

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

PLAINTIFFS' OUTLINE OF SUBMISSIONS

A PURPOSE OF APPLICATION

1 The Plaintiffs seek orders and directions pursuant to the *Corporations Act 2011 (the Act)* in connection with a number of managed investment schemes for which the First Plaintiff (**WFL**) is the responsible entity. Specifically, the Plaintiffs seek *inter alia* the following orders and directions: -

- (a) A direction pursuant to s 511 of the *Corporations Act 2001 (Cth) (Act)* that the Second and Third Plaintiffs (in their capacity as Liquidators of the First Plaintiff) are justified in procuring the First Plaintiff, as responsible entity of the Willmott Forests Project (ARSN 089 379 975) and the Willmott Forests Premium Forestry Blend Project (ARSN 131 549 589) (**HVP Registered Schemes**) and manager of the Willmott Forests - Professional Investor - 2004 Project and the Willmott Forests - Professional Investor - 2006 Project (**HVP Unregistered Schemes**), to terminate or surrender each of the Project Documents¹ in respect of the property the subject of the Final Implementation Deed.
- (b) A direction pursuant to s 511 of the Act that the Liquidators are justified in apportioning the Consideration (as defined in the Sixth Crosbie Affidavit) less any expenses incurred by the Second and Third Plaintiffs in realising the HVP Assets (as defined in the Sixth Crosbie Affidavit) between the Second and Third Plaintiffs (in their capacities as the liquidators of the First Plaintiff) and Mark Anthony Korda, Mark Francis Xavier Mentha and Bryan Webster, in their capacities as the joint and several receivers and managers of the assets of the First Plaintiff and its wholly owned subsidiaries (together, the **Receivers**), in the following shares:
 - (i) 30% to the Second and Third Plaintiffs (**Liquidators' Consideration**); and

¹ Eighth Crosbie Affidavit, CDC-26 and CDC-27, in so far as they relate to the HVP Registered Schemes and the HVP Unregistered Schemes [Vol A5].

- (ii) 70% to the Receivers.
- (c) A direction that the Second and Third Plaintiffs (in their capacity as Liquidators of the First Plaintiff) are justified in procuring the First Plaintiff, 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 Second and Third Plaintiffs in realising the HVP Assets) 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.

2 The Plaintiffs rely upon the following:

- (a) the affidavit of Craig David Crosbie sworn 13 December 2011 in this proceeding (**Sixth Crosbie Affidavit** [Vol B1, CB 12 - CB 38]);
- (b) the affidavit of Craig David Crosbie sworn 25 November 2010 in Federal Court proceeding VID 1019 of 2010 and exhibited at CDC-1 to the Seventh Crosbie Affidavit (**First Crosbie Affidavit** [Vol A1, CB 105 to CB 130]);
- (c) the affidavit of Craig David Crosbie sworn 4 February 2011 in Federal Court proceeding VID 1019 of 2010 and exhibited at CDC-1 to the Seventh Crosbie Affidavit (**Second Crosbie Affidavit** [Vol A1, CB 132 to CB 141]);
- (d) the affidavit of Craig David Crosbie sworn 11 May 2011 in Federal Court proceeding VID 386 of 2011 and exhibited at CDC-1 to the Seventh Crosbie Affidavit (**Third Crosbie Affidavit** [Vol A1, CB 143 to CB 173]);
- (e) the affidavit of Craig David Crosbie sworn 22 June 2011 in Federal Court proceeding VID 386 of 2011 and exhibited at CDC-1 to the Seventh Crosbie Affidavit (**Fourth Crosbie Affidavit** [Vol A1, CB 174 to CB 184]);
- (f) the affidavit of Craig David Crosbie sworn 24 June 2011 in Federal Court proceeding VID 386 of 2011 and exhibited at CDC-1 to the Seventh Crosbie Affidavit (**Fifth Crosbie Affidavit** [Vol A1, CB 185 to CB 187]);
- (g) the affidavit of Craig David Crosbie sworn 13 December 2011 i in Supreme Court proceeding SCI 2011 6816 (**Seventh Crosbie Affidavit** [Vol A1, CB 10 to CB 60]);
- (h) the affidavit of Craig David Crosbie sworn 18 January 2012 in Supreme Court proceeding SCI 2011 6816 (**Eighth Crosbie Affidavit** [Vol A5, CB 2706 onwards]);
- (i) the affidavit of Bryan Webster affirmed 15 December 2011 in Supreme Court proceeding SCI 2011 6816 (**Second Webster Affidavit** [Vol A1, CB 489 to CB 506]), on behalf of the receivers and managers of WFL (**Receivers**); and,

- (j) the affidavit of Bryan Webster affirmed 17 June 2011 in Federal Court proceeding VID 386 of 2011 and exhibited as BW-1 to the Second Webster Affidavit (**First Webster Affidavit** [Vol A1, CB 508 to CB 544]), on behalf of the Receivers.

B DIRECTIONS UNDER S 511

- 3 The Liquidators refer to and rely upon section B of their submissions filed in proceeding SCI 2011 6816 (**Main Sale Proceeding**).

C WFL'S MANAGED INVESTMENT SCHEMES

- 4 The Liquidators refer to and rely upon section C of their submissions filed in the Main Sale Proceeding.
- 5 The leased land is owned by Hancock Victorian Plantations Pty Ltd (**HVP**) and Grand Ridge Plantations Pty Ltd (**GRP**) (together, the **HVP Land**) or Forestry Commission of New South Wales (**FNSW**).² Only the leased land owned by HVP is relevant to this application.
- 6 The HVP land was deployed in the following Willmott Registered Schemes:
- (a) Willmott Forests Project (ARSN 089 379 975); and
 - (b) Willmott Forests Premium Forestry Blend Project (ARSN 131 549 589).
- 7 The HVP land was also used in the following Willmott Professional Investor Schemes:
- (a) Willmott Forests – Professional Investor – 2004 Project; and
 - (b) Willmott Forests – Professional Investor – 2006 Project.
- 8 Pursuant to registered charges dated 17 March 2009,³ the Receivers have been relevantly appointed in relation to WFL's rights and interests as lessees of land leased from HVP.⁴
- 9 The Receivers are not appointed in relation to *inter alia*:⁵
- (a) 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;

² First Crosbie Affidavit at [7], [Vol A1, CB 107].

³ See First Webster Affidavit at [7], [Vol A1, CB 512].

⁴ Second Webster Affidavit at [9], [Vol A1, CB 491].

⁵ Second Webster Affidavit at [10], [Vol A1, CB 491 to CB 492].

- (ii) any money or property which, in respect of any managed investment scheme operated by WFL, is scheme property for the purposes of the Act;
- (b) forestry rights held by WFL in its capacity as trustee or custodian in respect of the managed investment schemes operated by WFL; and
- (c) any other property held by WFL in its capacity as trustee or custodian.

D THE OPERATION OF THE SCHEMES AND THE CONSTITUENT DOCUMENTS

10 Relevantly, WFL's relationship with HVP is governed by four types of agreement⁶-

- (a) Relationship Agreements, which set out the agreement for the provision of land by HVP to WFL and the establishment and management of pine plantations upon that land;⁷
- (b) Leases of the HVP land to WFL for a term of 30 years;⁸
- (c) Forest Management Agreements, pursuant to which WFL appointed HVP to plant, maintain and harvest the trees on the HVP Land;⁹ and
- (d) Forest Property Agreements pursuant to which HVP or GRP granted an interest in the trees on the HVP land to Willmott Forests Investment Management Pty Ltd (ACN 098 718 837) (**WFIM**) as agent on behalf of the Growers in the schemes conducted on HVP land.¹⁰

11 The rent payable under the HVP Leases was payable by WFL in two distinct instalments:¹¹

- (a) an upfront sum calculated per hectare on the commencement of the HVP Lease (**Upfront Rent Portion**); and
- (b) a percentage of the proceeds of harvest of the trees on the HVP Land when those trees were harvested (**Harvest Rent Portion**).

12 The Directors' Report as to Affairs dated 6 September 2010 stated that the value of the Upfront Rent Portion on the unexpired term of the HVP Leases was \$31,671,470.¹²

The HVP Registered Schemes

13 The constituent documents of the HVP Registered Schemes are:¹³

- (a) a Product Disclosure Statement (**PDS**);

⁶ Sixth Crosbie Affidavit at [32], [Vol B1, CB 19 to CB 21].

⁷ Sixth Crosbie Affidavit at [32], [Vol B1, CB 19 to CB 21]; exhibit CDC-7, [Vol B1, CB 206 to CB 593].

⁸ Sixth Crosbie Affidavit at [32(b)], [Vol B1, CB 19]; exhibit CDC-8 [Vol B1, CB 594 to CB 689].

⁹ Sixth Crosbie Affidavit at [32(f)], [Vol B1, CB 20]; exhibit CDC-10 [Vol B1, CB 703 to CB 735].

¹⁰ Sixth Crosbie Affidavit at [32(h)], [Vol B1, CB 20]; exhibit CDC-11 [Vol B1, CB 736 to CB 772].

¹¹ Sixth Crosbie Affidavit at [32(c)], [Vol B1, CB 19].

¹² Sixth Crosbie Affidavit at [32(d)], [Vol B1, CB 20]; exhibit CDC-9, [Vol B1, CB 690 to CB 702].

¹³ Seventh Crosbie Affidavit at [46], [Vol A1, CB 22].

- (b) Constitution;
- (c) Grower Lease; and
- (d) Maintenance Agreement.

14 Taking the Willmott Forests Project (ARSN 089 379 975), 2006 Project, as an exemplar,¹⁴ the Constitution of the Willmott Forests Project provides that:

- (a) the Manager must hold the “Assets” on trust for the Growers;¹⁵
- (b) All Land acquired by the Manager for the purposes of the Project is held beneficially by the Manager in the course of, and in accordance with, its duties as responsible entity of the Project;¹⁶
- (c) A Woodlot must only be issued at an application price which is the amount payable as specified in the relevant PDS or other disclosure document and set out in the Project Documents in respect of the issue of each Woodlot;¹⁷
- (d) “Assets” are “all the property, rights and income *of the Project*, but not application moneys or property in respect of which Woodlots have not yet been issued”;¹⁸
- (e) “Woodlot” is an interest in half a hectare of the Land and all the improvements to the Land pursuant to the Project Documents and any relevant Forestry Right;¹⁹
- (f) “Project Document” is the current Land Tenancy Agreement (and/or, if applicable, a Pre-Lease Agreement) and Forestry Management Agreement executed by a Grower and the Manager;²⁰

¹⁴ See the Sixth Crosbie Affidavit at [24(a)(i)], [Vol B1, CB 17].

¹⁵ See, for example, clause 2 of the Constitution for the Willmott Forests Project (ARSN 089 379 975), [Vol B4, CB 1433]. This clause is also featured at clause 2.1 of the Constitution for the Willmott Forests Premium Forestry Blend Project (ARSN 131 549 589), [Vol B4, CB 1587].

¹⁶ See, for example, clause 6.7 of the Constitution for the Willmott Forests Project (ARSN 089 379 975), [Vol B4, CB 1437]. This clause is also featured at clause 6.7 of the Constitution for the Willmott Forests Premium Forestry Blend Project (ARSN 131 549 589), [Vol B4, CB 1594].

¹⁷ See, for example, clause 3 of the Constitution for the Willmott Forests Project (ARSN 089 379 975), [Vol B4, CB 1433]. A similar clause is featured at clause 3.1 of the Constitution for the Willmott Forests Premium Forestry Blend Project (ARSN 131 549 589), [Vol B4, CB 1587].

¹⁸ See, for example, clause 26.1 of the Constitution for the Willmott Forests Project (ARSN 089 379 975), [Vol B4, CB 1452]. This definition is consistent with the one at clause 27.1 of the Constitution for the Willmott Forests Premium Forestry Blend Project (ARSN 131 549 589), [Vol B4, CB 1613].

¹⁹ See, for example, clause 26.1 of the Constitution for the Willmott Forests Project (ARSN 089 379 975), [Vol B4, CB 1455]. In respect of the Constitution for the Willmott Forests Premium Forestry Blend Project (ARSN 131 549 589), a “Woodlot” is defined as “an interest in, at the time of issue of the Woodlot, approximately 5,200 square metres of Land and a beneficial interest in the relevant Forestry Rights” [Vol B4, CB 1617].

²⁰ See, for example, clause 26.1 of the Constitution for the Willmott Forests Project (ARSN 089 379 975), [Vol B4, CB 1454]. In respect of the Constitution for the Willmott Forests Premium Forestry Blend Project (ARSN 131 549 589), a “Project Document” is defined as “the current Land Tenure Agreement and current Land Sourcing and Forestry Management Agreement, executed by a Grower and the Manager” [Vol B4, CB 1615].

- (g) "Land Tenancy Agreement" is an agreement or other instrument under which the Manager grants to the Grower a right to enter, occupy and use the Land which may include a Lease Agreement or Licence;
- (h) "Lease Agreement" is a lease or sub-lease in the form for the time being specified by the Manager;
- (i) "Forestry Right" is an interest in the land granted by the owner of the land, or any other person entitled to grant such an interest in the land, under which the person who has the benefit of the interest is generally, among other things, entitled to enter the land to establish, maintain and harvest a crop of trees on the land;
- (j) "Project" is the project established pursuant to this constitution and includes all the Assets and Liabilities of the Project;
- (k) "Manager" is the company which is registered with the ASIC as a the single responsible entity for the Project under the Act;
- (l) Woodlots are taken to be issued when the Manager accepts the application;²¹
- (m) In respect of all Woodlots issued on or after 12 December 2003, the harvesting and sale of a Grower's Trees is to be carried out, or arranged to be carried out, by the Manager unless the Manager is otherwise notified by the Grower in accordance with the procedure set out in a New Product Disclosure Statement;²²
- (n) The total proceeds of the sale ("Gross Timber Proceeds"), from all trees marketed and harvested by the Manager that relate to Woodlots planted in a particular Financial Year ("Harvested Woodlots") will be dealt with as follows:
 - (i) the Harvesting Fee relating to the marketing and harvesting of the trees (together with the amounts payable under the terms of the Project Documents) will be deducted from the Gross Timber Proceeds; and
 - (ii) the balance of the Gross Timber Proceeds ("Net Timber Proceeds") will be distributed to the Growers based on the percentage that their Harvested Woodlots in respect of a Financial Year bear to the total number of all Harvested Woodlots for that Financial Year.

15 The provisions in the Constitution of the Willmott Forests Premium Forestry Blend Project (ARSN 131 549 589) relating to harvesting and distribution slightly differ from those in Constitution of the Willmott Forests Project (see 14(m) and 14(n), above). The Constitution of the Willmott Forests Premium Forestry Blend Project (ARSN 131 549 589) provides that:

²¹ See, for example, clause 4.5 of the Constitution for the Willmott Forests Project (ARSN 089 379 975), [Vol B4, CB 1434]. This clause is replicated at clause 4.5 of the Constitution for the Willmott Forests Premium Forestry Blend Project (ARSN 131 549 589), [Vol B4, CB 1591].

²² See, for example, clause 14.1 of the Constitution for the Willmott Forests Project (ARSN 089 379 975), [Vol B4, CB 1442].

- (a) in respect of all Woodlots in each Pool, the harvesting and sale of the Pool's trees is to be arranged to be carried out by the Manager on behalf of Growers;²³
- (b) a "Pool" is a grouping of Growers' Trees established in respect of each Financial Year in which a Woodlot is issued; each Woodlot issued during a Financial Year forms part of the Pool in respect of that Financial Year;²⁴
- (c) the "Manager" is the company which is registered with the ASIC as the single responsible entity for the Project under the Corporations Act;²⁵ and
- (d) the proceeds of the sale of the trees in any Pool will be dealt with as follows:²⁶
 - (i) certain rental, maintenance and marketing fees will be deducted from the proceeds; and
 - (ii) the balance will be distributed to the Growers on a pro rata basis by reference to the proportion of the total number of Woodlots referable to the relevant Pool which is held by each Grower.

16 According to the 2006 Product Disclosure Statement for the Willmott Forests Project (ARSN 089 379 975), if a Grower paid the \$3,850 (per Woodlot) application fee and was accepted, WFL would:²⁷

- (a) administer the Project;
- (b) lease the land to Growers;
- (c) obtain planning and development approval;
- (d) prepare the plantation site;
- (e) manage the plantations through to clear fell;
- (f) arrange harvesting operations if required; and
- (g) distribute harvesting proceeds to Growers.

17 According to the Forestry Management Agreement for the Willmott Forests Project (ARSN 089 379 975) (2006 Project), the Growers would pay WFL (in its capacity as Manager).²⁸

²³ See clause 14.1 of the Constitution for the Willmott Forests Premium Forestry Blend Project (ARSN 131 549 589), [Vol B4, CB 1601].

²⁴ See clauses 4.17 and 27.1 of the Constitution for the Willmott Forests Premium Forestry Blend Project (ARSN 131 549 589), [Vol B4, CB 1593 and CB 1615].

²⁵ See clause 27.1 of the Constitution for the Willmott Forests Premium Forestry Blend Project (ARSN 131 549 589), [Vol B4, CB 1614].

²⁶ See clauses 14.4, 14.5 and 14.6 of the Constitution for the Willmott Forests Premium Forestry Blend Project (ARSN 131 549 589), [Vol B4, CB 1602 to CB 1603].

²⁷ See, for example pages 2 and 3 of the 2006 Product Disclosure Statement in respect of the Willmott Forests Project (ARSN 089 379 975) [Vol B4, CB 1462 to CB 1463].

²⁸ See, for example, clause 4.1 and Parts 1 and 2 of Schedule 1 of the exemplar Forestry Management Agreement for the Willmott Forests Project (ARSN 089 379 975) (2006 Project), [Vol B4, CB 1546 and CB 1549].

- (a) a one-off, per Woodlot fee for the preparation of the site and planting of the trees; and
- (b) upon the thinning and clear fell of trees on that Grower's Woodlot(s), 7% of the gross timber proceeds received from the those trees, in consideration of WFL carrying out further establishment work and general maintenance after planting.

The HVP Unregistered Schemes

18 The constituent documents of the HVP Unregistered Schemes are:²⁹

- (a) an Information Memorandum;
- (b) an Investment Deed;
- (c) Grower Leases; and
- (d) Maintenance Agreements.

19 Taking the Willmott Forests - Professional Investor - 2004 Project as an example, the Investment Deed provides that:

- (a) the Manager must hold the "Assets" on trust for Growers;³⁰
- (b) "Assets" are "the property, rights and income of the Project, but not application money or property in respect of which Hectares have not yet been issued";³¹
- (c) all Land acquired or leased by the Manager for the purposes of the Project is held beneficially by the Manager in the course of, and in accordance with, its duties as manager of the Project;³²
- (d) a Hectare must only be issued at an application price which is the amount payable as specified in the relevant Information Memorandum and set out in the Project Documents in respect of the issue of each Hectare;³³
- (e) a "Hectare" is an interest in one hectare of the Land and all improvements to that Land pursuant to a Project Document and any applicable Forestry Right;³⁴

²⁹ Seventh Crosbie Affidavit at [45], [Vol A1, CB 21 to CB 22].

³⁰ See, for example, clause 2 of the Investment Deed dated 7 May 2004 for the Willmott Forests - Professional Investor - 2004 Project [Vol B4, CB 1881]. This clause is replicated in clause 2 of the Investment Deed dated 8 February 2006 for the Willmott Forests - Professional Investor - 2006 Project [Vol B4, CB 1943].

³¹ See, for example, clause 21.1 of the Investment Deed dated 7 May 2004 for the Willmott Forests - Professional Investor - 2004 Project [Vol B4, CB 1896]. This clause is replicated in clause 21.1 of the Investment Deed dated 8 February 2006 for the Willmott Forests - Professional Investor - 2006 Project [Vol B4, CB 1995].

³² See, for example, clause 6.7 of the Investment Deed dated 7 May 2004 for the Willmott Forests - Professional Investor - 2004 Project [Vol B4, CB 1885]. This clause is replicated in clause 6.7 of the Investment Deed dated 8 February 2006 for the Willmott Forests - Professional Investor - 2006 Project [Vol B4, CB 1946].

³³ See, for example, clause 3 of the Investment Deed dated 7 May 2004 for the Willmott Forests - Professional Investor - 2004 Project [Vol B4, CB 1881]. This clause is replicated in clause 3 of the Investment Deed dated 8 February 2006 for the Willmott Forests - Professional Investor - 2006 Project [Vol B4, CB 1943].

- (f) the "Project Documents" are the current Lease Agreement or Sublease Agreement (as applicable) (and/or, if applicable, a Pre-Lease Agreement) and a Forestry Management Agreement executed by a Grower and the Manager;³⁵
- (g) a "Lease Agreement" is a lease in the form for the time being specified by the Manager, and a "Sub-Lease Agreement" is a sublease agreement being in the form for the time being specified by the Manager, being a lease of a leasehold interest (known as the Headlease) to which the Manager is the sub-lessor and the Grower the sublessee;³⁶
- (h) a "Forestry Right" is an interest in the land granted by the owner of the land under which the person who has the benefit of the interest is generally, among other things, entitled to enter the land to establish, maintain and harvest a crop of trees on the land, including, without limitation, a forestry right within the meaning of section 87A of the *Conveyancing Act 1919* (NSW);³⁷
- (i) the "Project" is the project established pursuant to this Investment Deed and includes all the Assets and Liabilities of the Project;³⁸
- (j) the "Manager" is specified as Willmott Forests Ltd;
- (k) Hectares are taken to be issued when the Manager accepts the application;³⁹
- (l) in respect of all Hectares issued on or after 12 December 2003, the harvesting and sale of a Grower's Trees is to be carried out, or arranged to be carried out, by

³⁴ See, for example, clause 21.1 of the Investment Deed dated 7 May 2004 for the Willmott Forests - Professional Investor - 2004 Project [Vol B4, CB 1897]. This definition is replicated in clause 21.1 of the Investment Deed dated 8 February 2006 for the Willmott Forests - Professional Investor - 2006 Project [Vol B4, CB 1956].

³⁵ See, for example, clause 21.1 of the Investment Deed dated 7 May 2004 for the Willmott Forests - Professional Investor - 2004 Project [Vol B4, CB 1897]. This definition is replicated in clause 21.1 of the Investment Deed dated 8 February 2006 for the Willmott Forests - Professional Investor - 2006 Project [Vol B4, CB 1957].

³⁶ See, for example, clause 21.1 of the Investment Deed dated 7 May 2004 for the Willmott Forests - Professional Investor - 2004 Project [Vol B4, CB 1897]. Similar definitions appear in clause 21.1 of the Investment Deed dated 8 February 2006 for the Willmott Forests - Professional Investor - 2006 Project [Vol B4, CB 1956 and CB 1958].

³⁷ See, for example, clause 21.1 of the Investment Deed dated 7 May 2004 for the Willmott Forests - Professional Investor - 2004 Project [Vol B4, CB 1896]. A similar definition appear in clause 21.1 of the Investment Deed dated 8 February 2006 for the Willmott Forests - Professional Investor - 2006 Project [Vol B4, CB 1956].

³⁸ See, for example, clause 21.1 of the Investment Deed dated 7 May 2004 for the Willmott Forests - Professional Investor - 2004 Project [Vol B4, CB 1897]. This definition is replicated in clause 21.1 of the Investment Deed dated 8 February 2006 for the Willmott Forests - Professional Investor - 2006 Project [Vol B4, CB 1957].

³⁹ See, for example, clause 4.5 of the Investment Deed dated 7 May 2004 for the Willmott Forests - Professional Investor - 2004 Project [Vol B4, CB 1882]. This clause is replicated in clause 4.5 of the Investment Deed dated 8 February 2006 for the Willmott Forests - Professional Investor - 2006 Project [Vol B4, CB 1944].

the Manager unless the Manager is otherwise notified by the Grower in accordance with the procedure set out in an Information Memorandum,⁴⁰ and

- (m) the total proceeds of sale ("Gross Timber Proceeds"), from all Trees marketed and from all Trees marketed and harvested by the Manager that relate to Hectares planted in a particular Financial Year ("Harvested Hectares") will be dealt with as follows:⁴¹
 - (i) (the Harvesting Fee relating to the marketing and harvesting of the Trees (together with the amounts payable under the terms of the Project Documents) will be deducted from the Gross Timber Proceeds; and
 - (ii) the balance of the Gross Timber Proceeds ("Net Timber Proceeds") will be distributed to the Growers based on the percentage that their Harvested Hectares in respect of a Financial Year bear to the total number of all Harvested Hectares for that Financial Year.

20 According to the Information Memorandum dated 19 May 2004 for the Willmott Forests - Professional Investor - 2004 Project, if a Grower paid the \$7,700 application fee per Hectare, fulfilled the minimum subscription requirement and was accepted, WFL would:⁴²

- (a) administer the Project;
- (b) lease the land to Growers;
- (c) obtain planning and development approval;
- (d) prepare the plantation site(s);
- (e) plant suitable stock at a rate appropriate to the specific site;
- (f) grow trees to produce sawlogs;
- (g) manage the plantations through to clear fell;
- (h) arrange harvesting operations (unless the Manager is notified otherwise by the Grower); and
- (i) distribute the harvesting proceeds to Growers.

⁴⁰ See, for example, clause 14.1 of the Investment Deed dated 7 May 2004 for the Willmott Forests - Professional Investor - 2004 Project [Vol B4, CB 1890]. This clause is replicated in clause 14.1 of the Investment Deed dated 8 February 2006 for the Willmott Forests - Professional Investor - 2006 Project, save for the reference to 12 December 2003 [Vol B4, CB 1950 to CB 1951].

⁴¹ See, for example, clause 14.2 of the Investment Deed dated 7 May 2004 for the Willmott Forests - Professional Investor - 2004 Project [Vol B4, CB 1890]. This clause is similar to clause 14.2 of the Investment Deed dated 8 February 2006 for the Willmott Forests - Professional Investor - 2006 Project, save for the reference to 12 December 2003 [Vol B4, CB 1951].

⁴² See, for example, page 2 of the Information Memorandum dated 19 May 2004 for the Willmott Forests - Professional Investor - 2004 Project [Vol B4, CB 1779]. Similar statements appear at pages 2 and 3 of the Information Memorandum dated 22 February 2006 for the Willmott Forests - Professional Investor - 2006 Project [Vol B4, CB 1966 and CB 1967].

- 21 Under the Forestry Management Agreement for the Willmott Forests - Professional Investor - 2004 Project, the Growers would pay WFL (in its capacity as Manager);
- (a) a one-off, upfront fee for the preparation of the site and planting of the trees; and
 - (b) 7% of the Gross Timber Proceeds received from the thinning and felling of trees on each Hectare would be deducted by the Manager prior to distribution, in order to cover the Manager's fees for further establishment and general maintenance of the Trees after planting.⁴³

E INSOLVENCY OF WFL AND VIABILITY OF THE SCHEMES

- 22 The Liquidators refer to and rely upon section E of their submissions filed in the Main Sale Proceeding.

F EXPRESSION OF INTEREST CAMPAIGN AND THE HVP OFFER

- 23 In November 2010, the Liquidators called for expressions of interest from third parties in taking over as responsible entity of the Willmott Schemes. However, there has been very little appetite amongst the Grower cohort and prospective replacement REs to restructure the WFL HVP Schemes.⁴⁴ In particular:
- (a) Whilst the WAG have expressed an interest in a number of other schemes, no concrete proposals have been forthcoming, despite the effluxion of a significant period of time;⁴⁵ and
 - (b) there is no evidence that the necessary constitutional amendments could be passed and/or the requisite number of Growers will make the significant up-front contributions required to restructure the schemes (particularly in circumstances where WFL will not contribute to ongoing costs of the schemes in respect of which it holds interests in its own rights and the cost to Growers would further increase if certain Growers elected not to participate in the restructure).
- 24 The lack of an appetite amongst prospective REs and Managers is not unexpected. As the HVP schemes are structured so that the Growers pay an up-front fee, and then no

⁴³ See, for example, clause 4 (together with Schedule 1) of the Forestry Management Agreement in respect of the Willmott Forests - Professional Investor - 2004 Project [Vol B4, CB 1908 and CB 1910]. Similarly, see clause 4 (together with Schedule 1) of the Forestry Management Agreement in respect of the Willmott Forests - Professional Investor - 2006 Project [Vol B4, CB 2046 and CB 2048].

⁴⁴ Sixth Crosbie Affidavit at [41], [Vol B1, CB 22].

⁴⁵ Affidavit of Mark James Hoddinott dated 16 January 2012 filed in SCI 2011 6816 at [12], [14] and [16] [Vol A5, CB 2660 to CB 2662]. The material filed by the WAG shows that very few active steps have been taken to replace WFL since filing the affidavit of Ms Bermingham in the proceeding before Dodds-Streeton J.

rent or other fees until termination of the project, there is very little commercial return to be derived from taking over the RE role and continuing to operate the schemes.⁴⁶

25 Furthermore, it is not practicable for the ongoing maintenance and harvest of the trees to revert to individual Growers. Specifically-⁴⁷

- (a) The HVP land leased by WFL and used in the Willmott Schemes has been divided into individual lots.
- (b) The way in which lots have been allocated creates a “checkerboard effect”, with some lots surrounded on all sides by other lots, and others on the edge of a plantation. A Grower whose lot is surrounded on all sides by other Growers’ lots could not access his or her lot to commence harvesting without obtaining access across the surrounding lots. Further, the clear felling of an individual Grower’s lot is likely to result in damage to trees on adjacent lots as trees fall.
- (c) It is not feasible to harvest and sell trees on such a small scale.
- (d) Significant and substantial fire maintenance and access works would need to continue, requiring the co-ordination of Growers.

26 A further and significant difficulty faced in respect of the HVP schemes, is that WFL is in breach of the Forest Management Agreements.⁴⁸ Between August 2010 and February 2011, more than \$2.9 million (including GST) in management fees remained unpaid by WFL. WFL has not been in a position to rectify the breaches and accordingly:

- (a) HVP and GRP have a right to terminate the HVP leases pursuant to clause 15.2 of the HVP leases;⁴⁹ and
- (b) if the HVP leases are terminated, the Forestry Property Agreements terminate automatically.⁵⁰

27 On 23 March 2011, HVP offered to pay WFL an amount for the acquisition of the trees occupying the HVP land and for the termination or surrender of the HVP Leases and Grower interests in the HVP Land (**HVP Offer**).⁵¹

28 On 29 June 2011, the Liquidators sought and obtained orders to the following effect from Justice Dodds-Streeton (**Orders**):⁵²

- (a) the Liquidators are justified in procuring WFL to amend the constitutions of the Registered Willmott Schemes, pursuant to section 601GC(1)(b) of the Act by

⁴⁶ Fourth Crosbie Affidavit at [7], [Vol A1, CB 176].

⁴⁷ Seventh Crosbie Affidavit at [74], [Vol A1, CB 27 to CB 29].

⁴⁸ Sixth Crosbie Affidavit at [36-37], [Vol B1, CB 21].

⁴⁹ See, for example, clause 15.2 for the HVP Lease exhibited as CDC-8 to the Sixth Crosbie Affidavit [Vol B1, CB 613].

⁵⁰ See clause 6 of the Forest Property Agreement (Tranche 1) exhibited as CDC-11 to the Sixth Crosbie Affidavit [Vol B1, CB 742].

⁵¹ Sixth Crosbie Affidavit at [47], [Vol B1, CB 23].

⁵² Seventh Crosbie Affidavit at CDC-3 [Vol A1, CB 253 to CB 256].

executing the proposed deeds in the form annexed to Schedule 1 of the order, on the basis that such amendments will not adversely affect members' rights; and

- (b) the Liquidators are justified in procuring WFL to amend the investment deeds and constitutions of the Professional Investor Schemes executing the proposed deeds in the form annexed to Schedule 2 of this order, on the basis that such amendments will not adversely affect members' rights.

29 By reason of the Orders, WFL now has the power to terminate or surrender each of the Project Documents (as defined in the Eighth Crosbie Affidavit) of the Willmott Registered Schemes and the Willmott Professional Investor Schemes and to surrender, relinquish or release the rights of the Growers in the trees the subject of the HVP Offer. Therefore, the *first* question now arising for determination is whether the exercise of that power by the Liquidators is reasonable. In answering this question, it is submitted that the Court ought to consider:

- (a) whether in the circumstances the HVP Offer represents the best value to Growers in respect of the HVP Leases;
- (b) whether the allocation between the value of the HVP leasehold interest and the trees together with the apportionment of the sale proceeds amongst the Growers is reasonable; and
- (c) the existence and viability of any concrete competing proposals to continue the affected Willmott Registered Schemes and Professional Investor Schemes on the HVP land.

H THE HVP OFFER AND THE ALLOCATION OF PROCEEDS BETWEEN THE LEASEHOLD INTEREST (TO THE SECURED CREDITORS) AND THE VALUE OF THE TREES (TO THE GROWERS)

30 The Liquidators have acted reasonably and justifiably in considering, negotiating and accepting the HVP Offer. Specifically:

- (a) the Liquidators negotiated with HVP and improved on the preliminary offer received from HVP;⁵³
- (b) the Liquidators engaged Poyry to consider the reasonableness of the HVP Offer and obtained an opinion from Poyry that the HVP Offer was reasonable (**Poyry HVP Report**),⁵⁴ and,

⁵³ Sixth Crosbie Affidavit at [45] and [47], [Vol B1, CB 23].

⁵⁴ Sixth Crosbie Affidavit at [48] and [50], [Vol B1, CB 23 to CB 24]; Confidential Exhibit CDC-20, [Confidential Vol B3, CB 1266 to CB 1282].

- (c) the net present value ascribed to the trees in the Poyry HVP Report was based on the assumption that the HVP Schemes would continue in their current structure on the basis of the scheme documents – an assumption very favourable to the Growers in circumstances where the continuing operation of the schemes was likely to require them to incur substantial additional expenditure (such as the \$2.9 million outstanding under the Forestry Management Agreements).⁵⁵

31 Negotiations in relation to the HVP Offer concluded with the execution of the Final Implementation Deed on 30 November 2011.⁵⁶ A summary of the key terms is annexed as a confidential annexure. The conditions precedent to the Final Implementation Deed relevantly require.⁵⁷

- (a) a Court order that the Liquidators are justified in implementing the Final Implementation Deed and taking the steps contemplated by the deed, such order to be obtained by 31 January 2012;
- (b) a Court order that the Liquidators were justified in their determination and allocation of the Growers' portion of the consideration payable under the Final Implementation Deed, such order to be obtained by 31 January 2012;
- (c) releases to be provided by *inter alia* the Commonwealth Bank of Australia before Implementation; and
- (d) release, extinguishment or relinquishment of the Project Documents by the Liquidators.

32 In negotiating with HVP, the Liquidators have needed to be cognisant of the commercial realities placed upon that negotiation by the Receivers. Critically, the Receivers would not agree to provide releases of their charges unless agreement was reached on the amount payable to them in consideration for the surrender and releases.⁵⁸ As a consequence, the Liquidators have also had to reach agreement with the Receivers on the apportionment of the consideration payable by HVP and GRP under the Final Implementation Deed. An apportionment was approved by Pagone J *in the matter of Timbercorp Securities Limited (in liquidation)* [2009] VSC 597⁵⁹ in circumstances where the secured creditor would not consent to release of its security without its entitlement to the sale proceeds being agreed upon. This has required the Liquidators to:

- (a) consider whether the freehold HVP leases constituted "scheme property"; and,
- (b) determine how the consideration under the Final Implementation Deed should be allocated as between the leasehold interest of WFL and the trees.

⁵⁵ Sixth Crosbie Affidavit at [54(d)], [Vol B1, CB 25].

⁵⁶ Sixth Crosbie Affidavit at [62], [Vol B1, CB 26]; Confidential Exhibit CDC-21 [Confidential Vol B3, CB 1283 to CB 1398].

⁵⁷ Sixth Crosbie Affidavit at [63], [Vol B1, CB 26].

⁵⁸ Sixth Crosbie Affidavit at [65], [Vol B1, CB 27].

⁵⁹ See especially at [8] and [9].

Are the HVP leases the subject of the Final Implementation Deed “scheme property”?

33 The Liquidators refer to and rely upon paragraphs 59 to 69 of their submissions filed in the Main Sale Proceeding.⁶⁰

34 As detailed in section D above, in the present case, the “blueprint” of each of the schemes was documented. Moreover, it is demonstrably clear from the constituent documents of the Registered Schemes and Professional Investor Schemes, that HVP Leases were not acquired in connection with contributions from Growers. In particular:

- (a) in the Willmott Registered Schemes and Willmott Professional Investor Schemes, the PDS and Information Memoranda specified that if a Grower paid the application fee and was accepted, WFL would take a number of steps including: preparing the plantation site and managing the plantations. Critically, the PDS’s and Information Memoranda did not say that WFL would *lease* the land upon which the schemes were conducted;
- (b) Similarly, the Forestry Management Agreements made clear that the applicable fees were referable to preparing the site, planting the trees and general maintenance rather than the *leasing* of the necessary land;
- (c) WFL was obliged to enter into leases with HVP at prescribed times, so that the entry into the HVP Leases and payment of the Upfront Rent Portion was not referable to the establishment of a particular scheme or the payment of application money in respect of that scheme;
- (d) there is no reference to WFL’s capacity or right of indemnity out of the assets of any scheme in the Relationship Agreement and HVP Leases;
- (e) the constitutions of the Willmott Registered Schemes and the investment deeds of the Professional Investor Schemes make no express reference to the power of WFL to pay the Upfront Rent Portion or to a right of indemnity specifically in relation to the HVP Leases; and
- (f) rent or licence fees paid by Growers could not be used to fund the Upfront Rent Portion as the relevant fees were only payable at harvest.⁶¹

35 This conclusion is fortified by the difficulty of tracing the funds contributed by Growers to determine whether they were used to pay for the Upfront Rent Portion of the HVP

⁶⁰ Save for the reference in footnote 137 in the submissions filed in the Main Sale Proceeding, which is not relevant to this proceeding.

⁶¹ See, for example, the “rental” set out in the Lease Agreement in respect of the Willmott Forests Project (2006 Product Disclosure Statement) [Vol 4 CB 1551]; the “rental” set out in the Lease Agreement in respect of the Willmott Forests - Professional Investor - 2004 Project [Vol B4, CB 1913]; and the “rental” set out in the Lease Agreement in respect of the Willmott Forests Professional Investor - 2006 Project [Vol B4, CB 2051].

Leases.⁶² The absence of evidence of this type was considered relevant by Gordon J in *ASIC v Letten (No 5)*.⁶³

- 36 As the foregoing analysis demonstrates, the Liquidators are justified in having reached the conclusion that it would be difficult to establish that HVP Leases are “scheme property”.⁶⁴

The apportionment of value between trees and land

- 37 In negotiating the apportionment of the value between the termination or surrender of the HVP Leases and the trees, the Liquidators have acted properly and reasonably in trying to ensure that the Final Implementation Deed reflected the best possible deal available to the Growers. Specifically, the Liquidators obtained 30% of the consideration payable under the Final Implementation Deed for Growers, in circumstances where:

- (a) the Receivers’ would not release their charges unless content with the apportionment of the consideration;⁶⁵ and,
- (b) the net present value ascribed to the trees in the Poyry HVP Report was based on the assumption that the HVP Schemes would continue in their current structure on the basis of the scheme documents – an assumption very favourable to the Growers in circumstances where the continuing operation of the schemes was likely to require them to incur substantial additional expenditure (such as the \$2.9 million outstanding under the Forestry Management Agreements).⁶⁶

- 38 It is evident that the Liquidators have undertaken a detailed negotiation in the best interests of Growers by seeking to improve the value of the trees. This negotiation has been informed by expert independent advice. Having negotiated the best available outcome in light of the attitude taken by the Receivers and the exposure to termination of the HVP leases, the Liquidators have prudently observed that it would be preferable and in the best interests of Growers to complete the Final Implementation Deed, rather than allow them to face the very real of risk of receiving nothing for their investment.⁶⁷

The apportionment of funds as between Growers

- 39 In the event that the Court makes orders in the terms set out in paragraphs 1 and 2 of the Originating Process, 30% of the consideration payable under the Final Implementation Deed will be payable to the Liquidators (on behalf of the Growers). The question then arises – how should those proceeds be distributed? The constituent documents of the HVP schemes provide for pooling and distribution of the harvest proceeds as follows:

⁶² Sixth Crosbie Affidavit at [78]-[83], [Vol B1, CB 29 to CB 31].

⁶³ At [47] and [50].

⁶⁴ Sixth Crosbie Affidavit at [83], [Vol B1, CB 31].

⁶⁵ Sixth Crosbie Affidavit at [56], [Vol B1, CB 25].

⁶⁶ Sixth Crosbie Affidavit at [54(d)], [Vol B1, CB 25].

⁶⁷ Sixth Crosbie Affidavit at [89], [Vol B1, CB 31 to CB 32].

- (a) Willmott Forests Project (ARSN 089 379 975) on a project by project basis,⁶⁸
 - (b) Willmott Forests Premium Forestry Blend Project (ARSN 131 549 589), Willmott Forests – Professional Investor – 2004 Project,⁶⁹ and Willmott Forests – Professional Investor – 2006 Project⁷⁰ on a scheme by scheme basis.
- 40 Importantly, distribution of harvest proceeds is not dependent on where a Growers' woodlot is located. Therefore a Grower in the Willmott Forests Premium Forestry Blend Project will receive the same proportionate distribution of proceeds if his or her woodlot is located on HVP Land, North Coast or FNSW Land. As the HVP Schemes are located on various parcels of land used by WFL,⁷¹ the most fair and equitable distribution will occur if the proceeds of the Final Implementation Deed are held on trust until they can be pooled and distributed with the proceeds of the Sale Contracts the subject of proceeding SCI 2011 6816.⁷²

L APPROPRIATENESS OF GIVING DIRECTIONS IN THE PRESENT CASE

- 41 For the reasons referred to above, the Liquidators are justified in terminating the Project Documents and Grower interests in order to provide the best possible return to Growers in the circumstances. After the effluxion of seven months since the making of the Orders by Dodds-Streton J, it is not appropriate that this fair and equitable distribution is stymied by inchoate proposals that certain of the schemes may yet be recapitalised.⁷³ The material filed by the WAG reveals that very few concrete steps have been taken since it

⁶⁸ See clause 14.1 of the Constitution of the Willmott Forests Project [Vol B4, CB 1442] and p 10 of the 2006 Product Disclosure Statement in respect of the Willmott Forests Project (ARSN 089 379 975) [Vol B4, CB 1470].

⁶⁹ See clause 14 of the Investment Deed in respect of the Willmott Forests - Professional Investor - 2004 Project [Vol B4, CB 1890] and pages 5 and 6 of the Information Memorandum in respect of the Willmott Forests - Professional Investor - 2004 Project [Vol B4, CB 1782 and CB 1783].

⁷⁰ See clause 14 of the Investment Deed in respect of the Willmott Forests - Professional Investor - 2006 Project [Vol B4, CB 1950 to CB 1951] and page 6 of the Information Memorandum in respect of the Willmott Forests - Professional Investor - 2006 Project [Vol B4, CB 1970].

⁷¹ Sixth Crosbie Affidavit at [96], [Vol B1, CB 33].

⁷² Sixth Crosbie Affidavit at [100]-[101], [Vol B1, CB 34].

⁷³ Affidavit of Mark James Hoddinott dated 16 January 2012 filed in SCI 2011 6816 at [12], [14] and [16] [Vol A5, CB 2660 to CB 2662]. The material filed by the WAG shows that very few active steps have been taken to replace WFL since filing the affidavit of Ms Bermingham in the proceeding before Dodds-Streton J.

filed the affidavit of Ms Bermingham in June 2011. As in *Re Timbercorp Securities Limited* (2009) 74 ACSR 626, "a bird in the hand is worth two in the bush".⁷⁴

Dated: 18 January 2012

PAUL ANASTASSIOU

ROBERT G CRAIG

Arnold Bloch Leibler

ARNOLD BLOCH LEIBLER

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

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

Third Plaintiff

SCHEDULE 2 - REGISTERED MANAGED INVESTMENT SCHEMES

- 1 Willmott Forests Project (ARSN 089 379 975)
- 2 Willmott Forests Premium Forestry Blend Project (ARSN 131 549 589)

SCHEDULE 3 - UNREGISTERED MANAGED INVESTMENT SCHEMES: PROFESSIONAL INVESTOR SCHEMES

- 1 Willmott Forests - Professional Investor - 2004 Project - 2004 Information Memorandum and 2004 Information Memorandum (2005)
- 2 Willmott Forests - Professional Investor - 2006 Project - 2006 Information Memorandum

