the HVP Leases for rent or licence fees. Similarly, clauses 2.1 and 2.2 of the form of release to be granted by CBA Corporate Services (NSW) Pty Limited on behalf of the secured creditors of WFL and WFIM provided that such release included, without limitation, any claim in connection with any payments made at any time by WFL under the HVP Leases, including but not limited to the payment of rent and licence fees.
50. As I depose at paragraphs 113 and 114 of my First Affidavit, and referred to at paragraph 56 of the Crosbie Affidavit, the Receivers' position was that before the Receivers or secured creditors would consider agreeing to the terms of the Implementation Deed, they would need to be satisfied as to the amount that they would receive from HVP in consideration for the surrender of the HVP Leases and the provision of the required releases. Moreover, the Receivers considered – for the reasons set out below – that they were entitled to receive the full amount of any payment received from HVP on the basis that such payment could only be characterised as a payment in consideration for a surrender of the HVP Leases, and in light of the size of their claim for reimbursement of Unused Upfront Rent. In the absence of any agreement as to their share of the consideration receivable from HVP, at no time did the Receivers provide, or agree to provide, releases under the First Implementation Deed.

#### **HVP payment for surrender of HVP Leases not Trees**

51. The Receivers' consistent position was that any payment received from HVP reflected the value of the surrender of the HVP Leases (and any associated claim for the value of the Upfront Rent) rather than the value presently attributed to the trees because, as we

maintained at all times during the course of the negotiations between the Liquidators and HVP, we took the view that the trees on the HVP Land had a negative value.

52. As referred to at paragraph 48 of the Crosbie Affidavit, I note that the Liquidators engaged Pöyry Management Consulting (Australia) Pty Ltd (*Pöyry*) to prepare a review of the HVP Offer. The report produced by Pöyry dated 19 April 2011 and exhibited as Confidential CDC-20 to the Crosbie Affidavit (the *Pöyry HVP Report*) estimates the market value of the trees on HVP Land at \$13.31 million. However, I note that Pöyry did not include a land-holding cost in calculating the tree value.
53. As set out at page 3 of the Pöyry HVP Report, a land-holding cost was not included in Pöyry's calculation on the basis that "*WFL has paid the lease costs for the entire rotation at the beginning of the investment.*" The Receivers are of the opinion that a land-holding cost (either economic or opportunity cost) is an essential part of considering the value of the trees situated on the HVP Land. As the HVP Schemes cannot continue due to the insolvency of the responsible entity / manager, a land-holding cost needs to be included to derive the real value of the trees to a new owner.
54. In the context of a sale of the trees to an arms-length third party purchaser, in the event that the third party sought to grow the trees to harvest, it would be required to pay rent to HVP in order to occupy the HVP Land. The value of this rent would need to be included in a calculation of the net present value of the trees.
55. Even in present circumstances, where HVP itself wishes to acquire the trees, it is necessary to factor in a land-holding cost to reflect the fact that HVP will forgo the ability to either sell the HVP Land or rent it to a third party. Accordingly, there is an opportunity cost to HVP in growing the trees which must be considered when calculating the value attributable to the trees on the HVP Land in the hands of HVP.
56. Now shown and produced to me and marked **Confidential BW-19** is a copy of the Receivers' analysis of the value of the trees on the HVP Land. I consider that this analysis should be kept confidential except to the extent referred to in this affidavit. As referred to at paragraph 48 of the Crosbie Affidavit, should the Liquidators' application be unsuccessful, it will be necessary to negotiate with HVP to determine whether HVP would allow the sale of any interests in the HVP Leases and the HVP Land, including the trees, to a third party. I consider that the Receivers' analysis should be kept confidential on the basis that its disclosure may adversely impact upon the price which may be achievable in any such future sale.



57. On the Receivers' calculations, if a land holding cost is factored into a valuation of the HVP Plantations, the trees have a negative value. This is consistent with the value of the trees located on other Willmott plantations which are in close proximity to the HVP Land and being sold in connection with the Joint Sale Process. Now produced and shown to me and marked **Confidential BW-20** is a summary prepared by Mr Sherwood of my office which provides examples of comparative Willmott plantations located on land the subject of the Joint Sale Process. I consider that this exhibit should be kept confidential on the basis that it refers to material exhibited as Confidential CDC-16 to the affidavit of Craig Crosbie dated 13 December 2011 filed in relation to Supreme Court of Victoria Proceeding S CI 2011 6816 (*Crosbie Sale Affidavit*).
58. A copy of HVP's final bid for the WFL plantations located in the Murray Valley Region being sold in connection with the Joint Sale Process is exhibited as Confidential CDC-16 to the Crosbie Sale Affidavit. I note that in that letter, Linda Sewell, the CEO of HVP, states that (in relation to the Murray Valley trees that are of a similar age to the trees on the HVP Land) *"the young age of the trees, the condition of the plantations due to constraints placed on the original planting time frames, and the charging of a market rental gives rise to a plantation of negative value"*.
59. Given the above, the economic value of the trees on the HVP Land in the context of the HVP Offer is negative, unless the negotiated payment for surrendering the HVP Leases amounted to more than the Unused Upfront Rent. As such, the Receivers consider that the entirety of the Consideration can only be characterised as being a payment for the surrender of the HVP Leases and the release of any claims arising in connection with the HVP Leases.
60. As referred to at paragraphs 74 to 75 below, HVP agreed to the allocation of the Consideration between the Liquidators and the Receivers. As referred to at paragraphs 70 to 72 below, the Receivers agreed to the apportionment of the Consideration on the basis that such payment was referable only to the surrender of the HVP Leases and the provision of the required releases.

#### **HVP Leases are not 'scheme property'**

61. Since the Receivers' appointment, the Receivers have maintained that the HVP Leases (and any rights thereunder) do not constitute 'scheme property'.
62. The Receivers' view that the HVP Leases are not 'scheme property' is based on the following observations:



- (a) insofar as the HVP Leases relate to the HVP Unregistered Schemes, they cannot constitute 'scheme property' under Chapter 5C of the *Corporations Act 2001* (Cth) as the definition of 'scheme property' only applies to registered schemes;
- (b) it is clear that paragraphs (a), (b) or (c) of the definition of 'scheme property' in section 9 of the *Corporations Act* do not apply to any rights of WFL under the HVP Leases, including any right to any payment made by HVP in respect of their surrender. These rights are not money contributed to the schemes by Growers (paragraph (a)) nor are they money that forms part of the scheme property under the relevant legislation (paragraph (b)) nor are they money borrowed or raised by WFL for the purposes of the schemes (paragraph (c));
- (c) the rights of WFL under the HVP Leases could only conceivably constitute 'scheme property' if those rights were directly or indirectly acquired with, or derived from, contributions to the schemes (paragraphs (d) or (e)). In short, the HVP Leases would have to have been acquired or derived, directly or indirectly, by WFL from Growers' contributions of money to the relevant scheme; and
- (d) for the reasons set out below, the Receivers' position is that the HVP Leases and the rights of WFL under the HVP Leases thereunder were not acquired with or derived from contributions to the schemes. Rather, the rights were acquired, and paid for, by WFL using its own funds and in accordance with its contractual obligations to HVP.

#### *Growers' Application Money*

63. It is clear from the scheme documentation that application monies and other payments received by WFL from Growers were not contributed for the purpose of WFL securing the HVP Leases or paying the Upfront Rent. In this regard:
- (a) In each of the HVP Schemes, there was no upfront rent component payable by Growers to WFL; rather the rent was payable by Growers entirely out of harvest proceeds (or insurance proceeds, if any).
  - (b) In each of the HVP Schemes (other than the Willmott Forests Premium Forestry Blend Project), there was an upfront component to the maintenance fee, which was payable by the Growers on entry into the Scheme. In Part 1 of Schedule 1 of each of the Forestry Management Agreements, that part of the maintenance fee was specified to be paid for preparation and planting services, including ripping, mounding and ploughing, pre-planting weedicide treatment, supplying cuttings or seedling material, fertilising, or pest control.

- (c) Under the Willmott Forests Premium Forestry Blend Project, the Growers pay maintenance and harvesting fees out of the harvest proceeds (or insurance proceeds, if any) under cl 10.1 of the Scheme constitution and an application fee on applying to participate in the scheme.
64. In each case, the constituent scheme documents give no indication that any moneys contributed by the Growers are to be applied for the purposes of WFL paying for an interest in land for the purposes of the scheme; on the contrary, the apparent purpose of the contributed funds is for different objects including payment to WFL for the provision of services in relation to the establishment and maintenance of the Growers' woodlots leased or licensed by WFL to the growers, and consideration for benefits provided to Growers under the schemes.
65. Moreover, I note that WFL was obliged to enter into leases with HVP at prescribed times under clause 1.3 of the Relationship Agreement and clause 1.4 of the Second Relationship Agreement. As such, the entry into the HVP Leases and payment of the Upfront Rent was not referable to the establishment of a particular scheme or the payment of application money in that scheme.
66. The Receivers do not accept that the question whether a particular asset or property constitutes 'scheme property' is to be, or can be, answered by reference to a tracing exercise undertaken in respect of the funds contributed to Growers in particular schemes. Rather, the Receivers' position is that this question is a matter of characterisation of the payments made by the Growers. Nevertheless, according to the Receivers' review of the books and records of WFL, it is evident that WFL funded the payment of the Upfront Rent from WFL's personal assets and not from the application monies received by WFL from Growers.
67. The Receivers analysed the usage of WFL's trading account or day-to-day bank account (the *Trading Account*). Now produced and shown to me and marked **BW-21** is a spreadsheet summary of the Receivers' analysis. The analysis clearly shows that the Pre-Paid Rent amounts were paid out of the funds standing to the credit of the Trading Account. Further, it is clear that a variety of payments were made into the Trading Account, including from sources unrelated to WFL's receipt of moneys from Growers (including drawdowns from the facility provided by the secured creditors, ATO BAS refunds, proceeds from the sale of assets and collections from loan book receipts). Moreover, a wide variety of expenses were paid by WFL out of the funds held in the Trading Account in addition to the Upfront Rent amounts (including employee wages and commercial office rentals).

68. Accordingly, the Receivers consider that the only conclusion that can be drawn from an analysis of the usage of the Trading Account is that the payment of Upfront Rent was funded from a combination of sources to which WFL was legally and beneficially entitled and was not funded directly or indirectly by contributions from Growers.
69. I refer to paragraphs 73 to 82 of the Crosbie Affidavit in which Mr Crosbie deposes to the analysis of the cash flows within the Willmott Group conducted by the Liquidators (the **Liquidators' Tracing Analysis**). In relation to the Liquidators' Tracing Analysis, I note the following:
- (a) the figures set out in paragraph 81 of the Crosbie Affidavit represent the greatest sum which could have been used to pay HVP/GRP. The results of the Liquidators' Tracing Analysis represent a potential range that is between \$0 and the stated amounts as the analysis cannot demonstrate any direct connection between the payments entering and leaving the Trading Account;
  - (b) I have been advised by WFL's forestry management staff that the HVP Land was provided by HVP when it became available. WFL would then include the HVP Land in the 'pool' of freehold and leasehold land available to allocate to growers (the **Available WFL Land**). WFL's land manager would then allocate specific land parcels to growers based on WFL's obligation to allocate the land within a specified time period. Accordingly, growers across all of the various managed investment schemes conducted by WFL were allocated land from the Available WFL Land – that is, land already secured from HVP – on a first in, first served basis. This resulted in growers being allocated land based on a sales year regardless of which scheme they were in, as multiple Willmott Schemes were offered in some years. The Liquidators' Tracing Analysis assumes the last grower application funds deposited into the Trading Account were used to pay the first HVP rent payment. A more appropriate method would be to match the individual incoming grower funds with the payment for the lease tranche they were allocated to. If this tracing exercise were to be completed, the analysis would likely conclude that a much lower range of values represent the possible amount of grower funds used to pay the HVP rent;
  - (c) as stated at paragraph 82 of the Crosbie Affidavit, the closing balance test may not have been the most appropriate method of tracing. If intraday balances were used, it is likely that the potential range of grower funds used to pay the HVP rent would have diminished further; and

- (d) the Liquidators' Tracing Analysis fails to take into account any other scheme related payments which may have occurred in between the time grower application monies were received and the time the HVP rent was paid (such as the purchase of trees or maintenance costs).

#### **Apportionment of the proceeds received from HVP**

70. The Liquidators and the Receivers have met on numerous occasions to discuss the rights of each party and their claim over any consideration paid for the surrender of the HVP Leases. Throughout this process, I also engaged in discussions with Ms Sewell, who continued to insist that the Liquidators and the Receivers come to a commercial agreement between them as to apportionment of the Consideration in a timely manner. During the course of our discussions on 2 May 2011, Ms Sewell stated to myself and Mr Crosbie that the Receivers were giving up something of value, and that it would not be possible to complete any settlement without the consent of the Receivers or the secured creditors.
71. As referred to at paragraphs 65 to 83 of the Crosbie affidavit, discussions regarding the apportionment of any proceeds received from HVP as between the Liquidators and the Secured Creditors were substantially focused on the issue of whether the HVP Leases constituted 'scheme property'. Given the Receivers' position that the HVP Leases did not constitute 'scheme property', the Receivers considered, for the reasons set out above, that the full amount of the Consideration to be paid by HVP should be paid to the Receivers.
72. Nevertheless, in order to bring finality to the matter, the Receivers agreed to a compromise whereby the Receivers would be entitled to 70% of the Consideration (the **Receivers' Consideration**) and the Liquidators entitled to 30% of the Consideration (the **Liquidators' Consideration**). The Receivers agreed to this compromise in order to achieve a settlement, but were not prepared to provide the surrender and releases sought by HVP in return for less than 70% of the Consideration.
73. The position of the Receivers was and is that we are not prepared to provide the surrender and releases sought by HVP unless we receive 70% of the Consideration, as provided for in the Final Implementation Deed referred to below. Moreover, I have been instructed by the secured creditors, as our appointors, that their position is that they will not provide the releases and consents sought by HVP absent an allocation of the Consideration in this proportion to the Receivers.

#### **Final Implementation Deed**

74. Once the apportionment of the Consideration had been agreed between the Liquidators and the Receivers, it became necessary to document the agreed position. Given the

Receivers' position regarding the scope of our appointment and the issue of whether the HVP Leases constitute 'scheme property', it was agreed with the Liquidators and HVP that it would be appropriate for the parties to enter into a new, tripartite Implementation Deed.

75. On 30 November 2011, HVP, GRP, WFL, WFIM, the Receivers and the Liquidators entered into a revised Implementation Deed (***Final Implementation Deed***) which:
- (a) supersedes the First Implementation Deed;
  - (b) provides that the Receivers are entitled to the Receivers' Consideration and the Liquidators entitled to the Liquidators' Consideration;
  - (c) indicates that the purpose of the agreement is to provide a clean exit for the parties and the Growers from the current arrangements in relation to the HVP Land, such that HVP and/or GRP will hold the HVP Land as absolute owner (or licensee), free and clear of all interests in, or in respect of, the HVP Land held by WFL, WFIM and the Growers; and
  - (d) requires that WFL (in both its personal capacity and its capacity as the responsible entity of the HVP Schemes), WFIM (in both its personal capacity and its capacity as agent of the Growers) and those parties who provided finance to Growers provide HVP and GRP with releases in accordance with clause 5.5 of the Implementation Deed.

A copy of the Final Implementation Deed appears as exhibit "Confidential CDC-21" to the Crosbie Affidavit.

### **Conclusion**

76. The Receivers are satisfied that the payment to be made by HVP represents an appropriate amount in exchange for the surrender of the HVP Leases and the release of claims arising in connection with those leases, and that the Receivers' appointors are also prepared to provide releases from their security on the terms of the Final Implementation Deed. The Receivers also consider that the agreed apportionment of the payment received from HVP results in a good outcome for Growers, particularly when considering the value Growers will receive on a per hectare basis compared to that achieved in connection with the Joint Sale Process.
77. Clause 4.1(a) of the Final Implementation Deed provides that orders from the Court to the effect that:
- (a) WFL is justified in implementing the transactions and taking the steps contemplated by the deed; and

(b) the Liquidators can determine the allocation of the Liquidators' Consideration (as defined in the Implementation Deed) amongst Growers and creditors of WFL, Willmott Forests Investment Management Pty Ltd (Receivers and Managers Appointed) (In Liquidation), the Responsible Entity and the Agent, in the manner that they have determined and advised to the court,

is a condition precedent to 'Implementation'.

78. Accordingly, the Receivers support the Liquidators' present application. The orders and directions sought by the Liquidators are essential to achieving settlement of the Final Implementation Deed, and realising the maximum value for the HVP Leases and associated rights. In conclusion, the Receivers respectfully request that the Court make the orders sought by the Liquidators.

**AFFIRMED** by **BRYAN WEBSTER** at  
Melbourne in the State of Victoria this 22<sup>nd</sup> day  
of December 2011



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Before me



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**AMELIA JANE ROBERTS**  
of 530 Collins Street, Melbourne  
Victoria 3000  
An Australian Legal Practitioner  
within the meaning of the  
Legal Profession Act 2004

**SCHEDULE 1 - SCHEDULE OF PARTIES**

**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 2 AND IN ITS CAPACITY AS MANAGER OF THE UNREGISTERED MANAGED INVESTMENT SCHEME LISTED IN SCHEDULE 3**

First Plaintiff

and

**CRAIG DAVID CROSBIE  
IN HIS CAPACITY AS LIQUIDATOR OF WILLMOTT FORESTS LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 063 263 650)**

Second Plaintiff

and

**IAN MENZIES CARSON  
IN HER CAPACITY AS LIQUIDATOR OF WILLMOTT FORESTS LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 063 263 650)**

Third Plaintiff