

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

S ECI 2015 000490

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

BETWEEN

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

FOURTH AFFIDAVIT OF CRAIG DAVID CROSBIE

Date of document: 26 May 2017  
Filed on behalf of: The Defendants

Prepared by:  
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(Kimberley MacKay - kmackay@abl.com.au)

I, **CRAIG DAVID CROSBIE** of Level 21, 181 William Street, Melbourne, VIC, Chartered Accountant, **MAKE OATH AND SAY** that:

- 1 I am the second defendant in this proceeding. The third defendant, Ian Carson, and I are the liquidators of the first defendant, Willmott Forests Limited (receivers and managers appointed) (in liquidation) (**WFL**), and its wholly owned subsidiaries (together, the **Willmott Group**).
- 2 Except where I otherwise indicate, I make this affidavit from my own knowledge. Where I depose to matters from information and belief, I believe those matters to be true. I am authorised by Mr Carson to make this affidavit on his behalf.

- 3 Reference in this affidavit to the "Liquidators", "we", "us", "our" or "ourselves" is a reference to Mr Carson and me.
- 4 We were appointed as joint and several voluntary administrators of the Willmott Group on 26 October 2010, by order of the Federal Court of Australia. At the second creditors' meeting held on 22 March 2011, the creditors resolved to place the Willmott Group in liquidation and to appoint me and Mr Carson as its liquidators, in order that the assets of the Willmott Group could be realised and distributed.
- 5 I have previously sworn a number of affidavits in this Proceeding. The purpose of this affidavit is to comprehensively set out the matters relevant to the interlocutory process filed on our behalf on 26 May 2017. In doing so, this affidavit necessarily traverses and repeats some of the matters already set out in my previous affidavits, and exhibits some documents that have already been exhibited to affidavits filed earlier in the Proceeding.

#### Purpose of affidavit

- 6 This affidavit is made in support of an application by the Liquidators under, amongst other things, section 477(2B)(b) of the *Corporations Act 2001* (Cth) (the **Act**), which section provides that:

*(2B) Except with the approval of the Court, of the committee of inspection or of a resolution of the creditors, a liquidator of a company must not enter into an agreement on the company's behalf ... if:*

*...*

*(b) obligations of a party to the agreement may, according to the terms of the agreement, be discharged by performance;*

*more than 3 months after the agreement is entered into, even if the term may end, or the obligations may be discharged, within those 3 months.*

- 7 We seek approval from the Court of our entry into the following agreements on behalf of WFL in our capacity as liquidators, which agreements contemplate that the parties perform their obligations more than three months after execution of the agreement:
- (a) A Deed of Settlement executed by WFL, the Liquidators and the Plaintiff, Primary Securities Limited (**Primary**) on 15 May 2017, as amended by a short Amendment Deed executed on 25 May 2017 (**Deed of Settlement**).



(b) A call option, proposed to be executed by WFL and Primary (**Call Option**).

8 Now produced and shown to me are copies of the Deed of Settlement and the Call Option, marked **CDC-39** and **CDC-40** respectively.

9 The Schedule to the Deed of Settlement and Schedules 1 and 2 to the Call Option list the plantations the subject of those agreements and an allocation of price between each plantation (the **Plantation-by-Plantation Price Allocation**). On 19 May 2017, Michael Chapman of Mills Oakley (solicitors for Primary) sent an email to Meagan Grose of Arnold Bloch Leibler (our solicitors) asserting on behalf of Primary that the Plantation-by-Plantation Price Allocations are commercial-in-confidence and that Primary anticipates that it would suffer future loss from disclosure of the Plantation-by-Plantation Price Allocation. Now produced and shown to me marked "**CDC-41**" is a copy of the email from Mr Chapman to Ms Grose. We do not consider the Plantation-by-Plantation Price Allocations to be relevant to the present application. In those circumstances, and with Primary's agreement, the Plantation-by-Plantation Price Allocations are redacted from the versions of the Deed of Settlement and Call Option exhibited to this affidavit and marked "**CDC-39**" and "**CDC-40**".

10 In addition to this affidavit, we also refer to and rely on my third affidavit sworn on 11 May 2017 (my **Third Affidavit**) in support of the orders we seek. Now produced and shown to me marked **CDC-42** is my Third Affidavit together with exhibit CDC-33 to my Third Affidavit (which I refer to in paragraph 29(c) of this affidavit).

#### **Developments in the proceeding since swearing my Third Affidavit on 11 May 2017**

11 The trial of this proceeding was listed to commence on Monday 15 May 2017 on an estimate of eight days.

12 As stated in paragraph 10(b) of my Third Affidavit, on or about 23 December 2016, we entered into a conditional Put and Call Option with Southern Cross Forests (**SCF**) for the sale of the 95-99 Land and the trees on that land (**Plantations**) for \$7,191,148, split between \$4,276,661 for the 95-99 Land and \$2,914,487 for the Trees (the **SCF Put and Call Option**). Now produced and shown to me marked "**CDC-43**" is a copy of the SCF Put and Call Option.

13 In April 2017, we were in discussions with SCF in relation to the possibility of it submitting a revised offer to purchase the Plantations.

- 14 As stated in paragraph 4 of my Third Affidavit, on 19 April 2017 the Plaintiff (**Primary**) served on us a notice pursuant to section 568(8) of the Act requiring the Liquidators to decide whether they will disclaim certain of the lease agreements between WFL and each of the members of the Willmott Forests 1995-1999 Project (ARSN 089 598 612) (**95-99 Scheme**) (**Grower Leases**), as specified in that notice (**Primary's Notice**). Now produced and shown to me marked "**CDC-44**" is a copy of Primary's Notice.
- 15 Primary's Notice provided for a period of 28 days in which the Liquidators were required to make a decision about disclaimer in respect of the relevant property. That period was due to expire on 17 May 2017, being the third day of the trial of this proceeding.
- 16 As stated in paragraph 25 of my Third Affidavit, on 10 May 2017 we received a further revised offer from MALEC Holdings Pty Ltd (**MALEC**), to purchase the Plantations (**Further Revised MALEC Offer**). The Further Revised MALEC Offer is confidential and commercially sensitive. We wish to keep the Further Revised MALEC Offer confidential (other than from the Court and any person who is interested in and considering participating in this application, subject to receipt of a confidentiality undertaking) as MALEC has not given us permission to distribute it further. In any event, I describe in general terms the nature of the offer at paragraph 29(b), insofar as it is relevant to our view of the Deed Settlement and Call Option. We seek an order from the Court to the effect that this exhibit be kept confidential, and not be disclosed to any person other than any person who is interested in and seeks to be heard in respect of this application and their legal representatives, who may only use this exhibit upon receipt of a signed confidentiality undertaking and for the purpose of this proceeding. Now produced and shown to me marked "**Confidential CDC-45**" is a copy of the Further Revised MALEC Offer.
- 17 As stated in paragraph 26 of my Third Affidavit, having regard to all offers received by us as at 11 May 2017 in relation to the Plantations and the 95-99 Land (on both an encumbered and unencumbered basis) and to the Morton Tree Value and the Brown Encumbered Land Value (adopting the definitions of those terms as set out at paragraphs 35 and 36 of Jane Sheridan's affidavit sworn 4 May 2017), as at 11 May 2017 we considered the Further Revised MALEC Offer to represent the best value available to WFL's creditors as a whole, and to be in the best interests of WFL's creditors as a whole.



18 In those circumstances, on 11 May 2017, we filed and served a summons and my Third Affidavit, seeking orders that:

- (a) the time in which the Liquidators had to disclaim the property identified in Primary's Notice be extended to 4.00 pm on 3 July 2017; and
- (b) the trial be adjourned to the first available date after 3 July 2017,

(the **Adjournment Application**).

19 We made the Adjournment Application in order to provide us with the opportunity to explore interest from MALEC, SCF and any other interested purchaser, in order to maximise the return to creditors in the WFL liquidation.

20 The Adjournment Application was returnable at 10:30 am on Monday 15 May 2017.

21 Primary opposed the Adjournment Application. It filed submissions dated 15 May 2017 and the affidavit of Robert Garton-Smith sworn 15 May 2017 in opposition to the Adjournment Application.

#### **Settlement conference between the parties on 15 May 2017**

22 On Sunday, 14 May 2017, the parties agreed to meet for settlement discussions prior to the hearing of the Adjournment Application and commencement of trial.

23 On 15 May 2017, at the parties' request, the Court adjourned the hearing of the Adjournment Application and trial until 16 May 2017.

24 The parties and their legal representatives attended the Liquidators' offices from about 9.00 am until about 6:45 pm on 15 May 2017.

25 During that time the parties negotiated and executed the Deed of Settlement, which includes the following key provisions:

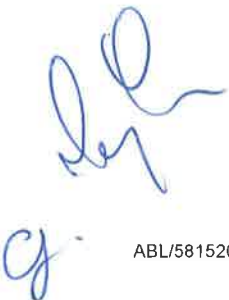
- (a) Primary will pay the settlement sum of \$4,000,000 (excluding any applicable GST), as follows (**Settlement Sum**) (clause 4):
  - (i) a deposit of \$400,000 to be paid on or before 30 June 2017;




- (ii) followed by five instalments of \$320,000 to be paid three months apart, with the first instalment due on 30 September 2017 and the fifth instalment due on 30 September 2018;
  - (iii) a final payment of the balance of the Settlement Sum as adjusted on or before 15 December 2018;
  - (iv) Primary may elect to accelerate repayments. Any amounts paid in excess of the instalments are to be deducted from the final balance due on or before 15 December 2018, and, if there is surplus after that, to be deducted from the instalments referred to in paragraph 25(a)(ii);
- (b) Primary and the Liquidators on behalf of WFL will enter into a call option agreement (on the terms set out in clause 5) (which call option agreement has subsequently been drafted and agreed by WFL and Primary, and forms exhibit **CDC-40** to this affidavit);
  - (c) Upon full payment of the Settlement Sum, WFL must transfer any remaining land titles in the 95-99 Scheme to Primary (clause 10(d)) or in accordance with a call made by Primary pursuant to the call option (clause 5(e));
  - (d) WFL agrees not to issue any further disclaimer notices or any default notices under the Grower Leases (clause 7(b));
  - (e) WFL and the Liquidators will not take steps to enforce any order made in proceeding S CI 2013 02145 regarding the extent of the Liquidators' lien (**Lien Proceeding**) (clause 8 (d)), and it is deemed dismissed;
  - (f) mutual releases (clause 11); and
  - (g) the Deed of Settlement is subject to approval orders from the Court (save for certain clauses), which both parties will consent to (clauses 3 and 8).

26 In addition, the Deed of Settlement includes the following protections for WFL:

- (a) an ability for WFL to recover outstanding amounts by selling one or more of the Plantations in the event Primary defaults on its payment obligations (clause 10); and



- (b) to the extent that outstanding amounts are not satisfied out of the proceeds of sale of the plantations, Primary will indemnify the Liquidators first from the 95-99 Scheme property and if that is exhausted, from invoicing Growers for a capital contribution, and then from Primary's personal assets (clause 12.2).

### My opinion on the Deed of Settlement and Call Option

- 27 The Settlement Sum of \$4,000,000 under the Deed of Settlement is consideration both for the purchase of the 95-99 Land and for settlement of our lien over the 95-99 Scheme assets, which we calculate totals approximately \$490,000 (inclusive of interest and costs) as at 15 May 2017, pursuant to orders made in the Lien Proceeding (**Lien**).
- 28 I believe that the Deed of Settlement and Call Option represent a good commercial deal for WFL and its creditors, for the following reasons.
- 29 First, the Settlement Sum (less the value referable to the Lien), being \$3.51 million:
- (a) falls at the top end of the range of values for the encumbered land provided by the parties' joint expert, Geoffrey Brown. Mr Brown provided a value of between \$3.33 and \$3.52 million at page 85 of his report filed in this proceeding, dated 3 March 2017. Mr Brown's report is now produced and shown to me is marked exhibit **CDC-46**;
- (b) is slightly less than the land value component of the most recent offer from a third party, MALEC, as set out in the Further Revised MALEC Offer (**Confidential Exhibit CDC-45**). That offer was conditional upon MALEC buying the land on an unencumbered basis; and
- (c) is greater than a previous offer by Primary to purchase the 95-99 Land on an encumbered basis for \$3,320,000 in instalments between 31 July 2017 and December 2018, and which attached conditions that were unattractive to WFL, including a waiver of the Lien which in effect resulted in a reduction of approximately \$490,000 such that the value offered for the land was approximately \$2,830,000 (as set out in paragraphs 41 - 44 in the affidavit of Jane Sheridan sworn 4 May 2017, and updated by letter from Mills Oakley to ABL on 8 May 2017 which is included in exhibit **CDC-42** to this affidavit).




30 Secondly, effecting the land sale to Primary on an encumbered basis is not contingent on WFL successfully disclaiming the Grower Leases, unlike the purchase offers from third parties which sought to purchase the land on an unencumbered basis. This provides certainty to creditors awaiting a distribution from any sale. In this regard, I note that:

- (a) SCF's offer in the SCF Put and Call Option to purchase the 95-99 Land and Trees was:
  - (i) split in value such that \$4,276,661 of the purchase price was in respect of the 95-99 Land and \$2,914,487 was in respect of the trees; and
  - (ii) conditional upon WFL successfully disclaiming the Grower Leases over any part of the 95-99 Land.

Having regard to the Morton Tree Value of between \$12.36 and \$16.963 million provided in March 2017, we formed the opinion that we would be unlikely to successfully disclaim the Grower Leases in order to take up the SCF offer which ascribed \$2,914,487 for the tree component.

- (b) We did not receive any alternative or increased value offer from SCF at the time of entry into the Deed of Settlement, and we have not since, despite providing material to SCF relating to both the Brown Encumbered Land Value and the Morton Tree Value.
- (c) As set out above, the Further Revised MALEC Offer was conditional upon purchasing the 95-99 Land on an unencumbered basis. In order to complete a sale with MALEC on these terms, we would have had to obtain Primary's consent to surrender the Grower Leases or to issue new disclaimer notices. We formed the opinion that Primary would not consent to surrender the Grower Leases and would apply to set aside any further disclaimer notices issued in respect of the Grower Leases, subjecting the parties to further litigation and the time and expense that would involve.

31 Thirdly, the land sale to Primary enables WFL to realise the 95-99 Land, which is the last significant tangible asset of WFL, by 15 December 2018. Subject to finality of some other matters outstanding in the winding up of WFL, I estimate that the winding up of WFL could be concluded in the first half of 2019 (ie, within about two years from now).



- 32 Fourthly, the Deed of Settlement resolves this proceeding brought by Primary, so that WFL does not need to incur further defence costs nor be exposed to the risks inherent in the litigation (as are inherent in any litigation). I am informed by my solicitors that had this proceeding gone to an eight day trial as it was set down to do, our costs of preparing for and defending the trial could have been in the range of \$200,000 - 250,000. WFL has actively defended this proceeding in order to obtain clear title to the 95 - 99 Land so that it can be sold for the purpose of the winding up. Further, the offer by Primary represents the ultimate outcome that WFL has sought in defending the proceeding - the ability to sell the land on commercial terms which benefit WFL's creditors.
- 33 Fifthly, the Deed of Settlement also resolves the payment of the Lien. We had been put on notice by Primary that it did not intend to pay the Lien until sufficient funds were available from the thinning and harvesting of the Plantations. No time estimate was provided as to when that might be. That left us either with the option of taking enforcement action to recover the Lien (which would have entailed additional legal costs) or awaiting Primary to recover sufficient funds from the thinning and harvesting of the Plantations, which could have taken up to another seven years and delayed the winding up of WFL. Now produced and shown to me marked **CDC-47** is the relevant correspondence from Mills Oakley dated 9 February 2017.
- 34 Sixthly, the Deed of Settlement provides certainty and payment protections to WFL.

#### **Alternative scenarios to the settlement with Primary**

35 The Deed of Settlement permits the final payment of the Settlement Sum to occur on or before 15 December 2018. If the Adjournment Application had been successful, but our negotiations with other potential buyers were not successful such that no further disclaimer notices were issued, then:

- (a) the trial relating to the breach notices would presumably not have been heard until the second half of 2017 at the earliest (subject to judicial availability). Following trial, the parties would then need to await judgment before next steps (including potential appeals) could be considered, adding to the time required before finality was achieved in this matter;
- (b) if we had succeeded at trial (including any appeal), we would have been in control of the woodlots the subject of the Type A Breach Notices, but the other



woodlots that are the subject of the 95-99 Scheme would still be subject to Grower Leases. Accordingly, we could not have sold the 95-99 Land on an unencumbered basis until the remaining Grower Leases expired or were surrendered, which could have been as late as 2025, and the winding up of WFL be delayed to that time;

- (c) if we had not succeeded at trial (including any appeal), the vast majority of the woodlots would still be subject to Grower Leases. Accordingly, we could not have sold the 95-99 Land on an unencumbered basis until the Grower Leases expired or were surrendered, which could have been as late as 2025, and the winding up of WFL would be delayed to that time.

36 If the Adjournment Application had been successful, and we had negotiated a deal with another buyer (such as SCF or MALEC) to sell the Plantations during the adjournment period, then:

- (a) we would have sought to reach agreement with Primary to surrender the Grower Leases to allow an unencumbered sale to complete. In this scenario, if such agreement could have been obtained (which is not certain), I estimate that the sale could have completed in approximately 90 to 180 days;
- (b) if we could not reach agreement with Primary to surrender the Grower Leases, WFL would have issued new disclaimer notices in respect of the leases before being able to sell the land on an unencumbered basis. In this scenario, I believe there would have been a high likelihood that Primary would have applied to set aside any new disclaimer notices, which would have caused further delay and uncertainty in realising WFL's assets (as further litigation between the parties would doubtless ensue).

37 An alternative scenario to the above is that the trial could have been settled on the basis that we withdrew the Type A Breach Notices. In that case, we would have had to wait until the 95-99 Scheme reached its natural conclusion in around 2025 before realising the 95-99 Land on an unencumbered basis, and we would have had to delay the winding up of WFL to that time.

38 In light of these possible alternative scenarios, I consider that the timeframe for final payment of the Settlement Sum is expeditious and reasonable.

39 In considering all of the foregoing, I sought advice from the Defendants' solicitors and Counsel. By referring to this advice, it is not my intention to waive privilege over any part of it.

### Termination of the SCF Put and Call Option

40 On 15 May 2017 at approximately 5:30 pm, I called Mr Phil Stelling of SCF. During that call:

- (a) I told Mr Stelling that we had received an offer from Primary (the terms of that offer are now encapsulated in the Deed of Settlement), and that we intended to accept Primary's offer; and
- (b) Mr Stelling indicated that SCF would seek that WFL pay a portion of its legal costs of negotiating the SCF Put and Call Option.

41 We are presently in discussions with SCF to reach agreement to release WFL from the SCF Put and Call Option. I expect within the next week or so, agreement will be reached. I will depose a further short affidavit about the position with SCF promptly following resolution of this point.

### Service and publication of application materials

42 We intend to serve a copy of the orders made by this Honourable Court on 23 May 2017 (the **Orders**), the interlocutory process and this affidavit via email on:

- (a) Primary;
- (b) the Willmott Committee of Inspection;
- (c) Mark Korda, Bryan Webster and Mark Mentha of KordaMentha, in their capacities as Receivers and Managers of WFL; and
- (d) ASIC.

43 We also intend to publish a copy of the Orders, the interlocutory process and this affidavit with exhibits, with the exception of **Confidential CDC-45**, on the website of PPB Advisory (<https://www.ppbadvisory.com/creditor-information/v/250/willmott-forests-ltd-receivers-and-managers-appointed-in-liquidation>) shortly after they have been filed, so that WFL's creditors and other interested persons are aware that we

are seeking the Court's approval to enter into the Deed of Settlement and the Call Option.

**SWORN** at Melbourne  
in the State of Victoria  
by **CRAIG DAVID CROSBIE** this  
26<sup>th</sup> day of May 2017

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Before me:

  
\_\_\_\_\_

Caroline Diana Jones  
Arnold Bloch Leibler  
Level 21, 333 Collins Street, Melbourne  
3000  
An Australian Legal Practitioner within the  
meaning of the Legal Profession Uniform  
Law (Victoria)



## 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 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

