

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

CORPORATIONS LIST  
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 SCHEDULE 4  
AND ORS ACCORDING TO SCHEDULE 1

Plaintiffs

OUTLINE OF SUBMISSIONS OF THE RECEIVERS AND MANAGERS:  
PROPOSED SURRENDER OF HVP LEASES

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Date of document: 18 January 2012

Filed on behalf of: the Receivers

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**A. Introduction**

1. These submissions are to be read in conjunction with the outline of submissions of the receivers and managers in proceeding S CI 2011 6816, which are also dated 18 January 2012 (the **GFP Sale Submissions**). Terms defined in the GFP Sale Submissions have the same meaning when used in these submissions.
2. Four of the Schemes are partly conducted on land (the **HVP Land**) situated in Victoria which is leased or sub-licensed by WFL from either Hancock Victorian Plantations Pty Ltd (ACN 084 801 132) (**HVP**) or Grand Ridge Plantations Pty Ltd (ACN 004 285 705) (**GRP**),<sup>1</sup> namely:

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<sup>1</sup> In these submissions references to HVP are taken to refer also to GRP, unless otherwise indicated.

- (a) two Registered Schemes (the **HVP Registered Schemes**), being:
- (i) the Willmott Forests Project (ARSN 089 379 975) – 2006 and 2007 PDSs only; and
  - (ii) the Willmott Forests Premium Forestry Blend Project (ARSN 131 549 589); and
- (b) two Professional Investor Schemes (the **HVP Unregistered Schemes**), being:
- (i) the Willmott Forests – Professional Investor – 2004 Project; and
  - (ii) the Willmott Forests – Professional Investor – 2006 Project,<sup>2</sup>
- (together, the **HVP Schemes**).
3. As described at paragraph [8(c)(ii)] of the GFP Sale Submissions, the Receivers' appointment has at all times included WFL's rights and interests in relation to the leases or sub-licences granted by HVP in respect of the HVP Land (collectively, the **HVP Leases**), regardless of whether WFL entered into the HVP Leases in its personal or RE capacity.
4. The initial term of the HVP Leases runs for 30 years, or until the completion of final harvest of the trees. A notable feature of the HVP Leases is that the rent is payable by way of a substantial upfront component, together with a second tranche to be paid following harvest of the trees: Affidavit of Bryan Webster affirmed 22 December 2011 (**Webster HVP Affidavit**), [24]. The total amount of upfront rent that WFL paid under the HVP Leases is more than \$34 million: Webster HVP Affidavit, [24]-[25]. In most cases, only a small percentage of the 30 year term of the HVP Leases has expired.
5. On 30 November 2011, the Receivers and the Liquidators entered into an agreement with HVP (the **Final Implementation Deed**),<sup>3</sup> under which WFL and Willmott Finance Investment Management Pty Limited (receivers and managers appointed) (**WFIM**)<sup>4</sup> have agreed to relinquish their interests under the HVP Leases and in respect of the HVP Land, so that HVP will hold the HVP Land as absolute owner (or licensee), free and clear of all interests of WFL and WFIM in, or in respect of, the HVP Land. The stated purpose of the Final Implementation Deed is to "provide a clean exit" for HVP, WFL and the Growers from the current arrangements in relation to the HVP Land: confidential exhibit CDC-21, cl 3.1.

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<sup>2</sup> See confidential exhibit CDC-22 to the Affidavit of Craig Crosbie made on 13 December 2011 filed in proceeding S CI 2011 6816: column headed "Ha per region: FNSW".

<sup>3</sup> Confidential exhibit CDC-21 to the Crosbie HVP Affidavit.

<sup>4</sup> WFIM, as agent for the Growers, holds the forestry rights granted by HVP in respect of trees standing on the HVP Leases.

6. Clause 4.1 of the Final Implementation Deed provides that it is a condition precedent to "Implementation" that, on or before 31 January 2012, orders are obtained 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 and WFIM in the manner that they have determined and advised to the Court.
  7. The Receivers make these submissions in support of the directions that the Liquidators seek in this application. They rely on the Webster HVP Affidavit and the affidavit of Craig David Crosbie sworn on 13 December 2011 and filed on behalf of the Liquidators (the **Crosbie HVP Affidavit**).
- B. The HVP Offer**
8. In November 2010, the Liquidators (then the voluntary administrators of the Willmott Group) commenced a campaign calling for expressions of interest from third parties to replace WFL as RE of the Schemes. In response, the Liquidators received a binding offer from HVP relating only to the HVP Schemes. This was the only binding offer received in connection with the Liquidators' expressions of interest campaign. The HVP proposal did not provide for the replacement of the RE. It would therefore have involved WFL's continued involvement or identification of a third party willing to take on those responsibilities: Crosbie HVP Affidavit, [41]-[42].
  9. On 16 February 2011, HVP submitted an alternative binding offer for the acquisition of the trees occupying the HVP Land and for both the termination or surrender of all leases, sub-leases, licenses, sub-licenses and sub-sub-licenses in respect of the HVP Land and the provision of full releases of claims against HVP (the **Preliminary HVP Offer**): Crosbie HVP Affidavit, [44].
  10. Following further negotiations between the Liquidators and HVP, on 23 March 2011, HVP agreed to increase the sum payable (the **Consideration**) for the full surrender or termination of the HVP Leases, acquisition of the trees on the HVP Land and the provision of full releases; to this end, HVP submitted a revised binding offer (the **HVP Offer**): Crosbie HVP Affidavit, [45]-[47].
  11. From the time the Receivers became aware that HVP was interested in obtaining unencumbered title to the HVP Land, they have consistently maintained that 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, as the HVP Leases fall within the scope of the Receivers' appointment: Webster HVP Affidavit, [32]-[50]; exhibits BW-5 – BW-18.

12. On 19 April 2011, the Liquidators and HVP entered into an Implementation Deed (the *First 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 Receivers were not a party to the First Implementation Deed and had not consented to its terms; however, the First Implementation Deed included conditions precedent that the Receivers and the secured creditors would provide releases in connection with the surrender of the HVP Leases: Crosbie HVP Affidavit, [55]; Webster HVP Affidavit, [48]-[49].
13. Eventually, on 30 November 2011, following extensive further discussions between the Receivers and the Liquidators regarding the apportionment of the Consideration to be paid by HVP, the Final Implementation Deed – to which the Liquidators and the Receivers are each party – was executed to replace the First Implementation Deed: Crosbie HVP Affidavit, [56]-[62]; Webster HVP Affidavit, [74]-[75].
14. The Liquidators consider that proceeding to implement the Final Implementation Deed:
  - (a) will represent the best value to Growers in relation to the HVP Leases: Crosbie HVP Affidavit, [54]; and
  - (b) is in the best interests of Growers: Crosbie HVP Affidavit, [102].
15. The Receivers agree with that assessment: Webster HVP Affidavit, [76].

**C. The HVP Leases are not scheme property**

16. For the reasons outlined at paragraphs [40] to [42] of the GFP Sale Submissions, the question whether the HVP Leases may be “scheme property” within the meaning of the Corporations Act 2001 (Cth) (the *Act*) arises only in respect of the HVP Registered Schemes. Each of the HVP Registered Schemes is also a Murray Valley/North Coast Registered Scheme, and has been addressed in section I of the GFP Sale Submissions.
17. As set out in the GFP Sale Submissions, the issue whether a particular asset constitutes “scheme property” of a registered scheme is a matter of characterisation, undertaken by reference to the terms and structure of the relevant scheme. For the reasons given in paragraphs [45] to [48(e)] of the GFP Sale Submissions, there is no evidence that upfront contributions made by Growers in the HVP Registered Schemes were paid for the

acquisition of the HVP Leases; indeed, there is not even any evidence that Grower contributions were, as a matter of fact, used by WFL to pay rent under the HVP Leases. This conclusion is consistent with those reached by the Liquidators and the Receivers on the basis of their respective tracing analyses (although, as before, the Receivers contend that the issue of scheme property falls to be resolved as a matter of legal characterisation rather than tracing of funds): Crosbie HVP Affidavit, [73]-[83]; Webster HVP Affidavit, [66]-[69].

18. Moreover, each of the First and Second Relationship Agreements between WFL and HVP stipulated that WFL was obliged to take up leases with HVP of specified "firm quantities" in accordance with a release schedule set out as Schedule 1 to each Agreement, regardless of whether WFL was in fact able to establish forestry schemes on that land.<sup>5</sup> Accordingly, WFL's obligations to enter into HVP Leases and to pay rent to HVP thereunder were not dependent upon the establishment of a particular Scheme, nor upon the payment of upfront fees by Growers in any Scheme.
19. There is, therefore, no basis to suggest that the HVP leasehold land is "scheme property" within the meaning of the Corporations Act. It follows that Growers in the HVP Registered Schemes do not have a deemed beneficial interest under s 601FC(2) in respect of either the HVP Leases or the upfront rental payments that WFL made under the HVP Leases.

**D. Apportionment of the Consideration as between the Receivers and the Liquidators**

20. HVP has consistently declined to set forth any notional apportionment of the Consideration as between the value referable to WFL's surrender of the HVP Leases and the value referable to the trees standing on the HVP Leases: exhibit BW-14 to the Webster HVP Affidavit; cl 3.1 of the Final Implementation Deed (confidential exhibit CDC-21 to the Crosbie HVP Affidavit).
21. The Liquidators and Receivers have agreed to the apportionment of the Consideration as set out in the Final Implementation Deed, being 30% in favour of the Growers and 70% in favour of the secured creditors. The apportionment represents a commercial compromise between the Receivers and the Liquidators to allow the Final Implementation Deed to proceed, but having regard to the potential uncertainty and/or disagreement regarding:
  - (a) the value attributable to the release of WFL's rights and claims under the HVP Leases (which fall within the scope of the Receivers' appointment); and

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<sup>5</sup> First Relationship Agreement, cl 1.3; Second Relationship Agreement, cl 1.4: exhibit CDC-7.

- (b) the value of the trees on the HVP Land (which are owned by Growers in the HVP Schemes): Crosbie HVP Affidavit, [85]-[88]; Webster HVP Affidavit, [70]-[72].

We deal with these two aspects of the apportionment question successively below.

***The value attributable to the release of WFL's rights and claims under the HVP Leases***

22. Shortly after their appointment, on 21 September 2010, the Receivers warned HVP that if it proceeded to terminate the HVP Leases, the Receivers would commence proceedings to protect WFL's rights and interests under the HVP Leases: exhibit BW-4 to the Webster HVP Affidavit.
23. As at the date of the Receivers' appointment, the unused portion of the rent paid upfront by WFL was approximately \$31.7 million (the ***Unused Rent***): Webster HVP Affidavit, [26]. Both the Receivers and the Liquidators recognised that WFL's claim for reimbursement of the unused rent represented both a potentially significant source of value to the Receivers and a source of litigation risk if an appropriate resolution was not achieved as between the Receivers, the Liquidators and HVP: Crosbie HVP Affidavit, [52]-[53]; Webster HVP Affidavit, [28]-[31].
24. As each of the parties recognised, it would be necessary for the Receivers and the secured lenders to give appropriate releases to allow WFL to surrender the HVP Lease and to provide the clean exit that HVP sought: Crosbie HVP Affidavit, [55]; Webster HVP Affidavit, [48]-[49]. This was reflected in the Offer Conditions set out in the Preliminary HVP Offer, which made it a condition of each of that offer and the subsequent HVP Offer<sup>6</sup> that WFL would provide a full and final release of HVP and its related parties. The quantum of the HVP Offer reflected the substantial value of the releases to be obtained from the Receivers on behalf of WFL.
25. Further, the Schedule to the HVP Offer made on 23 March 2011, headed "Key features of the Implementation Deed" stated (at paragraph 1.1):

**"1 Purpose and key steps**

**1.1 Purpose**

The purpose of the Implementation Deed will be to provide a clean exit for the parties and the Growers from the current arrangements in relation to the Land. ...

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<sup>6</sup> The HVP Offer is confidential exhibit CDC-19 to the Crosbie HVP Affidavit.

For WFL, WFIM and Growers, this will involve them, amongst other things, receiving value for relinquishing, discharging and/or extinguishing their rights and interests in the Land.”<sup>7</sup>

26. The Receivers’ potential claims in respect of the unused rent, and the fact that their undertaking to release those claims is therefore a benefit of substantial value to HVP, are reflected in the proposed apportionment that has been agreed between the Liquidators and the Receivers. The Liquidators and the Receivers are both of the view that, on any assignment of the residue of the HVP Leases, a prospective assignee would be prepared to pay a significant amount to enjoy the benefit of the Unused Rent: Crosbie HVP Affidavit, [52]; Webster HVP Affidavit, [29(b)]. Likewise, HVP would have had to pay a substantial sum to buy out WFL’s claim if this had occurred other than in conjunction with a sale of the trees and surrender of the HVP Leases. In satisfying themselves as to the appropriateness of the apportionment, the Liquidators had regard to the value of the Unused Rent as representing the maximum value of the Receivers’ claim: Crosbie HVP Affidavit, [86].
27. In the Final Implementation Deed, the substantial value of those releases to HVP is reflected in:
- (a) the stated purpose of the Deed, which is *“to provide a clean exit ... from the current arrangements in relation to the Land ... so that ... HVP and/or GRP will hold the Land ... as absolute owner [or as licensee], free and clear”* of the rights of the parties to the HVP Schemes;<sup>8</sup> and
  - (b) the forms of releases that WFL, WFIM and the Receivers will give in favour of HVP upon implementation:

“[E]ach of WFL, WFIM, the Responsible Entity and the Agent hereby releases and forever discharges HVP and GRP ... from all claims, causes of action, liabilities, accounts and demands of whatever nature ... in relation to or arising out of the Land, the Land Interests, the Terminating Documents, including, without limitation, any payments made by them under the Leases and Sub-Licences for rent or licence fees ...”<sup>9</sup>

“The Receivers hereby release and forever discharge HVP and GRP ... from all claims, causes of action, liabilities, accounts and demands of whatever nature ... in connection with the Land, the Land Interest, any interest in the Land arising under the Leases and/or the Terminating Documents, including without limitation in

<sup>7</sup> Confidential exhibit CDC-19 (emphasis added). See also paragraph 1.2(c) of the Schedule.

<sup>8</sup> Confidential exhibit CDC-21, cl 3.1.

<sup>9</sup> Confidential exhibit CDC-21, cl 5.5(a).

connection with any payment made at any time by WFL or the Responsible Entity under the Leases or the Sub-Licences, including but not limited to payment of rent and licence fees as the case may be ....<sup>10</sup>

***The value of the trees on the HVP Land***

28. Turning to the value of the trees on the HVP Leases, the Receivers disagree with the valuation that Pöyry purported to ascribe to the trees on a “market value” basis. When the associated land-holding costs are properly taken into account, the trees are shown to have a negative net present value: Webster HVP Affidavit, [57]; confidential exhibit BW-19. This is consistent with the valuations ascribed to comparable plantations through the GFP Sale process: confidential exhibit BW-20.
29. The Receiver and the Liquidators correctly observe that Pöyry has erred in failing to take account of HVP’s opportunity cost in occupying the land itself, rather than re-leasing it. The land-holding cost should have been included on a true arm’s-length market valuation: Webster HVP Affidavit, [53]-[55]; Crosbie HVP Affidavit, [102(g)].
30. Tellingly, in February 2011, HVP independently reached the conclusion that, if land-holding costs are taken into account, the trees themselves have no economic value. In the Preliminary HVP Offer,<sup>11</sup> HVP explained that they had calculated their offer without deducting land-holding costs:

“No land cost such as rental charge, consistent with the rental charge being paid upfront at the commencement of the lease and our valuation being for the trees and land access. Land tenure (and, by association, land tenure costs) cannot be separated from the tree asset. Typically, there is an annual rent charge for plantations on leased land. In these instances, a rental cost is factored into the valuation of the trees, in a similar way to other forest management costs, *reducing valuation. As the rental on the HVP leases has been paid upfront, no additional rental cost has been attributed to the trees and the valuation of the trees is higher. In short, the value to the trees incorporates the access to the land on an ongoing basis.*” (Emphasis added.)

And, in relation to the factors distinguishing HVP’s offer from potential other third party offers:

“HVP is in a unique position in that it has rights in the land which when exercised will give us access to maintain and harvest the trees. *Without those access rights, the*

<sup>10</sup> Confidential exhibit CDC-21, cl 5.8.

*value of the project trees would be negligible. Due to their young age, the trees would have no economic value if separated from the land.*" (Emphasis added.)

31. In assessing the appropriateness of the apportionment, the Liquidators had regard to the valuation given by Pöyry as representing the maximum value of the Growers' claim: Crosbie HVP Affidavit, [85].

***The compromise apportionment***

32. Having considered these matters, and after undertaking extensive negotiations with the Receivers, the Liquidators have concluded that the proposed apportionment of the Consideration as between the Growers (as to 30%, being the "Liquidators' Consideration") and the secured creditors (as to 70%, being the "Receivers' Consideration") is in the best interests of Growers: Crosbie HVP Affidavit, [88]-[89], [102].
33. Notwithstanding their view that the Consideration is wholly referable to the surrender of the HVP Leases and the release of WFL's potential claims in respect of the Unused Rent, the Receivers have agreed to the proposed apportionment as a reasonable compromise in the interests of realising a clean exit for all parties concerned: Webster HVP Affidavit, [71]-[72].

**E. Orders and Directions Sought**

34. The Receivers agree with the Liquidators' proposal to apportion the Liquidators' Consideration (less costs) among Growers in the HVP Schemes: Crosbie HVP Affidavit, [96]-[101].
35. The orders sought in the present application are required to fulfil the conditions precedent in the Final Implementation Deed. Clause 4.1(a) of that deed relevantly require that, on or before 31 January 2012, orders are obtained from the Court to the effect that:
- (a) the Liquidators are justified in implementing the Final Implementation Deed and taking steps contemplated by the deed; and
  - (b) the Liquidators were justified in their determination and allocation of the Growers' portion of the Consideration.

Should the Liquidators not receive the orders sought in the present application by 31 January 2012, HVP will have the right to terminate the Final Implementation Deed.

36. Accordingly, in circumstances where:

- (a) the orders sought are essential to achieve settlement of the surrender of the HVP Leases at maximum value for the benefit of the secured creditor, unsecured creditors and the Growers;
- (b) if the Final Implementation Deed is not able to be completed, it is unlikely that an improved realisation would be obtained through any alternative means,

the Receivers respectfully submit that the orders sought by the Liquidators ought to be made.

18 January 2012

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**TOM CLARKE**

Counsel for the Receivers



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**ALLENS ARTHUR ROBINSON**

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