

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMERCIAL COURT

COMMERCIAL LIST - JUDD J
S ECI 2015 00490

**IN THE MATTER OF THE WILLMOTT FORESTS 1995-1999 PROJECT
ARSN 089 598 612**

PRIMARY SECURITIES LTD (ABN 96 089 812 635)

Plaintiff

AND

**WILLMOTT FORESTS LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN
LIQUIDATION) (ACN 063 263 650) & ORS (according to the attached Schedule)**

Defendants

**OUTLINE OF DEFENDANTS' SUBMISSIONS –
APPLICATION FOR APPROVAL OF ENTRY INTO AGREEMENTS COMPRISING
SETTLEMENT OF THE PROCEEDING**

Date of document: 6 June 2017
Filed on behalf of: the Defendants

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A The Liquidators' application

(i) Background

1. From about 1983, the First Defendant (**WFL**) and its subsidiaries (collectively, the **Willmott Group**) ran forestry investment schemes.¹ From about 1995 until 21 December 2011,² WFL was the Responsible Entity of, amongst other schemes, the Willmott Forests 1995-1999 Project (ARSN 089 598 612) (**95-99 Scheme**).³

¹ Affidavit of Jane Sheridan sworn 4 May 2017 (**Sheridan Affidavit**) at [4].

² Sheridan Affidavit at [15].

³ Sheridan Affidavit at [5].

2. The 95-99 Scheme was operated on land in the Bombala region owned by WFL (**95-99 Land**).⁴
3. Pursuant to the scheme documents, each member of the 95-99 Scheme (**Growers**) entered into leases (**Grower Leases**) with WFL for one or more “hectares” of the 95-99 Land for a period of 25 years with a five-year option.⁵ The 95-99 Land was planted with trees (**Trees**), with the timber to be harvested and sold about 16 to 25 years after planting.⁶
4. The Second and Third Defendants to this proceeding (**Liquidators**) were appointed as joint and several voluntary administrators of the Willmott Group on 26 October 2010.⁷ On 22 March 2011, they were appointed as Liquidators of the Willmott Group, which included WFL.⁸
5. The trial of this proceeding was set down to commence on 15 May 2017, on an estimate of eight days.⁹ On 15 May 2017, the matter was adjourned to permit the parties to negotiate.¹⁰
6. Those negotiations culminated in the execution of:¹¹
 - a. a deed of settlement dated 15 May 2017 (**Deed of Settlement**) (exhibit CDC-39 to the Crosbie Affidavit),¹² and
 - b. a Call Option proposed to be executed by WFL and the Plaintiff (**Primary Call Option**) (exhibit CDC-40 to the Crosbie Affidavit);

(together comprising the **Settlement**).
7. The Liquidators bring this application for approval of the entry into these agreements and the Settlement pursuant to ss 477(2B), 506(1A) and/or 1322(4)(d) of the *Corporations Act 2001* (Cth) (**the Act**), and/or the Court’s inherent power.
8. All of the material relating to this application filed as at the date of these submissions¹³ has been served on Primary, the Willmott Committee of Inspection, the

⁴ Sheridan Affidavit at [10].

⁵ Sheridan affidavit at [11].

⁶ Sheridan affidavit at [11].

⁷ Fourth Affidavit of Craig Crosbie sworn on 26 May 2017 (**Crosbie Affidavit**) at [4].

⁸ Crosbie Affidavit at [4].

⁹ Crosbie Affidavit at [11].

¹⁰ Crosbie Affidavit at [22]-[24].

¹¹ Note that the documents comprising CDC-39 and CDC-40 have (a) the details of the plantations that are the subject of those documents and (b) the allocation of purchase price to each plantation redacted (cf Crosbie Affidavit at [9]; CDC-41). The allocation of purchase price to each plantation is not, in the Liquidators’ submission, relevant to the present application. Unredacted copies of these documents will be made available for the Court’s (confidential) use on the date of hearing of the Liquidators’ application, if required.

¹² As amended by an Amendment Deed executed on 25 May 2017: Crosbie Affidavit at [7(a)].

¹³ Being the Summons, the Crosbie Affidavit and a copy of the Court’s Orders dated 23 May 2017: Order 2, Orders dated 23 May 2017; Crosbie Affidavit at [42]-[43].

Receivers and Managers of WFL and ASIC, and has also been published on the Liquidators' website.¹⁴

B Relevant legal principles

B.1 Statutory provisions and inherent power relied upon – Overview

9. Section 477(2B) of the Act provides that liquidators require the approval of (relevantly) the Court to enter into an agreement on a company's behalf if either:
 - a. the term of the agreement may end; or
 - b. obligations of a party to the agreement may, according to the terms of the agreement, be discharged by performance;
 more than three months after the agreement is entered into (even if the term may end or the obligations may be discharged within those three months).
10. Section 1322(4)(d) of the Act provides that the Court may extend the period for doing any act, matter or thing or instituting or taking any proceeding under this Act or in relation to a corporation (including an order extending a period where the period concerned ended before the application for the order was made) or abridging the period for doing such an act, matter or thing or instituting or taking such a proceeding.
11. There is some judicial disagreement about whether s 1322(4)(d) permits approval of a settlement *nunc pro tunc* (although the Supreme Court of Victoria recently made orders pursuant to both this provision and the Court's inherent power in a settlement approval case, "for abundant precaution").¹⁵ In any event, the considerations relevant to the exercise of these heads of power appear to be those applicable to s 477(2B).¹⁶ Accordingly, these grounds for relief will not be considered separately in these submissions.¹⁷

B.2 Principles relevant to application of s 477(2B) of the Act

12. Section 506(1A) of the Act provides that s 477(2B) applies to voluntary liquidations.

13. Section 477(2B) is:¹⁸

concerned to ensure that the court exercises some oversight of the liquidator's actions and, in effect, confers or completes the necessary power only where it

¹⁴ Order 2, Orders dated 23 May 2017.

¹⁵ See *Lewis & Templeton & Warehouse Sales Pty Ltd (in liq) v LG Electronics Australia Pty Ltd (No 2)* (2016) 48 VR 450 (**Lewis**) at [115]-[116], citing *Chamberlain v RG & H Investments Pty Ltd (No 2)* (2009) 76 ACSR 415 at [22] in which similar orders were made (which case considered *Empire (Aust) Nominees Pty Ltd (in liq) v Vince* (2000) 35 ACSR 167 and *Re Stewart, Newtronics Pty Ltd* [2007] FCA 1375 (**Stewart**), in which orders extending time under s 1322(4)(d) were made, and *Re Forestview Nominees Pty Ltd* (2007) 164 FCR 237, in which French J expressed disagreement with the approach taken in those two cases).

¹⁶ *Lewis* at [115]-[116].

¹⁷ But these remain further or alternative grounds on which the Liquidators seek the relief identified in the Summons.

¹⁸ *Re HIH Insurance Ltd* [2004] NSWSC 5 (**Re HIH**) at [15]; cited in *Handberg (in his capacity as liquidator of S&D International Pty Ltd) (in liq) v MIG Property Services Pty Ltd* [2012] VSC 551 (**Re S&D**) at [77].

sees that a case for exercise of the power in the particular circumstances has been sufficiently shown.

14. Orders approving settlement agreements under this provision can be made *nunc pro tunc*.¹⁹
15. Court approval is not to be taken as an endorsement of a proposed agreement, but merely permission for a liquidator to exercise his or her own commercial judgement²⁰ (to which courts will pay regard).²¹ In doing so, the Court does not act as “a mere rubber stamp”.²² It will grant an application under s 477(2B) “only when it is satisfied that a case for its exercise, in the particular circumstances, has been shown”.²³
16. Critically, the Court’s role is not to evaluate or second-guess the liquidator’s commercial decision or judgement.²⁴ It is not required to reconsider every issue considered by the liquidator, develop some alternative proposal which might seem preferable,²⁵ substitute its determination for the liquidator’s in a hearing *de novo*,²⁶ or otherwise assess the commercial desirability of the transaction.²⁷
17. Rather, the Court ought satisfy itself under s 477(2B) that there is no error of law, or reason to suspect some impropriety or bad faith.²⁸ That said, there must be real or substantial grounds for doubting the prudence of a liquidator’s conduct.²⁹ Provided that a liquidator acts in good faith and for proper purposes, the Court will give them “considerable latitude” in exercising their commercial judgement.³⁰
18. Ultimately, the Court must evaluate whether the proposal is consistent with the expeditious and beneficial administration of the winding up.³¹ It must also be satisfied that the compromise is for the benefit of the creditors.³²

¹⁹ Lewis at [114].

²⁰ *Ascot Vale Self Storage Centre Pty Ltd (recs and mgrs apptd) (in liq) v Nom De Plume Nominees Pty Ltd* [2015] VSC 751 (**Ascot Vale**) at [25].

²¹ Re HIH at [15], citing *Re Spedley Securities Ltd (in liq)* (1992) 9 ACSR 83 (**Spedley**).

²² *Ascot Vale* at [25].

²³ *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 89 NSWLR 110 (**Fortress**) at [125].

²⁴ Re HIH at [15] citing *Spedley* (the Court in *Re HIH* held that although *Spedley* was a case principally concerned with an application under the equivalent of s 477(2A) of the Act, those principles apply equally to applications under s 477(2B)). This was confirmed by Sifris J in *Lewis* at [76]. See also Re HIH at [19]; *Fortress* at [125]; *Australian Power Steering Pty Ltd v Exego Pty Ltd* [2010] VSC 497 (**Australian Power Steering**) at [2], where the Court noted that it would “place weight and rely upon the liquidator’s commercial judgement in reaching the compromise”.

²⁵ *Lewis* at [78] citing *Re One.Tel Ltd* (2014) 99 ACSR 247 at [26].

²⁶ *Lewis* at [114], citing *Stewart* at [26].

²⁷ *Re S&D* at [77].

²⁸ *Lewis* at [114], citing *Stewart*.

²⁹ *Fortress* at [125].

³⁰ *Re ACN 076 673 875 Ltd (in liq)* (2002) 42 ACSR 296 at [16].

³¹ *Lewis* at [78].

³² *Australian Power Steering* at [2], citing McPherson, *The Law of Company Liquidation*, (2006, 5th edition) at [8.1115]; *Re HIH* at [15]; *Ascot Vale* at [25].

C The relief sought ought be granted in this case

C.1 Relevant events occurring prior to the Settlement

19. Prior to the Settlement, the following relevant events occurred:

- a. Between December 2015 and August 2016, the Liquidators issued notices of disclaimer in respect of the Grower Leases (**Disclaimer Notices**).³³ The relief sought by Primary in this proceeding includes orders that the Disclaimer Notices be set aside.³⁴
- b. On about 23 December 2016, the Liquidators entered into a conditional Put and Call Option with Southern Cross Forests (**SCF**) (**SCF Put and Call Option**) for the sale of the 95-99 Land and Trees (together, **Plantations**).³⁵ The total sale price proposed for the Plantations was \$7,191,148, split between \$4,276,661 for the 95-99 Land, and \$2,914,487 for the Trees.³⁶ The SCF Put and Call Option was conditional on, amongst other things, the Liquidators successfully disclaiming the Grower Leases within 18 months of the date of the Put and Call Option.³⁷
- c. At all relevant times, the Liquidators have intended to account to the Growers for the value of the Trees on the 95-99 Land.³⁸
- d. In approximately March 2017, the joint-appointed expert witnesses in the proceeding provided the following evidence:³⁹
 - i. Mr Morton opined that the net present value of the Growers' interests in the 95-99 Scheme is between \$12.36 million and \$16.963 million (depending on whether the Growers are required to remove tree stumps after harvest) (**Morton Tree Value**).
 - ii. Mr Brown opined that the market value of the 95-99 Land (encumbered) is between \$3.33 million and \$3.52 million (depending on whether the Growers are required to remove tree stumps after harvest) (**Brown Encumbered Land Value**).
- e. On 13 April 2017, having regard to the SCF Put and Call Option, the Morton Tree Value and the Brown Encumbered Land Value, the Liquidators withdrew the Disclaimer Notices.⁴⁰

³³ Sheridan Affidavit at [15]-[18].

³⁴ Sheridan Affidavit at [25].

³⁵ Crosbie Affidavit at [12]; CDC-43 (SCF Put and Call Option).

³⁶ Crosbie Affidavit at [12]; CDC-43 (SCF Put and Call Option).

³⁷ Sheridan Affidavit at [22].

³⁸ Sheridan Affidavit at [27].

³⁹ Sheridan Affidavit at [35]-[36].

⁴⁰ Sheridan Affidavit at [37].

- f. In April 2017, the Liquidators negotiated with SCF about the possibility of it submitting a revised offer to purchase the Plantations,⁴¹ in light of the Brown Land Valuation and Morton Tree Valuation. Despite these negotiations, no further or better offer was ever made by SCF.⁴²
- g. On 19 April 2017, Primary served a notice pursuant to s 568(8) of the Act (**Primary Notice**), requiring the Liquidators to decide within 28 days (by 17 May 2017) whether they would disclaim the Grower Leases.⁴³
- h. On 10 May 2017, the Liquidators received an offer from MALEC Holdings Pty Ltd (**MALEC**) to purchase the Plantations (**MALEC Offer**).⁴⁴ This offer was conditional upon purchasing the 95-99 Land on an unencumbered basis.⁴⁵
- i. The Liquidators determined the MALEC Offer represented the best value available to and was in the best interests of WFL's creditors as a whole at that time.⁴⁶ Accordingly, on 11 May 2017, the Liquidators sought orders extending the time in which to disclaim the property identified in the Primary Notice to 3 July 2017, and adjourning the trial until after that date.⁴⁷ Primary opposed that application.⁴⁸

C.2 Key terms of the Settlement reached in May 2017

20. Pursuant to the Settlement:

- a. Primary and the Liquidators will enter into a Call Option;⁴⁹
- b. Primary will pay to WFL the settlement sum of \$4,000,000 (excluding GST) as follows:⁵⁰
 - i. A deposit of \$400,000 to be paid on or before 30 June 2017;
 - ii. Five instalments of \$320,000 each to be paid three months apart, with the first due on 30 September 2017 and the fifth due on 30 September 2018;
 - iii. Final payment of the balance of the settlement sum (as adjusted, if Primary accelerates repayments or exercises its Call Option rights) on or before 15 December 2018;

⁴¹ Crosbie Affidavit at [13].

⁴² Crosbie Affidavit at [30(b)].

⁴³ Crosbie Affidavit at [14]; CDC-44. The Primary Notice did not include the 95-99 Land comprising the Plantations known as "Nimmitabel".

⁴⁴ Crosbie Affidavit at [16]; Confidential CDC-45. This offer was actually the third offer to purchase received from MALEC.

⁴⁵ Crosbie Affidavit at [30(c)].

⁴⁶ Crosbie Affidavit at [17], [30].

⁴⁷ Crosbie Affidavit at [18].

⁴⁸ Crosbie Affidavit at [21].

⁴⁹ Crosbie Affidavit at [25]; CDC-39 at cl 5.

⁵⁰ Crosbie Affidavit at [25]; CDC-39 at cl 4.

- c. Upon full payment of the settlement sum, WFL must transfer any remaining titles to the 95-99 Land to Primary;⁵¹
- d. WFL agrees not to issue any further disclaimer or default notices in respect of the Grower Leases relating to the 95-99 Land;⁵²
- e. WFL and the Liquidators will not take steps to enforce any order made in proceeding S CI 2013 02145 (**Lien Proceeding**) regarding the extent of the lien determined in favour of the Liquidators, and the Lien Proceeding is deemed to be dismissed;⁵³
- f. The parties provide mutual releases;⁵⁴ and
- g. WFL is protected in the event of default by Primary on its payment obligations by sale rights in respect of Plantations and an indemnity from Primary.⁵⁵

21. The Deed of Settlement (except for certain clauses) is expressed to be subject to approval orders being made by the Court (to which all parties consent).⁵⁶

C.3 The Court ought to approve the Settlement

22. The payment of \$4,000,000 to WFL pursuant to the Settlement represents consideration for the sale of the 95-99 Land, and settlement of the lien declared in favour of the Liquidators in the Lien Proceeding (estimated at approximately \$490,000 inclusive of interest and costs).⁵⁷
23. Relevantly, the Settlement sum, being the purchase price for the 95-99 Land as encumbered by Grower Leases (which totals approximately \$3.51 million once the amount of the lien is deducted):
- a. falls at the top end of the range of values provided for the encumbered 95-99 Land by the Brown Encumbered Land Value.⁵⁸
 - b. is slightly less than that offered in the MALEC Offer, but the MALEC Offer was conditional upon MALEC buying the 95-99 Land on an unencumbered basis.⁵⁹
 - c. is greater than Primary's previous offer to purchase the 95-99 Land on an encumbered basis (being \$3.32 million, or approximately \$2.83 million after proposed waiver of the lien), which offer also included conditions rejected by the Liquidators.⁶⁰

⁵¹ Crosbie Affidavit at [25]; CDC-39 at cl 5(e) and 10(d).

⁵² Crosbie Affidavit at [25]; CDC-39 at cl 7(b).

⁵³ Crosbie Affidavit at [25]; CDC-39 at cl 8(c)-(e).

⁵⁴ Crosbie Affidavit at [25]; CDC-39 at cl 11.

⁵⁵ Crosbie Affidavit at [25]; CDC-39 at cl 10 and 12.2.

⁵⁶ Crosbie Affidavit at [25]; CDC-39 at cl 3 and 8.

⁵⁷ Crosbie Affidavit at [27].

⁵⁸ Crosbie Affidavit at [29(a)].

⁵⁹ Crosbie Affidavit at [29(b)], [30(c)].

⁶⁰ Crosbie Affidavit at [29(c)].

d. is not contingent on WFL successfully disclaiming the Grower Leases.⁶¹

24. In the circumstances, the Court ought be satisfied that it is appropriate to approve the Liquidators' entry into the agreements effecting the Settlement and the Settlement itself, as:

- a. The Settlement was reached after detailed correspondence, investigations and negotiations by the Liquidators and their lawyers.⁶²
- b. The Liquidators have approached the resolution of the proceeding in a manner proportionate to the amount at stake and the assets available.⁶³
- c. The Settlement was agreed between legally advised⁶⁴ commercial parties negotiating at arms' length.⁶⁵ In this regard, the Liquidators have obtained advice from both Counsel and solicitors.⁶⁶
- d. The Settlement would bring to an end the proceeding, which is complex and expensive litigation.⁶⁷ To this end, the Settlement avoids the risk involved in the proceeding, the need for the Liquidators to incur expenses in respect of defending the proceeding,⁶⁸ and the risk of adverse costs orders against the Defendants.⁶⁹ Critically, the Settlement represents the ultimate outcome that WFL has sought all along in the proceeding – the ability to sell the 95-99 Land on commercial terms which maximise the return to WFL's creditors.⁷⁰ The Settlement also resolves the question of payment of the lien, which otherwise would likely require the Defendants to take enforcement action to effect recovery.⁷¹
- e. Finalising this proceeding without further expense facilitates the efficient winding up of both WFL and the Willmott Group more broadly. The Settlement enables WFL to realise the 95-99 Land, which is the last significant tangible asset remaining in WFL's liquidation, by 15 December 2018.⁷² The Liquidators estimate that the winding up of WFL could now be completed in the first half of 2019.⁷³ By contrast, if the Liquidators' adjournment application was granted, the proceeding would be unlikely to be heard until the second

⁶¹ Crosbie Affidavit at [30].

⁶² Lewis at [94(g)].

⁶³ Ibid [110(f)].

⁶⁴ Re S&D at [78] and [84].

⁶⁵ Lewis at [94(d)].

⁶⁶ Crosbie Affidavit at [39].

⁶⁷ Lewis at [88(a)].

⁶⁸ The costs of preparing for and defending the trial were estimated by the Defendants' solicitors as potentially being in the range of \$200,000 to \$250,000: Crosbie Affidavit at [32].

⁶⁹ Lewis at [94]; Crosbie Affidavit at [32].

⁷⁰ Crosbie Affidavit at [32].

⁷¹ Crosbie Affidavit at [33].

⁷² Crosbie Affidavit at [31].

⁷³ Crosbie Affidavit at [31].

half of 2017 at the earliest, followed by time for delivery of judgment and any appeal process.⁷⁴ Regardless of the outcome of the proceeding, it could have been as late as 2025 (when the Grower Leases expired) that the Liquidators were able to sell the 95-99 Land unencumbered in order to complete the winding up of WFL.⁷⁵ Any proposed third party sale during this time would require Primary's agreement, or potentially, further litigation if further disclaimer notices were issued in the absence of agreement.⁷⁶ In the circumstances, the Liquidators consider that the timeframe for payment under the Settlement is both expeditious and reasonable.⁷⁷ The Settlement is therefore consistent with the "general expectation that winding up will proceed in as expeditious a fashion as circumstances allow".⁷⁸

- f. Further, the Settlement provides certainty of payment (through the protections provided by Primary) for WFL's creditors.⁷⁹
- g. The creditors of WFL have had the opportunity to consider and object to the settlements, and none has done so.⁸⁰ Nor has any opposition been filed or indicated by any of the Growers.
- h. There is no evidence (or allegation) of any error of law, bad faith or impropriety in the Liquidators' approach to the Settlement.⁸¹
- i. The Settlement is, in the Liquidators' commercial judgement, both in the best interests of WFL's creditors, and appropriate in all of the circumstances.⁸² Commercial considerations play a significant part in whether a compromise will be for the benefit of creditors, as judged by a Court under s 477(2B).⁸³ Due regard ought be accorded by the Court to the Liquidators' judgement and knowledge of all the circumstances of the WFL liquidation in this regard.⁸⁴

K A BRAZENOR

6 June 2017

⁷⁴ Crosbie Affidavit at [35(a)].

⁷⁵ Crosbie Affidavit at [35(b) and (c)], [37].

⁷⁶ Crosbie Affidavit at [36].

⁷⁷ Crosbie Affidavit at [38].

⁷⁸ Re S&D at [83].

⁷⁹ Crosbie Affidavit at [34].

⁸⁰ Lewis at [94(f)]. As at the date of these submissions, no "Interested Persons" (as that term is defined in the Court's Orders dated 23 May 2017) have filed any appearance or material in opposition of the Settlement.

⁸¹ Lewis at [114], citing Stewart, in turn citing Spedley.

⁸² Lewis at [110(e)]; Crosbie Affidavit at [28].

⁸³ Lewis at [114], citing Stewart, in turn citing Spedley.

⁸⁴ Ibid.

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 WILLMOTT FORESTS 1995-1999 PROJECT (ARSN 089 598 612)**

First Defendant

and

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

Second Defendant

and

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

Third Defendant