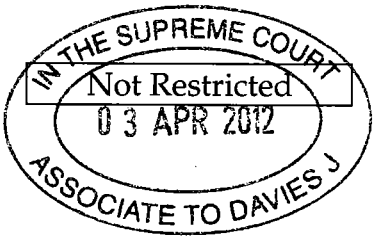
IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL COURT
CORPORATIONS LIST



No. 6816 of 2011
No. 6762 of 2011

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) & ORS (according to the scheduled attached) — Plaintiffs

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JUDGE:	DAVIES J
WHERE HELD:	Melbourne
DATE OF HEARING:	23-25 January, 27-29 February and 1 March 2012
DATE OF JUDGMENT:	3 April 2012
CASE MAY BE CITED AS:	Re Willmott Forests Ltd (No. 2)
MEDIUM NEUTRAL CITATION:	[2012] VSC 125

CORPORATIONS – WINDING UP – APPLICATION UNDER SECTION 511 OF THE CORPORATIONS ACT FOR JUDICIAL ADVICE – Where the company in liquidation is the responsible entity and manager of registered and unregistered managed investment schemes – Where the schemes are forestry operations conducted on land which is either freehold land owned by the company or leasehold land that the company leases to the members of the schemes – Where the liquidators are realising the assets of WFL in the course of winding up the company – Where the liquidators have entered into sale contracts for the land with the trees grown on the land which are the property of the members of the schemes – where the contracts are conditional upon the giving of clear title to the land unencumbered by the rights of the members of the scheme, including their rights with respect to the trees – application by the liquidators under s 511 of the *Corporations Act 2001* (Cth) for approval for entering into and completing the contracts – Whether the liquidators acted properly and reasonably in conducting the sale process – Whether the liquidators are justified in terminating and disclaiming the agreements that govern the schemes conducted on the land to be sold – Where the sale contracts provide for the allocation of the sale proceeds between the liquidators and receivers appointed over the land to be sold – Whether the liquidators are justified in allocating the sale proceeds in the manner proposed between themselves and the receivers based on the value of the land to be sold (excluding the trees) – Whether the liquidators are justified in allocating the sale proceeds amongst the growers based on the value of the trees sold with the land on a scheme-by-scheme basis in

the manner proposed - *Corporations Act 2001* (Cth) s 511

CORPORATIONS – WINDING UP – JURISDICTION AND POWERS OF COURT UNDER SECTION 511 OF THE CORPORATIONS ACT – Where substantive rights of third parties affected by the orders and directions sought under s 511 – Whether the Court has the power under s 511 of the *Corporations Act* to determine third party rights – Whether the third parties must be joined as parties to the proceeding – Factors relevant to the exercise of power to give judicial advice under s 511 – Whether the determination of the questions in the winding up of WFL will be just and beneficial – *Corporations Act 2001* (Cth) ss 479(3), 511(1),(2) – *Trustee Act 1925* (NSW) s 63 – *Supreme Court (General Civil Procedure) Rules* 2005 (Vic), r 16.01

CORPORATIONS – MANAGED INVESTMENT SCHEMES – Whether any of the land owned by or leased by WFL that was used by the schemes is scheme property – Whether the land is held on trust by WFL for the Growers in any of the schemes – *Corporations Act 2001* (Cth) ss 601FC, 601FC(2), 601EB, 601EE

WORDS AND PHRASES – "Scheme property", "managed investment scheme"

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	P Anastassiou SC with RG Craig	Arnold Bloch Leibler
For the Receivers and Managers (interveners)	WA Harris SC with T Clarke	Allens Arthur Robinson
For Willmott Action Group Inc. (an intervener)	DH Denton SC with AP Downie	Eales & Mackenzie
For Willmott Growers' Group Inc. (an intervener)	GT Bigmore QC with M Kennedy	Mills Oakley

HER HONOUR:

Introduction

1 Willmott Forests Limited ("WFL") is the responsible entity ("RE") and manager of registered and unregistered managed investment schemes. These schemes are forestry operations conducted on land which WFL either owns or leases. WFL is in liquidation and Messrs Crosbie and Carson (the second and third plaintiffs), who are the liquidators ("the Liquidators"), are realising the assets of WFL in the course of winding up the company. The Liquidators sought expressions of interest from parties interested in acquiring the land subject to the schemes with the ability to take over as the RE and manager of those schemes, or in acquiring both the land and the trees unencumbered by the schemes. Bids were only received for the land and trees unencumbered by the schemes and the Liquidators have now entered into sale contracts which are conditional upon the ability of the Liquidators to give clear title to the land and trees. To do this, the Liquidators must terminate and disclaim the project documents that govern the schemes conducted on the land to be sold. As the rights of the members of the affected schemes ("the Growers") are to be extinguished, the Liquidators have applied to the Court under s 511 of the *Corporations Act 2001* (Cth) ("the Act") for directions that they would be justified and acting properly and reasonably in taking those steps and for Court approval for entering into and completing the contracts ("the applications").

2 Unlike in other recent cases,[1] the proceeds of sale will not be held on trust by the Liquidators pending a separate proceeding to determine the respective entitlements of the competing stakeholders to part or all of those sale proceeds. The Liquidators also ask the Court for directions that they would be justified in, and would be acting properly and reasonably, if they distribute the proceeds in a particular way. The reason is that some of the land to be sold is charged to secured creditors who appointed Messrs Webster, Korda and Mentha ("the Receivers") as receivers and managers over that property. The Receivers and secured creditors would not agree

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1 *Re Timbercorp Securities Ltd (in liq)* [2011] VSC 24, *Re Great Southern Managers Australia Ltd (receivers and managers appointed) (in liquidation)* [2009] VSC 557.

to enter into the sale contracts or to release the security without agreement as to how much they will receive out of the sale proceeds. The Liquidators have formed a view on how the sale proceeds should be apportioned but the correctness of that view depends in part on whether the land on which the schemes operate is "scheme property". The proposed apportionment has been determined on the basis that only the trees are scheme property, so that the Growers' share of the proceeds of sale is the value of their trees. The competing rights of the stakeholders in respect of the sale proceeds, which include the Growers, will therefore fall to be determined as part of this application.

3 The Receivers and the Growers have not been joined as parties to the application because it is made under s 511 of the Act. However the Receivers and two groups representing the interests of the Growers, namely the Willmott Growers' Group Inc ("WGG") and the WILLMOTTACTIONGROUP INC ("WAG") were given leave to intervene. The Receivers support the application but the application is opposed by WAG and WGG, although WGG took a confined role in the proceeding.[2]

4 The application has raised a raft of issues that require the Court's consideration in order to determine the applications, including a threshold question as to whether seeking orders and directions under s 511 of the Act is the appropriate process. Before identifying those issues, it is useful to give some context to them.

The Schemes

5 WFL is part of the Willmott Group, whose core activities until liquidation included establishing, managing, harvesting, processing and supplying timber products from plantation-grown resources on behalf of the members of managed investment schemes. There were three primary regional plantation operations, two of which are relevant to this application:

(a) softwood pine operations in the Bombala and Murray Valley regions of New

2 WGG only made submissions on the issue which was the subject of a separate decision in *Re Willmott Forests Ltd* [2012] VSC 29.

South Wales and throughout the major softwood growing regions of Victoria; and

(b) she-oak and silky oak operations in northern New South Wales and southern Queensland.

6 WFL, at the time of liquidation, was the RE and manager of eight registered managed investment schemes and twenty nine unregistered managed investment schemes, comprising contractual schemes ("the contractual schemes"), partnership schemes ("the partnership schemes") and professional investor schemes ("the professional investor schemes"). There are 6,329 grower members of the various schemes.

7 These schemes are operated on land which is either freehold land (approximately 62,000 hectares) owned by WFL, or leasehold land (over 15,000 hectares) leased by WFL from Hancock Victorian Plantations Pty Ltd and a related entity ("HVP") and from the Forestry Commission of New South Wales ("Forestry NSW"). There are approximately 510 plantations, of which 160 are on freehold land and 350 are on leasehold land. Many of the schemes are conducted on more than one plantation. One scheme (the Willmott Forests Project) is conducted on 105 different plantations.

8 Each scheme is governed by its own suite of constituent documents but Growers in each scheme hold a lease from WFL with respect to the land owned or leased by WFL. The project documents of all schemes also give Growers a right to grow, maintain and harvest trees on the parcels of land allotted to them upon acceptance to a scheme, although the actual planting, maintaining and harvesting is the responsibility of WFL by and under forestry management agreements (or like agreements) in return for which the Growers pay fees to WFL. WFL itself has no interest in the trees (other than as a member of certain schemes), which are the property of the Growers.

Appointment of the Receivers

9 On 6 September 2010, the Receivers were appointed as joint and several receivers and managers of all of the charged property of the Willmott Group ("the charged property"). The charged property relevantly includes the freehold land located in the Murray Valley and North Coast regions of New South Wales, WFL's rights and interests as lessee of the land leased from HVP and Forestry NSW and interests held by WFL in its own right in the schemes. The charged property does not include approximately 27,600 hectares of WFL's freehold land located in the Bombala region of New South Wales ("the Bombala land") or property that is scheme property of the managed investment schemes for the purposes of the Act. It is common ground that the trees are scheme property and do not form part of the security.

The appointment of the Liquidators

10 The Willmott Group was placed under voluntary administration on 6 September 2010. Shortly afterwards, the secured creditors successfully applied to the Federal Court to remove the administrator appointed by WFL's board. On 24 December 2010, Finkelstein J ordered the administrator's removal pursuant to s 449B of the Act and in his stead, appointed Messrs Carson and Crosbie as the administrators of the Willmott Group. The original administrator was removed on the basis that he did not appreciate the extent of his task as administrator of the Willmott Group, that he and his staff did not have the capacity to carry out the task required to be performed, and that he did not have the appropriate amount or type of insurance cover.[3]

11 On 14 March 2011, Messrs Crosbie and Carson issued the s 439A Report to the Growers and creditors recommending that the Willmott Group be wound up so that the assets could be realised. The second creditors' meeting held on 22 March 2011 resolved to place the Willmott Group into liquidation and to appoint Messrs Carson and Crosbie as the Liquidators.

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3 *Commonwealth Bank of Australia v Fernandez* (2010) 81 ACSR 262; [2010] FCA 1487.

12 The Liquidators are in control of WFL's obligations as RE and manager of the eight registered schemes and twenty-two out of the twenty-nine unregistered schemes. WFL's rights, title and interest in the other seven unregistered schemes are charged to the secured creditors.

Solvency and viability of the schemes

13 The initial investigations of the Liquidators indicated that all schemes were insolvent because there were insufficient funds to meet their day-to-day expenditure such as fire prevention and weed and pest control, and that there was no obligation on Growers to meet that expenditure. It is a feature of most of the schemes that the Growers are not liable to make any payments for rent or management fees beyond their application fees until such time as the trees are harvested, when rent and management fees are payable based on a specified percentage of harvest proceeds.

14 The Liquidators engaged Poyry Management Consulting (Australia) Pty Ltd ("Poyry") to conduct a detailed viability analysis of the schemes. On 19 January 2011, the Liquidators received Poyry's viability analysis ("the Poyry viability analysis"). That analysis concluded that a number of the schemes were not financially viable, depending on the discount rate applied (11%, 13% or 15%). In forming a view that the other schemes were viable, Poyry made two key assumptions: (1) that no new RE would accept responsibility for any scheme under the current scheme structure; and (2) that the schemes would be restructured and, as restructured, funding would be raised or made available immediately for the assumed new RE to manage the plantations in order to ensure adequate funds were available for future maintenance and upkeep of the plantations through to maturity. In Poyry's opinion, none of the existing schemes would be viable in the absence of further and ongoing maintenance work. Poyry estimated that the funds needed to cover costs was in the order of $336.7m in absolute terms and $123m in net present value, which is the estimated costs plus a 15% contingency. The report stated:

> Poyry has estimated the present value of all future plantation maintenance, overheads and administration costs for all Willmott projects to be in the

> order of AUD107.1 million. This estimate includes the cost of maintaining plantation projects owned by Willmott. Poyry has assumed the Growers' contribution to be AUD123.2 million, which is the estimated costs plus a contingency of 15%. Poyry has assumed that this funding will be available immediately for an assumed new RE to manage the plantations in order to ensure adequate funds are available to see the projects through to maturity.
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> ...
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> All schemes require a large up front contribution to cover costs. The estimated per-ha contributions required for each scheme are shown at Table S-2. The required contributions are estimated on the assumption that all Growers expcept (*sic*) Willmott will contribute to the costs. If say, one third of Growers by area does not contribute to costs, the required contribution per ha of the contributing Growers will increase by 50%. In Poyry's opinion, it appears likely that for younger schemes that require large contributions per-ha relative to their NPV per ha, many Growers may not contribute to costs.[4]

Some of the schemes that were assessed as not viable were due to the fact that the Willmott Group owns a proportion of those schemes and cannot contribute to the ongoing costs of those schemes.

Expressions of interest campaign

15 By November 2010, the Liquidators had determined that WFL was insolvent and did not have funds available to it to meet its debts, to comply with its statutory obligations as owner or manager of the plantations or to fulfil its obligations to Growers and third parties under the constituent documents of the scheme. The Liquidators obtained a loan of $5m in their personal capacity to meet certain expenses but urgent additional funds were required for the maintenance of the plantations. The Liquidators formed the view that they should expedite an expression of interest campaign because various scheme assets were wasting without the funds for the upkeep of the plantations.

16 On 12 November 2010, the Liquidators commenced a campaign seeking expressions of interest in assuming the obligations of RE and/or manager for all or any of the Willmott schemes, a restructure of the Willmott Group's affairs or its business, or a

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4 Poyry Management Consulting (Australia) Pty Ltd, *Viability Analysis of the Willmott Forestry Projects* (2011) viii.

recapitalisation of the Willmott Group. They were approached by twenty one interested parties and received four conditional, indicative, non-binding proposals and one binding offer. The binding offer was received from HVP and related only to the managed investment schemes conducted on the land leased by WFL from HVP. After negotiation, HVP made a further offer, which the Liquidators accepted. It is a condition precedent to the sale contract which the Liquidators have entered into with HVP ("the HVP sale contract") that judicial advice or orders be obtained from the Court to the effect that WFL would be justified in implementing the transactions and taking the steps contemplated by the contract, including that the Liquidators can determine the allocation of the proceeds of sale amongst the Growers and creditors of WFL in the manner determined and advised to the Court. The HVP sale contract is the subject of orders and directions sought in proceeding S CI 2011 06762.

17 None of the other proposals were acceptable. One other proposal was to purchase the assets of the Willmott Group and that bidder was not interested in taking over as RE. All other proposals involved amending the schemes to allow the new RE to charge additional fees to the Growers to fund the continued operation of the schemes. The proposals generally did not provide any consideration for the secured creditors' claim, although the proposals sought to bind the secured creditors. They were also generally conditional upon further due diligence and exclusivity periods, although no party was willing to continue to fund the operations of the schemes during this period. The Liquidators did not have sufficient funds to continue to manage the schemes whilst bidders undertook due diligence and without any guarantee of a party agreeing to assume responsibility at the end of a due diligence process. The Receivers also indicated that none of those proposals were acceptable to the secured creditors on the basis that they were too uncertain in terms of costs to Growers and assuming the liabilities of the RE. The Liquidators accordingly informed the bidders that their offers were not acceptable but that they would be willing to consider any further proposals up until such time as the schemes had been terminated or the assets of the Willmott Group sold. No further proposals have been

received.

Decision that schemes could not be continued

18 By February 2011, the Liquidators were faced with a situation in which they had no available funding, other than the personal loan taken out by them, and no acceptable proposal for a new RE or manager of any of the Willmott schemes. It had become clear to the Liquidators that it was very unlikely that a party would be willing to take over as RE and manager of the schemes in circumstances where that party would be required to assume the liabilities of WFL and fund the continued operation of the schemes without any income or contributions from the Growers until harvest. The Liquidators were also of the view that without a party willing to take over management and maintenance, the only available remedy was to sell the trees immediately because it was impractical for individual Growers to undertake the ongoing maintenance and harvest of the trees on their individual lots. Mr Crosbie explained why in his seventh affidavit:

> (a) Land owned or leased by WFL and used in the Willmott Schemes has been divided into individual lots of, for example, one hectare. This division and allocation appears to have been done by overlaying a grid onto plantation maps. However, trees were planted as a single plantation rather than in individual lots. The lots are not delineated on the ground by access roads or other dividers or buffer zones. There are no markers to identify individual Growers' lots or trees. Global Positioning System (**GPS**) may be able to assist in identifying a Grower's individual lot, however satellite coverage for the GPS often cannot be obtained due to the location of plantations in remote areas and under thick plantation canopies. The alternative would be to employ surveyors to peg out individual woodlots but this would be prohibitively expensive and may still not be accurate.
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> (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 for the necessary vehicles and equipment. The clear felling of an individual Grower's lot is likely to result in damage to trees on adjacent lots as trees fall. In reality, the harvest will need to commence from the site nearest the relevant main vehicular access and progress across the plantation as trees are clear felled and access can be given.

(c) As many plantations are used in more than one Scheme or Project, a Grower's lot may be adjacent to the lots of Growers in other Schemes and Projects as well as other Growers in the same Scheme. In some cases, the trees within the plantation have been planted at different times. The timing of harvest will need to take into account the different ages of the trees.

(d) It is not feasible to thin or harvest Trees on such a small scale. It costs approximately $10,000 to $15,000 for the appropriate harvesting equipment to transport the timber products after thinning or harvesting. Based on the price achievable for timber products, 10,000 tonnes would need to be harvested to make each single operation profitable. This would require a minimum thinning area of 100 hectares or a minimum clear fall area of 40 hectares. Each Grower leases an average of 7 hectares.

(e) It is extremely unlikely that Growers would be able to market and sell their Trees on an individual basis. WFL's produce supply contracts were usually on a region by region basis (ie based on the entire Bombala Land or Murray Valley Region Land) and generally involved a continuous supply of products over many years. These contracts would be considered medium-size in the timber industry. Whilst in some cases, it may be possible to market and sell at a plantation level and for a single one-off supply, the minimum supply would be around 10,000 tonnes (being approximately 100 hectares for thinning and 40 hectares for clear fall).

(f) Existing access roads or fire breaks would need to be maintained or upgraded to enable the necessary vehicles to traverse the roads and firebreaks in safety. Additional gravel roads also need to be constructed in accordance with various codes of practice when the trees are being thinned or harvested. It costs approximately $25,000/km to build these roads. Harvesting roads generally service around 50 hectares. Due to the high cost of road construction, it is not practical to build roads to service areas less than 40-50 hectares.

(g) Outside of thinning and harvesting, Growers would need to continue to maintain their trees, both to preserve the value of the trees as well as to prevent fire risks. Fire maintenance is a statutory requirement involving demanding obligations and considerable expense with serious consequences for a breach (including penalties, recovery of costs incurred by the fire authority and forfeiture of interests in the forestry assets). Fire maintenance also goes beyond Growers' lots and trees and includes ongoing maintenance on access roads and paths. Compliance with the fire maintenance obligations would require a coordinated effort by Growers on, at a minimum, a plantation basis including agreement from all parties to meet the costs of that maintenance.[5]

In the view of the Liquidators, the Growers' right to maintain and harvest their own trees was only a theoretical right and could not be exercised in practice.

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5 Affidavit of Craig David Crosbie sworn 13 December 2011 (Seventh Affidavit) at [74].

Decision to sell the freehold, leasehold and scheme assets

19 The Liquidators considered it necessary to commence the process of attempting to sell the land and the scheme assets, including the trees on an unencumbered basis as quickly as possible. In furtherance of this process, the Liquidators made application to the Federal Court on 11 May 2011 for directions that they were justified in procuring WFL to amend the Constitutions of the registered schemes and the Investment Deeds of the professional investor schemes to empower WFL to terminate, relinquish or surrender the leases, subleases, forestry management agreement and other project documents between WFL and the Growers (together the "project documents") and to disclaim the project documents of the contractual and partnership schemes as onerous and unprofitable pursuant to s 568(1) of the Act.

20 Mr Crosbie deposed in support of the application that:

> 63. We consider that the best possible price will be achieved by offering all the Freehold Land and the [Forestry NSW] Leases (collectively **Sale Assets**) for sale at the one time and providing interested parties with the option of bidding for part or all of the Sale Assets. We have spoken with the Receivers who have informed us that they agree with this proposition and we have therefore agreed to coordinate a joint sale process.
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> ...
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> 65. We consider that the granting of a power of sale and/or the confirmation of the liquidators' right to disclaim the Project Documents will provide sufficient comfort to potential purchasers of the ability of the liquidators to give clear title on settlement of any sale. Potential purchasers should therefore be willing to participate in the sale process and incur the costs and take the time needed to submit a binding bid. This should maximise the price obtained both for the land and trees.
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> 66. Any sale contract will be conditional on the liquidators obtaining approval from the court to the exercise of the power of sale or right to terminate, relinquish, surrender or disclaim. It is our intention to request potential purchasers to allocate the purchase price between the land and the trees, so that this can be used as a basis for the allocation of the purchase price between Growers and creditors. We will seek an opinion from an independent expert as to the reasonableness of any offer. If necessary at the time of seeking approval to the exercise of the power or right, a process will be established for determining the appropriate allocation of the purchase

price.[6]

21 The application was heard on 29 June 2011 and WAG and WGG both appeared at the hearing on behalf of the Growers as non-party interveners. The Liquidators successfully obtained directions from the Federal Court in the terms sought, save that the Court made it a condition of the direction that the Liquidators would be justified in disclaiming the project documents that the Liquidators apply to the Court before doing so.[7] Dodds-Streeton J reasoned as follows:

> 112. In my opinion, it was, in all the circumstances, appropriate to make directions broadly in the terms sought by the plaintiffs.
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> ...
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> 116. Section 601GC permits the alteration of rights in the broadest possible terms, as it contemplates that an entire constitution may be repealed and a new one substituted. The provision thus assumes that the radical alteration or extinction of existing rights may properly be effected, subject to the qualification that the alteration must not adversely affect the members' rights. The factual circumstances in which a constitutional amendment may be made are not, in my opinion, limited to a "total financial disaster".
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> 117. I was satisfied that, in the present case, the constitutional amendment could be made. The material before the court established that it was, in the prevailing circumstances, in the interests of the schemes to put in train the proposed marketing campaign likely most effectively to maximise prospects of a return for growers, creditors and all interested parties. The factual context rendered reasonable the responsible entity's belief that the relevant amendment would not adversely affect growers' rights, as the existing rights were currently very precarious and potentially subject to disclaimer or termination in any event. Further, they would not be terminated or disclaimed without the court's consent and without the payment of the value of the rights.
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> 118. The WGG also alleged that as the Bombala land may be scheme property, that uncertainty constituted an impediment to making the directions sought. The only immediate effect of making the directions would be, however, the making of the amendment, rather than the exercise of any powers thereunder, unless and until the plaintiffs again approach the courts. That would be upon the basis stated and with the compensation set out. I was not persuaded that the directions would impede any restructure or replacement of a responsible entity which was otherwise validly open for any scheme, including the 1995 to '99 scheme. The intervener's arguments were, in my view, premature and anticipatory, being directed at apprehended developments or outcomes which, if they arose at all, would be in the future.
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> 119. The existence of unresolved questions, such as whether the Bombala land was scheme property or the effect of a landlord's disclaimer of leases as onerous

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6 Exhibit CDC-1 (Third Affidavit sworn 11 May 2011) to the Affidavit of Craig David Crosbie sworn 13 December 2011 (Seventh Affidavit).

7 *Re Willmott Forests Ltd (in liq)* [2011] FCA 1517.

> property, did not preclude the directions. Their determination was unnecessary in the context of the application given its essentially preliminary and facultative nature and the safeguards, protocols and requisite consideration it incorporated. At worst, the resolution of those outstanding issues may ultimately limit the liquidators' ability to achieve a total unencumbered sale, if a new responsible entity were introduced and parts of the Bombala land vested in it, or if some or all of the growers' interests under leases could survive disclaimer and were not susceptible of termination under a constitutional amendment.[8]

22 By deeds dated 12 July 2011, the Liquidators caused WFL to amend the Constitutions of the registered schemes and the Investment Deeds of the professional investor schemes to insert the power to terminate, relinquish or surrender the project documents.

Sale process

23 Following the orders granted by Dodds-Streeton J on 29 June 2011, the Liquidators, in conjunction with the Receivers, commenced a campaign to sell the Willmott Group assets (apart from the HVP leases and trees on that land which was the subject of a sale agreement to HVP). In addition to the freehold land, they were also seeking to assign the Forestry NSW leases and offering for sale assets situated upon the freehold and Forestry NSW leasehold land, including the trees and other facilities, such as forestry offices, storage facilities, stockyards and residential dwellings ('the sale assets").

24 The sale assets were split in to four main regions: Bombala, Murray Valley, the North Coast and the Forestry NSW leases. The Liquidators agreed to coordinate a joint sale process with the Receivers. Whilst the sale process was effectively run as a single campaign, the Receivers took primary responsibility for the North Coast region and the Liquidators took primary responsibility for the Bombala and Murray Valley regions and the land the subject of the Forestry NSW leases.

25 The sale campaign was conducted over a period of approximately three months. The sale campaign was advertised in local and national papers and in addition 364 parties were specifically contacted by email by members of the Liquidators' team to

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8 *Re Willmott Forests Ltd (in liq)* [2011] FCA 1517.

notify them of the sale of the sale assets. The sale campaign was run on the basis that parties could either purchase the sale assets unencumbered by the schemes or purchase the sale assets encumbered by the schemes with the ability to take over as RE and manager of the schemes.

Offers

26 In all, 227 parties expressed an interest in participating in the sale process and 54 binding offers were received. The Liquidators negotiated with five preferred bidders. The Liquidators had some concerns with the financial capability of the highest bidder. The second highest offer was received from Global Forest Partners LP ("GFP"). GFP was advised that it was not the highest bidder and that it would need to increase its offer should it wish to be competitive. This eventuated in a revised offer from GFP.

27 The original and revised offers from GFP contained, at the request of the Liquidators, a breakdown of the amount offered between land and trees on a property-by-property basis. The Liquidators sought that breakdown to get an indication of the separate market values of the land and trees but they did not consider themselves bound by GFP's allocation and moreover, any allocation and apportionment of the proceeds of sale had to be negotiated with the Receivers.

28 The Liquidators met with the Receivers on 11 October 2011. They advised the Receivers that the allocations set out in the GFP revised offer were not acceptable to them as not enough value was attributed to the trees on the Bombala land. The Liquidators' position was that the value ascribed to all land should be allocated between regions in proportion to the values set out in a report on the value of the land that they had commissioned from an independent valuer, M3 Property Pty Ltd ("the M3 Property land valuation"). The Receivers' position was that they were not willing to accept less than the amounts allocated by GFP to the secured assets (namely the Murray Valley and the North Coast land). The Receivers asserted that GFP's revised offer reflected the market value of the portions of land and would not

allow any adjustment. The Liquidators then had further discussions with GFP to explore whether the offer could be increased but were advised that it could not be increased.

29 Nonetheless, the Liquidators considered that they could, acting in the best interests of both the unsecured creditors of WFL and the Growers, adjust the total amount offered for the Bombala land and trees to reflect an apportionment of the proceeds between land and trees in accordance with the M3 Property land valuation and a valuation of the trees that the Liquidators obtained also from Poyry ("the Poyry trees valuation"). This adjustment resulted in an increase to the amount allocated to the Bombala trees and a consequent decrease in the Bombala land price ("the Bombala adjustment"). The Liquidators otherwise accepted GFP's allocation of the offer amount between land and trees on a region-by-region basis.

30 Contracts of sale were executed on 6 December 2011 ("the main sale contracts"). There are six main sale contracts, each of which covers a different region – Bombala Victoria, Bombala New South Wales, Murray Valley Victoria, Murray Valley New South Wales, North Coast New South Wales and North Coast Queensland. The main sale contracts relevantly provide that (in summary):

(a) WFL must provide a release of any registered charge at least 21 days before settlement (clause 7);

(b) title to the sale assets passes to the purchaser at settlement free of the encumbrances arising out of the schemes (clause 57);

(c) title to the trees passes to the purchaser on settlement (clause 58);

(d) it is a condition precedent to the sale contracts that WFL obtains an order or declaration from the court that would allow it (1) to exercise its powers under the Constitutions of the registered schemes and Investment Deeds of the professional investor schemes to terminate, relinquish or surrender the project documents of those schemes; and (2) to disclaim the project documents of the

contractual and partnership schemes as onerous pursuant to s 568(1) of the Act so as to allow settlement to occur (clause 60.1);

(e) if WFL cannot deliver clear title to the sale assets over a certain threshold and an agreement cannot be reached between the parties as to an acceptable way to proceed, each party has a right to elect to walk away (clause 67), and

(f) if the trees suffer damage over a certain threshold and an agreement cannot be reached between the parties as to an acceptable way to proceed, each party has a right to walk away (clause 61).

The main sale contracts are the subject of orders and directions sought in proceeding S CI 2011 06816.

Consideration of the best interests of Growers and execution of sale contracts

31 The Liquidators are of the view that acceptance of the revised GFP offer is in the best interests of the Growers. They consider that they are entitled to disclaim the Growers' leases and forestry management agreements for the following reasons:

(a) leases generally run for twenty five years with all rent either prepaid or payable in arrears at the end of the term. Accordingly, WFL will in most cases not receive any further payments from Growers before harvest but continues to bear the obligations of maintaining the plantation until that time;

(b) continuing to run the schemes and retain the Growers' leases would delay the winding up of the Willmott group for up to twenty five years;

(c) the Poyry viability analysis estimates that WFL would need to contribute a net present value of $123m or $336.7m in absolute terms to continue running the schemes for the remaining life of the schemes. This does not include any costs associated with one of the projects that had not been planted when WFL was placed into administration. WFL is insolvent and not in a position to provide

this funding and continue running the schemes;

(d) the Poyry viability analysis also concluded that even if the funding was available, between 28% and 88% of the schemes would still not be viable depending on the discount factor applied;

(e) the value of the trees and, in turn, the viability of the schemes will continue to decrease as WFL does not have sufficient funds to undertake the requisite maintenance activities. Only minimal work has been performed over the past year and the Liquidators consider that the viability of the schemes has decreased appreciably since the Poyry viability analysis. Trees are at risk of wasting (particularly newly planted trees) and the fire risk continues to increase due to increased fuel loads until the maintenance work can be undertaken;

(f) under the majority of the Growers' leases, Growers have the right to enter upon the land and harvest the trees. Even if this right was capable of performance, the Liquidators consider that, if this right was exercised, it would increase WFL's liability and would be onerous to monitor. Mr Crosbie has been advised by Mr Paul Kaiser of King Insurance Brokers Pty Ltd (the insurance broker who arranged the existing policy) that WFL's public liability insurance would be void if Growers individually harvested their trees as it was not the intent of the policy to cover such activity. Mr Kaiser does not believe that the insurer, QBE Insurance (Australia) Limited, would be willing to provide cover for individual Growers to maintain and harvest their own trees even for an increased premium due to the increased risk and lack of control associated with individual parties entering upon the land.

32 Furthermore, Growers have not put forward any other restructure or recapitalisation proposal for the schemes which are the subject of these applications. One registered scheme, the Willmott Forests 1995-1999 Project, has a new RE, Primary Securities Ltd ("PSL") which replaced WFL on 21 December 2011. WGG has also been successful in developing a proposal for the continuation of four of the partnership schemes and

one of the contractual schemes. These schemes have been excluded from the sale process. Very recently PSL has also agreed to work with WAG to develop a proposal for the other schemes and has entered into Heads of Agreement with WAG to give its consent to act as RE of the registered schemes and as manager of the professional investor schemes conditional upon, amongst other things, a due diligence to the satisfaction of PSL in relation to the viability of the schemes, operational matters, legal aspects and the liabilities of the RE and manager of the schemes. This development becomes relevant because a basis of opposition put forward by WAG to the orders and directions sought in these proceedings is the potential therefore for a restructure to occur.

Apportionment of proceeds of the purchase price

33 The Liquidators reached an agreement with the Receivers and the secured creditors on the allocation and apportionment of the sale proceeds prior to entering into the main sale contracts. The following issues arose in determining how the proceeds of sale should be apportioned:

(a) whether the Growers had rights to the freehold and Forestry NSW leases as "scheme property". The Liquidators took advice that the freehold land and Forestry NSW leases were not "scheme property";

(b) determining whether and how the consideration related to the sale assets. This has been done on the basis of an allocation of sale proceeds as between land and trees. In negotiating the allocation with the Receivers, the Liquidators had regard to GFP's allocation compared with the M3 Property land valuation and the Poyry trees valuation. The Liquidators' case is that they have acted properly and reasonably to ensure that the allocation agreed with the Receivers reflects the best possible deal available to Growers and unsecured creditors;

(c) how costs should be deducted from the purchase price: these costs are broken

down into general administration/liquidation costs ("non-scheme costs") and costs relating to the Liquidators' role of RE ("scheme-related costs"). Scheme-related costs have been broken down on a project-by-project basis and the Liquidators propose to deduct all scheme-related costs from the sale proceeds referrable to the trees on a project-by-project basis. They also propose to deduct non-scheme costs and any scheme-related costs that cannot be paid from the trees proceeds from the sale proceeds referrable to the non-charged assets held by WFL in its personal capacity, namely the Bombala land;

(d) the apportionment of funds as between Growers: the Liquidators propose to pool the sale proceeds referrable to the trees and to distribute those proceeds amongst the Growers on a project-by-project basis.

Issues

34 Ten questions have been identified for the Court's consideration for the purpose of determining the applications before the Court. The questions are as follows:

1. Are the questions that arise for determination in the applications suitable for determination pursuant to s 511 of the Act?

2. Are the Liquidators able to disclaim the Growers' leases with the effect of extinguishing the Growers' leasehold estate or interest in the subject land?

3. Have the Liquidators demonstrated on the material that they have acted reasonably and prudently in conducting the sale process and in entering into the main sale contracts and the HVP contract?

4. Is the allocation between land and trees justified having regard to the parties' legal rights; specifically is any of the land owned by WFL scheme property in respect of the schemes?

5. Is the allocation of the sale proceeds from GFP between land and trees as

proposed by the Liquidators reasonable in the circumstances?

6. Having regard to the insolvency of the Willmott Group, the viability of the schemes and the existence of alternatives to the proposed sale, is the extinguishment of the Growers' interests pursuant to the Liquidators' powers under the relevant constitutions and their statutory power under s 568(1), as the case may be, justified?

7. Is the apportionment between Growers of the sale proceeds from GFP and HVP (in respect of their interests in trees) as proposed by the Liquidators, reasonable and justified having regard to the constituent documents of the various schemes?

8. Is the allocation of the sale proceeds of the HVP land between the Liquidators' portion (in respect of trees) and the Receivers' position (in respect of the surrender of the head lease) justified in the circumstances?

9. Is WFL's leasehold interest in the HVP land scheme property in respect of any of the schemes conducted upon the HVP land?

10. Are the Liquidators justified in recovering their costs from the assets in the manner they propose?

Determination of Question 2 as a separate question

35 These applications have a degree of urgency, as is commonplace with applications of this kind involving managed investment schemes and wasting assets. Both applications were filed on 14 December 2011 with a view to having the applications determined by 31 January 2012. The applications came on for hearing on 23 January 2012 but it quickly became apparent that obtaining a decision by 31 January 2012 was not realistic. Apart from anything else, WAG had not been given sufficient opportunity to prepare its case in opposition to the orders and directions that were sought.

36 The Liquidators accordingly sought a separate determination of Question 2, which only impacts on the partnership and contractual schemes that are affected by the main sale contracts. Question 2 is not relevant to the schemes affected by the HVP sale contract as the land to be sold under that contract is not used by the partnership and contractual schemes. As Question 2 posed purely a legal question and all parties were in agreement, I heard argument on that question and handed down judgment on 9 February 2012.[9] I concluded that the answer to the question was no.

37 In view of the Court's decision, now on appeal, the Liquidators and GFP have renegotiated the main sale contracts ("the amended sale contracts") to exclude the land on which the contractual and partnership schemes are operated ("the removed land"). Due to the removed land no longer being the subject of any sale contracts, the Liquidators do not seek a direction that they would be justified in disclaiming the leases relating to the contractual and partnership schemes, but they continue to seek orders that they would be justified in disclaiming the forestry management agreements relating to those schemes. This is because WFL is responsible under those agreements for maintaining and harvesting trees and lots on the Growers' behalf and is unable to continue performing its obligations.

Section 511 of the Act

38 Amongst the orders sought by the Liquidators under s 511 of the Act in the present application are:

(a) a direction that the Liquidators are justified in procuring WFL to enter into and perform the sale contracts;

(b) a direction that the Liquidators are justified and otherwise are acting properly and reasonably in procuring WFL to terminate or surrender the project documents of the schemes, and to surrender, relinquish or release the rights of the Growers in the trees, the subject of the amended sale contract on the basis that the net proceeds of sale under those contracts are distributed in the manner proposed by the Liquidators; and

9 *Re Willmott Forests Ltd* [2012] VSC 29.

(c) the Court's consent to the disclaimer of the forestry management agreements of the contractual and partnership schemes.[10]

39 If those orders are made and the Liquidators take the steps foreshadowed by those orders, the effect will be to bring the schemes to an end and to bring to an end all of the rights of the Growers by and under the schemes and, specifically, their rights in relation to the trees, which are their assets. In order to make those orders, the Court must be satisfied, amongst other things, that the proposed allocation of sale proceeds to the Growers is appropriate. As the proposed allocation of sale proceeds is premised on the freehold and leasehold land not constituting scheme property, the Court must consider whether that premise is correct in order to form a view that the proposed allocation is appropriate.

40 Section 511 of the Act provides as follows:

> **(1) [Persons entitled to apply]** the liquidator, or any contributory or creditor, may apply to the Court:
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> **(a)** to determine any question arising in the winding up of a company; or
>
> **(b)** to exercise all or any of the powers that the Court might exercise if the company were being wound up by the Court.
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> ...
>
> **(2) [Court's powers]** The Court, if satisfied that the determination of the question or the exercise of power will be just and beneficial, may accede wholly or partially to any application on such terms and conditions as it thinks fit or may make such order on the application as it thinks just.

41 WAG submits that the declarations and orders sought are not within the scope of the Court's power under s 511 as the Court is being asked:

(a) to determine the rights of third parties (being the Growers) to the land which is the subject of the sale contracts; and

(b) to sanction the end of the proprietary and personal rights of the Growers in these schemes -

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10 Amended Originating Process (S CI 2011 06816) filed 28 February 2012 at [2]-[5]; Originating Process (S CI 2011 06762) filed 13 December 2011 at [1]-[2].

and therefore that the application must be dismissed because the Court is not empowered by s 511 to make orders directly affecting the rights and liabilities of third parties.

42 Reliance was placed on *Re GB Nathan & Co Pty Ltd (in liquidation)*[11] and other cases which have considered the scope of cognate provisions to s 511(1).[12] In *Re GB Nathan & Co Pty Ltd (in liquidation)*, McLelland J held that s 479(3) of the Act did not permit the Court to make orders that were binding on third parties. His Honour stated:

> Modern Australian authority confirms the view that s 479(3) "does not enable the court to make binding orders in the nature of judgments" and that the function of a liquidator's application for directions "is to give him advice as to his proper course of action in the liquidation; it is not to determine the rights and liabilities arising from the company's transactions before the liquidation."[13]

Re GB Nathan & Co Pty Ltd (in liquidation) has often been cited for the proposition that the Court has no power under s 479(3) of the Act to determine rights and liabilities arising from a company's transactions prior to liquidation and no authority to resolve substantive matters in dispute between the liquidator and third parties.

43 Similar statements are found in other cases. In *Editions Tom Thompson Pty Ltd v Pilley*[14] Lindgren J said:

> The preponderance of authority is to the effect that on a liquidator's application for directions under that provision [s 479(3)] or its predecessors, the Court has no power to make orders binding upon, or affecting the rights of, third parties, and the view is also commonly taken that directions should not be given where the proposed acts of the liquidator which would be "sanctioned" by the directions would affect such rights.[15]

In *Re Southern Cross Airlines Holdings Limited (in liquidation)*[16] Fitzgerald P (with whom McPherson JA and Thomas J agreed) said:

> It is ordinarily inappropriate for a direction to be given which will adversely affect identifiable legal rights or interests of other persons or will entitle the

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11 (1991) 24 NSWLR 674.

12 In *Dean-Willcocks v Soluble Solution Hydroponics Pty Ltd* [1997] 42 NSWLR 209 Young J expressed the view that the Court has the same jurisdiction under s 479(3) and s 511(1).

13 *Re GB Nathan & Co Pty Ltd* (1991) 24 NSWLR 674, 679.

14 (1997) 77 FCR 141.

15 *Editions Tom Thompson Pty Ltd v Pilley* (1997) 77 FCR 141, 147.

16 *Re Southern Cross Airlines Holdings Limited (in liquidation)* [2000] 1 Qd R 84.

liquidator to do so with impunity.[17]

In *Australian Securities and Investments Commission v Rowena Nominees Pty Ltd*[18] Pullin J said:

> The function of a liquidator's application for directions is to give him advice as to his proper course of action in the liquidation. It is not to determine the rights and liabilities arising from the company's transactions before the liquidation. The court must confine itself, in giving directions, to matters concerning the administration of the company, and it has no authority to resolve substantive matters in dispute between a trustee and a third party.[19]

WAG submitted, by analogical reasoning, that the Court therefore has no power under s 511(1) to determine substantive rights. For the reasons that follow that submission is rejected.

44 First, the cases on s 479(3) indicate that it is not a question of power; rather, it is a question of the appropriateness of using the s 479(3) procedure to determine the substantive rights of third parties in the context of an application by a liquidator for directions about the proper course to be taken in a liquidation. As McLelland J observed in *Re GB Nathan & Co Pty Ltd (in liquidation)*, the significance of obtaining directions under s 479(3) is the protection that the directions afford for a liquidator who acts in accordance with them and has made full and fair disclosure of the material facts from claims by unsecured creditors or contributories in respect of any alleged breach of his or her duties as liquidator. The function is not to determine rights and liabilities arising from pre-liquidation transactions. But that is not to say that a liquidator cannot seek substantive relief against a third party in an application for directions under s 479(3). This was recognised by McLelland J in *Re GB Nathan & Co Pty Ltd (in liquidation)* who went on to say that:

> ... there are instances where a court has, in proceedings commenced as a liquidator's application for directions, gone on to make orders declaratory of substantive rights, clearly intended to be of binding effect on the parties to the proceedings, and where necessary has made representative orders for this purpose: see, eg *Re Staff Benefits Pty Ltd and the Companies Act* [1979] 1 NSWLR 207 and cf *Re Securitibank Ltd (In Liq)* [1978] 1 NZLR 97; *Re Securitibank Ltd* [1978] 2 NZLR 133, and *Re Securitibank Ltd (No 2)* [1978] 2

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17 *Re Southern Cross Airlines Holdings Limited (in liquidation)* [2000] 1 Qd R 84, 93.

18 *Australian Securities and Investments Commission v Rowena Nominees Pty Ltd* (2003) 45 ACSR 424.

19 *Australian Securities and Investments Commission v Rowena Nominees Pty Ltd* (2003) 45 ACSR 424, 441.

> NZLR 136. The procedures of the court are sufficiently flexible to enable proceedings commenced as an application for directions to be changed into proceedings for the determination of substantive rights, and this is sometimes a convenient course in order to avoid the need to commence further proceedings involving additional cost and delay: see, eg, *Anmi Pty Ltd v Williams* [1981] 2 NSWLR 138 at 156-157. However it is important that the distinction between the two kinds of proceedings be not lost sight of or blurred, and such a fundamental change should not be permitted unless the court is satisfied that those affected either consent to that course (see, eg, *Re Standard Insurance Co Pty Ltd* (1963) 5 FLR 292; 80 WN (NSW) 1355 and *Murdoch* (at 100-101)), or will not suffer injustice in consequence of the alteration to the status of the proceedings.[20]

In *Editions Tom Thompson Pty Ltd v Pilley*[21] Lindgren J similarly concluded that the application for directions before him (made under s 447D of the *Corporations Law* which he did not consider to be distinguishable from an application by a liquidator for directions under s 479(3)), could be reconstituted as an *inter partes* proceeding for the determination of substantive rights. Although Lindgren J refused to make orders on the application, he did not dismiss the application "as it may well be that a further motion for leave to amend will be brought so as to re-constitute the application as a proceeding inter partes".[22]

45 There is little doubt on the authorities on s 479(3) that the Court has the power under that provision to make orders of a substantive nature affecting third parties. It is a separate question as to whether the Court should exercise that power in a given case but the issue is one of discretion, not of power. In that regard, the cases on s 479(3) make it reasonably plain that the Court should not make substantive orders under that provision affecting the rights of third parties without first giving the affected parties the opportunity to be heard. This is a matter of process and procedure for the Court, not a matter of the power of the Court under s 479(3),[23] which is a facultative provision entitling the liquidator to apply for directions.

46 Secondly, there is authority directly on point that the Court can entertain an application under s 511(1) for the determination of substantive rights affecting third

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20 *Re GB Nathan & Co Pty Ltd* (1991) 24 NSWLR 674, 680.

21 (1997) 77 FCR 141.

22 (1997) 77 FCR 141, 152.

23 *Australian Securities Investment Commission v Melbourne Asset Management Nominees Pty Ltd (receiver and manager appointed) & anor* (1994) 49 FCR 334 (Northrop J).

parties. In *Meadow Springs Fairway Resort Ltd (In Liq) v Balanced Securities*[24] French J (as His Honour then was) held that it was a matter of discretion whether the Court should determine competing claims in an application brought by a liquidator under s 511(1). French J referred to a passage from *ASIC v Melbourne Asset Management Nominees*[25] where Northrop J said in relation to s 479(3):

> It has been accepted that Courts have power to make final orders in preference claims on an application by a liquidator under sections similar to subsection 479(3) of the Corporations Law. There is no logical reason why final orders binding on other persons cannot be made on applications under subsection 479(3) with respect to other subject matters. The second passage from the judgment of McLelland J cited above refers to consent of parties or to cases where a party "will not suffer injustice in consequence of the alteration to the status of the proceedings". This is the crucial matter. In proceedings brought by a liquidator under subsection 479(3), I can see no reason why binding orders cannot be made where the parties affected have been given the opportunity to be heard...The parties affected by the directions and orders sought on the motion in the winding up proceedings are before the Court and have been heard.[26]

French J stated that these observations were "even more apposite in applications made under [s 511(1)]"[27] given the more substantive character of the applications contemplated by s 511(1)(a) than by s 479(3). His Honour concluded:

> In my opinion it is open to the Court, in a suitable case, to entertain an application for the determination of questions under s 511 by joining affected parties with competing interests as defendants and permitting them to file cross-claims for declaratory relief as between themselves and any other interested parties and the liquidator so that there can be a res judicata between all of them. Such a course may be appropriate where the evidence necessary to determine the questions and the competing claims is largely documentary and amenable to expeditious hearing and determination. Otherwise the parties can simply commence their own substantive proceedings.

The limitation on the power under s 511(1) is that the Court is only to accede to the liquidator's application if the determination of the question or exercise of power "will

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24 *Meadow Springs Fairway Resort Ltd (In Liq) v Balanced Securities Ltd* (2007) 25 ACLC 1433; [2007] FCA 1443.

25 (1994) 49 FCR 334.

26 (1994) 49 FCR 334 at [60].

27 *Meadow Springs Fairway Resort Ltd (In Liq) v Balanced Securities Ltd* (2007) 25 ACLC 1433; [2007] FCA 1443 at [50].

be just and beneficial".[28]

47 In an earlier decision, *Crawford v Oswald Park (in liq)*,[29] Austin J had reached a similar conclusion, without finding it necessary to decide whether s 511 allowed the Court to grant relief in circumstances where that relief would not be available under s 479(3).[30] Other cases where the Courts have concluded that substantive rights can be determined in a s 511(1) application are *Re Graf Holdings Pty Ltd*;[31] *Re Anglican Insurance Ltd*;[32] *Saker, in the matter of Great Southern Manager Australia Ltd (Receivers and Managers Appointed (in liquidation) (No 3)*;[33] *Re Purchas as liquidator of Astarra Asset Management Pty Ltd (In liq)*,[34] and *Re Rewards Projects Ltd (In Liq); Ex Parte Rewards Projects Ltd (In Liq)*.[35]

48 Thirdly, if and in so far as there was any doubt about the power of the Court under s 511(1) to make orders affecting substantive rights of third parties, that doubt has been put to rest by the High Court decision in *Macedonian Orthodox Community Church of St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand*.[36] In that case the High Court considered the jurisdiction of the Court conferred by s 63 of the *Trustee Act 1925* (NSW). Section 63 is a mechanism by which trustees can obtain protection from liability if they act in accordance with judicial advice or directions given. The scope of judicial advice or direction may be "on any question respecting the management or administration of the trust property, or respecting the interpretation of the trust instrument."[37] This may be compared with s 511 of the Act which permits a liquidator to apply to the Court to determine "any question arising in the winding up of a company".[38]

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28 *Corporations Act 2001* (Cth), s 511(2).
29 [2006] NSWSC 987.
30 [2006] NSWSC 987 at [11].
31 [1999] NSWSC 217 (Austin J).
32 (2008) 26 ACLC 147; [2008] NSWSC 41 (Barrett J).
33 [2011] FCA 1192.
34 [2011] NSWSC 91.
35 [2011] WASC 339.
36 (2008) 237 CLR 66.
37 *Trustee Act 1925* (NSW), s 63(1).
38 *Corporations Act 2001* (Cth), s 511(1)(a).

49 The plurality[39] held that the s 63 procedure was not limited to "non-adversarial" proceedings.[40] The only jurisdictional bar was that the applicant must point to the existence of a question respecting the management or administration of the trust property or a question respecting the interpretation of the trust instrument.[41] That reasoning is applicable to s 511(1) of the Act.

50 The plurality also stated that there were no express words in s 63, and no implications from the express words, which are used in s 63 making some discretionary factors always more significant or controlling than others, including the tendency of the advice to foreclose an issue.[42] The discretion of the Court to consider applications brought under s 63 is not fettered by any principle that it is not appropriate to give advice where there is a contest or where there are adversaries. The plurality accepted that the fact that a court may rely on a written statement of the trustee or use other material "instead of evidence" by reason of s 63(3) undoubtedly gave rise to discretionary considerations of some substantial weight where the question for advice is in form or substance an application which will determine or affect questions that could also be resolved in ordinary adversarial litigation. But it is not a bar to the s 63 procedure.[43] By parity of reasoning, the fact that the judicial advice sought in an application under s 511(1) may determine substantive rights is not an automatic bar to the giving of advice or as a factor of such weight as generally would compel the Court not to give the advice.

51 The plurality also said that s 63 operates as an exception to the Court's ordinary function of deciding disputes between competing litigants; it affords a facility for giving private advice because its function is to give personal protection to the trustee who acts in accordance with that private advice.[44] But the plurality also said that a trustee's application for directions was not directed only to personal protection but also had another "and no less important purpose of protecting the interests of the

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39 Gummow ACJ, Kirby, Hayne and Heydon JJ.

40 *Macedonian Orthodox Community Church of St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at [56].

41 Ibid at [58].

42 Ibid at [59].

43 Ibid at [59], [60].

44 Ibid at [64], [65].

trust".[45] This reasoning is again apposite to s 511(1) applications. In s 511(1) applications, it has the important purpose of assisting the liquidators in the proper performance and discharge of their statutory function and duties.

52 The plurality concluded:

> Upon one view, what was involved in these proceedings was the consideration by this Court of little more than the disturbance of orders made in the exercise of discretionary power by a judge empowered to superintend the conduct of a trustee under provisions afforded to him, in that respect, by the Act. We have dealt with the proceedings at some little length for a number of reasons. They involved a consideration of powers that, despite their long history, rarely reach the consideration of final appellate courts. Those powers are of frequent practical importance in the administration of the Act which has a distinct provenance in legislation first enacted in England and later in Australia. They also find reflection in statutes operating in Australian jurisdictions other than that to which the Act applies.[46]

Kiefel J delivered separate reasons. Her Honour was also of the view that it was not a question of power under s 63 but a question of exercise of discretion and that in exercising the discretion to give the judicial advice sought, the Court should be guided by the scope and purposes of the section.[47]

53 It is noted that in *Hall v Poolman*[48] the New South Wales Court of Appeal (Spigelman CJ, Hodgson JA and Austin J) accepted that the principles espoused by the High Court in *Macedonian Orthodox Community Church of St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* applied to an application for judicial directions under s 479(3) and s 511(1).[49] There is thus considerable authority supporting the use of the s 511(1) process for the orders and directions sought by the Liquidators.

54 Senior Counsel for WAG submitted that if the Court is to be asked to make orders sanctioning the end of third party rights, those third parties should be joined as parties to the proceeding. Reference was made to *John Alexander's Clubs Pty Ltd v*

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45 Ibid at [72].

46 Ibid at [190].

47 Ibid at [196].

48 [2009] NSWCA 64.

49 *Macedonian Orthodox Community Church of St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66 at [172]; see also *Re Mento Developments (Aust) Pty Ltd*(2009) 73 ACSR 622; [2009] VSC 343 (Robson J).

White City Club Ltd[50] where the High Court stated that where a Court is invited to make, or proposes to make, orders directly affecting the rights or liabilities of a non-party the non-party is a necessary party and ought to be joined.[51] WAG has not been joined as a party to the proceeding and if it was joined, it could only be in a representative capacity under r 16.01 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic). WAG did not seek joinder nor did the plaintiffs seek to have WAG (or WGG) joined. Nonetheless, I have concluded that the fact of non-joinder is not an impediment to the Court providing the judicial advice that is sought in this application.

55 First, the orders sought in this application plainly raise questions that arise in the winding up of WFL, which the Court has the jurisdiction to determine under s 511. Any limitation on the Court's exercise of power is provided by s 511(2), which mandates that the Court is only to accede to a liquidator's application if the determination of the questions "will be just and beneficial". This expression has been judicially considered in a number of cases and is said to allow the Court a discretion whether to make such an order by reference to whether the relief sought by a liquidator is "of advantage in the liquidation".[52] In *Dean–Willcocks v Soluble Solution Hydroponics Pty Ltd*[53] Young J stated that:

> There are many questions where the only order that the court should make is that the liquidator or the claimant proceed in the ordinary courts in the ordinary way for the determination of a dispute. However, there are many other situations where the court can summarily solve the difficulty that has arisen in the liquidation by an order under the section in a cheap and efficient manner. Where this can be done it is "just and beneficial" to exercise the power.[54]

The crucial consideration here is whether it is in the interests of the winding up of WFL that the Court give judicial advice to the Liquidators in the terms of the directions that are sought.

56 Secondly, it is necessary to consider whether the Growers whose rights will be affected by the orders and directions sought have been given proper opportunity to

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50 (2010) 241 CLR 1.
51 *John Alexander's Clubs Pty Ltd v White City Club Ltd* (2010) 241 CLR 1, 46 at [131].
52 *Dean–Willcocks v Soluble Solution Hydroponics Pty Ltd* (1997) 42 NSWLR 209, 212 (Young J).
53 (1997) 42 NSWLR 209.
54 (1997) 42 NSWLR 209, 212-213.

be heard. Although the application is "conceptually"[55] *ex parte* the Growers are represented by two groups which have been given leave to intervene. The Growers are entitled to be heard in this application because their substantive rights are brought into issue. The two interveners have been afforded full opportunity to present their opposition to the proposed orders, including the right to lead evidence and to cross-examine the Liquidators' witnesses. Moreover, they have been heard in the context where the application has been conducted as a proceeding which raises the substantive rights of the Growers, on which there has been full argument. This is not a case where persons who may be affected by the orders that are sought are not before the Court and have been denied the opportunity to be heard and denied the opportunity to call evidence and present submissions on the substantive matters for determination which have the potential to affect their rights. Non-joinder is not a disabling factor in this application.

57 Thirdly, in my view it is in the interests of the winding up of WFL to give judicial advice on the question of whether WFL's freehold and leasehold interests are "scheme property' of the schemes, on the question of whether the Liquidators are justified in terminating and disclaiming the project documents of the schemes and on the question whether the proposed allocation of sale proceeds is justified. The Court should conclude that the judicial advice on those questions will be of advantage in the liquidation. The orders, if made, will enable the Liquidators to complete the sale contracts in the process of realising WFL's assets and to disclaim onerous contracts which WFL does not have the funds to perform. Obtaining the judicial advice will assist the Liquidators to get on with winding up of the company. Moreover, it is well apparent from the evidence before the Court that there is a need for urgency in dealing with the assets that are the subject of the sale contracts as the plantations cannot be maintained and the Growers cannot presently exercise their rights to grow, maintain and harvest the trees on the plantations. The evidence sufficiently shows that there is warrant to have the substantive issues raised by this application determined through the s 511(1) procedure and not to require a separate *inter partes* proceeding for the determination of those substantive issues.

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55 *Editions Tom Thompson Pty Ltd v Pilley* (1997) 77 FCR 141.

58 Finally, for the sake of completeness, it is noted that the power under s 511(1) is not exercisable when effectively the Court is being asked only to give its approval to a commercial decision about which the liquidator wants reassurance. In *Re Ansett Australia Ltd & Ors*[56] Goldberg J reviewed the authorities and concluded as follows:

> There must be something more than the making of a business or commercial decision before a court will give directions in relation to, or approving of, the decision. It may be a legal issue of substance or procedure, it may be an issue of power, propriety or reasonableness, but some of issue of this nature is required to be raised. It is insufficient to attract an order giving directions that the liquidator or administrator has a feeling of apprehension or unease about the business decision made and wants reassurance. There must be some issue which arises in relation to the decision. A court should not give imprimatur to a business decision simply to alleviate a liquidator's or administrator's unease. There must be an issue calling for the exercise of legal judgment.[57]

The orders here sought do not involve merely a consideration of commercial or business issues.

Scheme property

59 The question of whether any of the land owned by or leased to WFL is scheme property was left open in the reasons for decision given by Dodds-Streeton J. This question must now be determined in the context of considering whether the allocation of the sale proceeds between land and trees as proposed by the Liquidators is justified, as the premise on which the proposed allocation is founded is that the land is not property of the various schemes,[58] and hence that the land is covered by the charges under which the Receivers were appointed.

60 The issue that underlies the question is whether the land is held on trust by WFL for the Growers in any of the schemes. "Scheme property" has a particular statutory meaning in reference to managed investment schemes registered under Pt 5C.2 of

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56 (2002) 40 ACSR 433.

57 *Re Ansett Australian Ltd & Ors* (2002) 40 ACSR 433 at [65], see also *Handberg v MIG Property Services Pty Ltd* (2010) 79 ACSR 373 (Warren CJ).

58 The properties used by the Willmott Forests Premium Timberland Fund No. 1 scheme are excepted as they are "scheme property" of that scheme. The Liquidators seek a direction pursuant to s 511 of the Act that they are justified in procuring WFL to exercise its powers under clause 10.3 of the Constitution of that scheme to sell the "scheme property" constituted by the land. This is considered later in the reasons for decision.

the Act, and property that is "scheme property" of a registered scheme is declared by s 601FC(2) of the Act to be held on trust by the RE of that registered scheme for the scheme members.[59] Thus, the conclusion that the land is "scheme property" of the registered schemes means that WFL holds that land on trust for the Growers in those schemes. The definition of "scheme property" does not apply to unregistered schemes, so that the question of whether any of the land used in the operations of the unregistered schemes is property held on trust for the Growers in those schemes is not answered by s 601FC(2) of the Act. It is necessary in that circumstance to have regard to the terms of the schemes to ascertain the property interests held by the Growers. However, whilst the definition of "scheme property" does not apply to unregistered schemes "of its own force",[60] the cases nonetheless have held that it is relevant in that consideration to have regard to what constitutes "scheme property" of a registered scheme.[61]

61 In its defined sense, "scheme property" of a registered scheme means:

> (a) contributions of money or money's worth to the scheme; and
>
> (b) money that forms part of the scheme property under provisions of this Act or the ASIC Act; and
>
> (c) money borrowed or raised by the responsible entity for the purposes of the scheme; and
>
> (d) property acquired, directly or indirectly with, or with the proceeds of, contributions or money referred to in (a), (b) or (c); and
>
> (e) income and property derived directly or indirectly from contributions, money or property referred to in (a), (b), (c) or (d).[62]

62 The Act also provides a definition of "managed investment scheme". Relevantly:

> (a) Managed investment scheme means a scheme that has the following features:
>
> (i) people contribute money or money's worth as consideration to

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59 *Re Investa Properties Ltd & Anor* (2001) 187 ALR 462.

60 *Mier v FN Management Pty Ltd* [2006] 1 Qd R 339, 350 at [26].

61 *Mier v FN Management Pty Ltd* [2006] 1 Qd R 339; *Brookfield Multiplex Ltd & Anor v International Litigation Funding Partners Pte Ltd & Ors* (2009) 180 FCR 11 at [236] (Jacobson J, dissenting on other grounds); *Australian Securities and Investment Commission v Letten (No 5)* (2010) 273 ALR 264; [2010] FCA 1047 at [10]; *Treecorp Australia Ltd (in liq) v Dwyer & Anor* (2009) 175 FCR 373.

62 *Corporations Act 2001* (Cth), s 9.

> acquire rights (**interests**) to benefits produced by the scheme (whether the rights are actual, prospective or contingent and whether they are enforceable or not);
>
> (ii) any of the contributions are to be pooled or used in a common enterprise, to produce financial benefits, or benefits consisting of rights or interests in property for the people (the **members**) who hold interests in the scheme (whether as contributors to the scheme or people who have acquired interests from holders);
>
> (iii) the members do not have day-to-day over the operation of the scheme (whether or not they have the right to be consulted or to give directions);[63]

63 A registered managed investment scheme is a scheme that meets that statutory description and which is registered under s 601EB of the Act.[64] An unregistered managed investment scheme is a managed investment scheme as defined but which is not registered under s 601EB of the Act. As Keane JA stated in *Mier v FN Management Pty Ltd*[65], there is little to differentiate between registered and unregistered schemes apart from registration itself.[66]

64 In *Mier v FN Management Pty Ltd*[67], Keane JA (with whom McMurdo P and Douglas J agreed) stated that

> ... there can be no doubt that the scheme property of an unregistered scheme is to be identified by reference to the terms of the scheme in relation to the contribution of assets to the enterprise involved in the scheme.[68]

In Keane JA's view, the key feature is in the identification of the assets "contributed" to the scheme or obtained in connection with such contributions.[69] Keane JA gave three reasons for that view. First, that the definition of "managed investment scheme" makes it clear that investors contribute "money or money's worth" to the "program or plan of action" constituted by the scheme, and those contributions are pooled to produce benefits for those who made contributions. Keane JA stated that:

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63 *Corporations Act 2001* (Cth), s 9.
64 See definition of "registered scheme" in *Corporations Act 2001* (Cth), s 9.
65 [2006] 1 Qd R 339.
66 *Mier v FN Management Pty Ltd* [2006] 1 Qd R 339, 351 at [28].
67 [2006] 1 Qd R 339.
68 *Mier v FN Management Pty Ltd* [2006] 1 Qd R 339 at [26].
69 Ibid at [27].

> The absence of any such connection would make it doubtful that the property was really part of, or subject to, the scheme.[70]

Secondly, that the definition of "scheme property" for a registered scheme must serve as a guide to what should be considered to be the property of an unregistered scheme, because the notion that the property of a scheme consists only of the contributions of money or money's worth that are made to the scheme, or benefits derived from the use of the property contributed to the scheme, is explicitly picked up in the definition of "scheme property" of a registered scheme contained in the Act. Thirdly, that s 601EE of the Act (which provides for the winding up of unregistered schemes) proceeds on the postulate that there is scheme property to be realised through a process of winding up, despite there being no explicit description of scheme property provided by the Act in relation to an unregistered scheme.

65 *Mier v FN Management Pty Ltd*[71] has been approved and applied in other cases where the issue is the identification of the property of an unregistered scheme.[72] In *Treecorp Australia Ltd (in liq) v Dwyer*,[73] Gordon J explicitly made the point that s 601FC(2) "does not necessarily apply to all property held by a responsible entity or used in the operation of a scheme".[74] This is made clear in the legislation, in particular by s 601FC(1)(i) which imposes obligations on REs to ensure that scheme property is clearly identified as scheme property and held separately from the property of the RE.

66 Applying these considerations to the present case, the first question is whether the freehold and leases should be taken to have been "contributed" to the schemes. Whether that is so depends on the legal arrangements underpinning the respective schemes and the nature of the rights in, or to, the freehold and leases held by members of the relevant schemes. As the structure and legal form of the schemes

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70 *Mier v FN Management Pty Ltd* [2006] 1 Qd R 339.

71 [2006] 1 Qd R 339.

72 *Brookfield Multiplex Ltd v International Litigation Funding Partners Pte Ltd* (2009) 180 FCR 11 at 236 (Jacobson J, dissenting on other grounds); *Australian Securities and Investment Commission v Letten (No 5)* (2010) 273 ALR 264; [2010] FCA 1047 at [10]; *Treecorp Australia Ltd (in liq) v Dwyer* (2009) 175 FCR 373.

73 (2009) 175 FCR 373.

74 (2009) 175 FCR 373, 383 at [42].

under consideration vary between type of scheme, it is necessary to look at each type of scheme.

(a) The registered schemes

67 Participants in these schemes subscribed for "Woodlots" by completion of the application form that was contained in the Product Disclosure Statement that issued for each scheme. On making application, the applicant had to agree to take a lease from WFL of the land on which the applicant would be allocated Woodlots and to agree to engage WFL under the terms of a forestry management agreement to manage the forestry operations on those Woodlots. The application form contained a power of attorney under which the applicant appointed a director of WFL to execute the lease and forestry management agreement on acceptance of the application.

68 The permitted use of the Woodlots by the participants in these schemes for the purpose of forestry operations was provided for in the Constitution in the obligation placed on WFL:

> ... to use its best endeavours to create a Forestry Right ... in respect of the land on which the Woodlots are located for the benefit of all Growers who have acquired Woodlots on the Land, as soon as practicable after the issue of those Woodlots.[75]

The "Forestry Right" gave the participants the right to enter the land to establish, maintain and harvest a crop of trees on the land. [76]

69 The fee structure required an up-front payment (per Woodlot) for WFL's fees for the initial preparation and planting of the Woodlots, which was a term of the forestry management agreement.[77] Otherwise, no other fees became payable until harvest as rent under the lease and the other fees due to WFL under the forestry management agreement only became payable at harvest, when WFL was entitled to retain 2% of the gross sale proceeds in payment of rent and 7% of the gross sale proceeds in payment of management fees.

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75 Consolidated Constitution of the Willmott Forests Project (2 September 2009) cl. 4.9.
76 Ibid cl. 26.1.
77 Forestry Management Agreements Sch. 1, cl. 1.

70 Accordingly, whilst it is evident that WFL contributed to the use of its land for scheme purposes, WFL did not contribute its interest in the land, instead making the land available to the Growers by way of lease and by granting "forestry rights" entitling Growers to establish, maintain and harvest a crop of trees on the land. This conclusion is supported by provisions in the Constitution.

71 Clause 6.7 of the Constitution provided:

> **Land Held Beneficially**
>
> 6.7 All Land acquired by [WFL] for the purposes of the Project is held beneficially by [WFL] in the course of, and in accordance with, its duties as [RE] of the Project.[78]

This is to be compared with clause 2 of the Constitution which provided that WFL, as RE, "must hold the Assets on trust for Growers". The term "Assets" is defined by reference to interests in the project and means:

> **Assets:** all the property, rights and income of the Project, but not any application money or property in respect of which Woodlots have not been issued.[79]

The Constitution thus identifies the land separately from the scheme property, consistently with the duties on WFL as RE to ensure that scheme property is clearly identified as scheme property and held separately from property of the RE.[80]

(b) The professional investor schemes

72 These schemes were constituted similarly to the registered schemes, save that participants were allocated "Hectares" on WFL's land instead of "Woodlots" but with the same rights attaching to Hectares, and instead of a Constitution, the schemes were governed by an Investment Deed in the same terms as the Constitutions of the registered schemes. Accordingly the same conclusion follows.

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78 Consolidated Constitution of the Willmott Forests Project (2 September 2009) cl. 4.9.

79 Ibid cl. 26.1.

80 *Corporations Act 2001* (Cth), s 601 FC(1)(i).

(c) The partnership schemes

73 These schemes were structured as partnerships. Participants took interests in "Partnership Units" (representing a minimum of one hectare of forest) located on land that WFL leased to the partnerships. Again it was a feature of these schemes that participants, through the partnership, were required to enter into a lease agreement with WFL, and to engage WFL to undertake the actual forestry operations under two agreements, a Preparation and Planting Agreement and a Maintenance Agreement. The amount payable per Partnership Unit was for the rent payable under the lease and the fees due to WFL for services under the two agreements.

74 Relevantly, the partnership agreements provided that the assets of the partnerships comprised the capital contributed and:

> ... all such forests, goods and other property and improvements thereon as shall accrue to or arise for the benefit of or be acquired by the Partnership from time to time and of all moneys in bank accounts belonging to the Partnership.[81]

This does not include WFL's interest in the land used by these schemes.

(d) The contractual schemes

75 There were no overarching documents such as a Constitution or Investment Deed. The key contractual documents were a lease and a maintenance agreement. The lease provided relevantly that the Grower was entitled to plant the demised land with trees and use and maintain it for the purposes of aforestation. Nothing in the contractual documents indicated that any rights with respect to that land were other than those rights conferred under the lease on the terms set out in the lease.

(e) Decision on "contribution"

76 In my view, the analysis of the legal arrangements underpinning the respective schemes and the nature of the rights in, or to, the freehold and leases held by members of those schemes, by virtue of those legal arrangements, make it clear that

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81 Partnership Agreement Exemplar, cl. 6.

WFL did not contribute its interest in the land to the schemes but simply the use of its land in accordance with the constituent documents regulating the schemes.

77 WAG however submitted that "the substance and effect of the scheme documents, construed in their context, make it demonstrably clear that WFL acquired the freehold land as scheme property, and that the land acquired is held beneficially by the RE for the growers".[82] WAG made reference to *Huntley Management Ltd v Timbercorp Securities Ltd*[83] in which Rares J concluded that leases that Timbercorp Securities Limited ("TSL") took from a third party to secure land for use by a managed investment scheme of which it was the RE were "scheme property", although the leases had provided that TSL had entered into them in its personal capacity and that they were not scheme property. WAG drew by way of analogy with some of the factors to which Rares J had regard in reaching his conclusion that the leases were scheme property:

(a) that TSL had a provision in its Australian Financial Services Licence ("AFSL") which required it to lodge for registration in its name beneficially the leases of the land on which the schemes would operate. Rares J stated that this provision "had the consequence that the leasehold interest was held as scheme property by whomever was the [RE]"[84] by reason that it was a condition of the AFSL that the leasehold be held "beneficially in the course of and in accordance with its obligations as RE", coupled with TSL's obligations under the constitution. WFL has a similar condition in its AFSL and the constitutions governing the registered schemes; and

(b) that the rights that TSL enjoyed as lessee of the land on which the schemes were conducted were derived wholly and solely because the leases were essential to the operation of the schemes as the investors only had rights under licence to use the land for their horticultural activities.[85] WAG submitted that like *Huntley*

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82 Outline of Submissions of WAG (Intervener) at [81].
83 (2010) 187 FCR 151.
84 (2010) 187 FCR 151 at [61].
85 (2010) 187 FCR 151 at [62].

the schemes could not operate without the land and without the land, WFL would have nothing to lease to growers for their investment.

78 With respect to Rares J, it does not follow that an asset held by the RE must be scheme property because the licence condition requires the asset to be held by the RE "beneficially in the course of and in accordance with [the RE's] obligations as RE". The trust will be created either because property is "scheme property" as defined or because the RE holds the property on trust for the members under principles of general law. Moreover, property does not become "scheme property" as defined merely because the property is registered by the RE in its name "beneficially" in accordance with the licence requirements. Or to put it another way, registration does not of its own force make property "scheme property". It is only if it is "scheme property" as defined that s 601FC creates the statutory trust in respect of that property.

79 Moreover, in the present case, the terms of WFL's licence make it clear that the licence requirement does not have the effect in law contended by WAG. The licence requirement is that:

> [T]he licensee must ... ensure (in relation to each scheme) that an instrument that confers the right, for the purpose of the scheme, to use the land on which any primary production will occur in the operation of the scheme, is lodged for registration, under State or Territory land titles law, in the name of:
>
> ...
>
> (d) the licensee, either
>
> (i) as trustee for the members; or
>
> (ii) beneficially in the course of and in accordance with its duties as responsible entity.[86]

The licence requirements recognise that land may be made available for the purposes of the scheme without becoming vested beneficially in the members. Properly understood, registration in the name of the RE "beneficially in the course of and in

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86 Exhibit MJH-35 to the Affidavit of Mark James Hoddinott affirmed 24 January 2012, 13.

accordance with its duties as responsible entity" means in this case no more than that the RE is subject to duties as RE in relation to that land. And, as the cases have held, not all property used in a scheme will be scheme property as defined.[87]

80 Clause 6.7 of the Constitutions and the Investment Deeds, which similarly provide that all land acquired by WFL for the purposes of the project is held beneficially by WFL in the course of, and in accordance with, its duties as RE, is to be understood in the same sense as the licence condition. Considered in context, the function served by clause 6.7 is to identify that the land is not scheme property and hence not part of the "Assets" that WFL holds on trust for the members by WFL. Clause 6.7 does not operate to make all land acquired by WFL for the purposes of the project "Assets" of the scheme, whether or not "scheme property" as defined in s 9 of the Act.

81 The second factor focussed on by WAG needs to be considered in its proper context. *Huntley* was not concerned with what is "scheme property" but whether the rights, obligations and liabilities of TSL under those leases were statutorily novated by ss 601FS and 601FT of the Act to the RE that replaced TSL after it went into liquidation. Critical to answering that question was whether the rights, obligations and liabilities of TSL under the leases were rights, obligations and liabilities of TSL "in relation to the scheme" and it was in that context that Rares J observed that the rights enjoyed by TSL as lessee of the land derived wholly and solely because the leases were essential to the scheme. This factor coupled with other factors led Rares J to conclude that the capacity in which TSL entered into the leases was not in its personal capacity but as RE. The other factors to which Rares J had regard are not applicable in the present case[88] and the case is distinguishable on its facts.[89] No different conclusion is required to be reached on the facts of this case, having regard to the proper construction of the constituent documents. It may be that without the freehold and leasehold that WFL made available for use in the schemes, the schemes

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87 *Mier v FN Management Pty Ltd* [2006] 1 Qd R 339; *Treecorp Australia Ltd (in liq) v Dwyer & Anor* (2009) 175 FCR 373; *Australian Securities and Investment Commission v Letten (No 5)* (2010) 273 ALR 264; [2010] FCA 1047.

88 *Huntley Management Ltd v Timbercorp Securities Ltd* (2010) 187 FCR 151 at [63], [64].

89 Cf *Syncap Management (Rural) Australia Ltd v Lyford* (2004) 51 ACSR 223.

could not have operated. But that is not the test. This is not to take an artificial or restricted view as to what constitutes the scheme or the property over which WFL as RE had duties and obligations.[90]

82 Accordingly, WAG's submissions based on the constituent terms of the schemes are rejected.

(e) Tracing

83 The next question is whether the land was acquired or derived, directly or indirectly, with contributions or money from the Growers or from money borrowed or raised by the RE for the purposes of the scheme. WAG argued that this nexus was shown based on a tracing exercise. This argument was not premised on a tracing of funds by reference to the application of the funds in accordance with the constituent documents regulating the schemes. The submission could not be so based because those documents put beyond doubt that the application fees were constituted by amounts payable as fees due to WFL for management of the plantations and, in some schemes, payable as rent due to WFL under the leases. None of that is surprising, given that these schemes were designed and marketed as tax-effective structures that entitled Growers to up-front deductions for the whole of their application fees and tax deductibility depended on the application fees having the character of outgoings on revenue account.[91]

84 The tracing undertaken was the actual use of the application fees to demonstrate that the application fees were in fact used by WFL to acquire land for the purposes of the projects. The proposition was that if any of the Growers' funds were so applied, then the property acquired must be "scheme property" as defined. The approach is wrong in law and contrary to authority. A forensic examination that traces where the funds went is of no assistance in identifying scheme property. The correct approach, as explained by Keane JA in *Mier v FN Management Pty Ltd*[92] and exemplified in

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90 Cf *Re Environinvest Ltd* [2009] VSC 33.

91 *Income Tax Assessment Act 1997* (Cth) s 8.1.

92 [2006] 1 Qd R 339.

Treecorp Australia Ltd (in liq) v Dwyer,[93] is one of objective characterisation having regard to the constituent documents of a scheme. It is the scheme itself, not a forensic tracing of the funds, which provides the connection between the "contribution" of funds by investors and any property that "acquired" or "derived" from those contributions. In this context it is important to bear in mind the features which distinguish a managed investment scheme from other arrangements:

(a) that people contribute money or money's worth as consideration to acquire rights to benefits produced by the scheme; and

(b) the contributions are to be pooled or used in a common enterprise to produce financial benefits or benefits consisting of rights and interests in property for the people who hold interests in the scheme.

85 In *National Australia Ltd Bank v Norman*[94] Gilmour J observed:

> ... what is required is an intention objectively discerned that contributions are to be pooled relevantly, "to produce financial benefits ... for the people (the members) who hold interests in the scheme". Accordingly, contributions are not merely to be pooled. Rather they are to be pooled for a purpose, namely the production of financial benefits for the members as a whole proportional to the interest they acquired by making contributions.[95]

The required nexus between contributions made by investors in a given managed scheme and the acquisition of property for use in the "common enterprise" of that scheme is entirely consistent with the statutory obligations on the RE of a registered scheme to hold property on trust for members of that scheme (s 601FC(2)) and to ensure that scheme property is held separately from property of the RE and property of any other scheme (s 601FC(1)(i)(ii)). The second of these obligations does no more than reflect the "hallmark duty" of a trustee at general law: namely, to hold trust funds separately from its own funds and separately from those of any other trust of which it is also a trustee.[96]

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93 (2009) 175 FCR 373.

94 (2009) 180 FCR 243.

95 (2009) 180 FCR 243 at [150].

96 *Puma Australia Limited v Sportman's Australia Limited* [1994] 2 Qd R 149; see also *Skinner v Trustees Executors & Agency Co Ltd* [1907] 27 VLR 218.

86 In *Treecorp Australia Ltd (in liq) v Dwyer*,[97] member contributions could be traced through to an account held by the subsidiary of the RE which had been charged in favour of the RE. However, neither the asset nor the RE's charge over that asset was held to be "scheme property". Gordon J reached that conclusion on the basis that neither the account, nor the charge, had been contributed by members of the scheme to the common enterprise. Had it been sufficient merely to trace the member contributions through to the asset, the position would have been different. In my view Gordon J was clearly right not to decide the case simply on that basis but rather to look at the legal rights and entitlements flowing from the constituent documents governing the scheme in question.

87 Expert evidence was led on behalf of WAG which was responded to on behalf of the Liquidators tracing WFL's use of the application fees paid and other funds contributed by the Growers, by way of management fees or rental. It is unnecessary to consider any of that evidence, with no disrespect intended to the work of the experts. It is unnecessary because the analysis undertaken is not the analysis required in order to establish that property was acquired, directly or indirectly, from member contributions or from the financial benefits obtained by the Growers from their horticultural operations or from money borrowed or raised by WFL for the purposes of the schemes.

88 Accordingly, WAG's argument that the land is scheme property based on a tracing exercise is also rejected.

(f) Conclusion

89 I am therefore satisfied that the allocation between land and trees is justified having regard to the respective legal rights of the parties.

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97 Ibid.

Allocation of sale proceeds based on value of land and trees

90 The issue here is whether the allocation of the sale proceeds proposed by the Liquidators is reasonable in the circumstances. It is necessary to deal with the main sale contracts separately from the HVP sale contract under this topic.

(a) Main Sale contracts: approach

91 GFP provided a break down of the revised GFP offer on a plantation-by-plantation basis and, within each plantation, an allocation between the land and trees. The plantations are split into three regions: Bombala, Murray Valley and North Coast. The consideration is then split between the plantations and between the land and the trees on the plantations. The Receivers' interest and assets to be sold to GFP relate to the freehold in the Murray Valley land, the freehold in the North Coast land and the Forestry NSW leases. The Bombala land is not subject to the charge.

92 The Liquidators appointed independent experts M3 Property to value the land and Poyry to value the trees and, in considering the reasonableness of the allocation between the value of the land and the trees in the revised GFP offer, they compared the allocation in the revised GFP offer with the valuations provided by the experts.

93 The Liquidators' proposed allocation of sale proceeds to the Growers has been determined on the basis that the freehold and leasehold is not property of any of the schemes and that whilst the Growers' leases confer proprietary rights on the Growers, those rights are not practically capable of being exercised by individual Growers so that the Growers' leases do not have an independent commercial value and the Growers should receive an amount out of the proceeds of sale referable to the value of the trees that are sold with the land.

(b) Main Sale contracts: freehold land

94 In relation to the sale of the freehold of the Murray Valley Land and North Coast Land, the Liquidators' proposed allocation of consideration payable by GFP between

land and trees reflects the allocation given by GFP in the revised GFP offer, apart from the Bombala adjustment. In relation to the Bombala land, the Liquidators made an adjustment to transfer a portion of the value ascribed to the Bombala land to the trees on the Bombala land to reflect an apportionment that was more in accordance with the M3 Property land valuation and the Poyry trees valuation. The consequence is that the relevant Growers will receive more for their trees on the Bombala land than allocated by GFP in the revised bid. The Liquidators considered that they are acting in the best interests of both the Growers and WFL's unsecured creditors, although it decreases the amount that will be payable to the unsecured creditors. I consider that the Liquidators are justified in allocating the proceeds referable to the land as proposed based on value.

95 The Liquidators consider that the fairest method of apportionment amongst the Growers is to pool the proceeds and to distribute them on a scheme-by-scheme basis. The various schemes contain different provisions about whether the proceeds of sale should be pooled and distributed on a project-by-project basis or whether Growers should be entitled to the proceeds of sale specifically referrable to their trees. Some schemes provide that the Growers are responsible for managing and harvesting their own trees and are silent on how the proceeds of sale should be distributed and whether the RE is responsible for managing and harvesting. Other schemes provide for pooling and distribution in proportion to the Growers' interest in the scheme. In determining how the sale proceeds referrable to trees are to be allocated as amongst the Growers, the Liquidators have ascribed a value to the trees on the land used by each scheme, on a scheme-by-scheme basis, based upon the GFP allocation between land and trees (apart from the Bombala adjustment) and then reallocated the amount for trees between the schemes by reference to the proportionate values of the trees on the land used by the particular scheme that were determined by the Poyry trees valuation. I consider that the Liquidators are justified in allocating the sale proceeds referrable to the value of the trees on a scheme-by-scheme basis in the manner proposed.

96 WAG argued that the Liquidators are not acting in the best interests of the Growers in accepting the GFP revised bid. First, they contended that trees have been sold at under market value. The Liquidators have acknowledged that GFP's revised offer (taking into account the Bombala adjustment) for the trees amounts to approximately 45-96% of the value set out in the Poyry trees valuation, depending on whether a discount rate of 8.5% or 10.5% is applied. The short answer is that no party has been willing to take over the schemes that will be affected by the land sales and the economic value of the trees cannot be realised except as part of the land sales. Also, the contention is premised on the fundamental misconception that the Liquidators' fiduciary duties are owed only to the Growers as members of the schemes of which WFL is RE. They are not. In *Timbercorp Securities Ltd v WA Chip & Pulp Co Pty Ltd*,[98] Finkelstein J stated:

> 8. It is, I think, necessary to say something about the position of a liquidator of a responsible entity which is in the course of being wound up in insolvency. The liquidator is fiduciary. The principal beneficiaries of the duties owed by the liquidator in their capacity as a fiduciary are those who are interested in the liquidation, namely the creditors and members. Moreover, as a fiduciary the liquidator must act impartially between all those who are interested in the winding up.
>
> 9. Is the position of a liquidator of a responsible entity any different? The Corporations Act requires a managed investment scheme to have a responsible entity operate the scheme: s 601FB. The responsible entity must be a public company that holds an Australian financial services licence authorising it to operate a managed investment scheme: s 601FA. Strict duties are imposed on a responsible entity under s 601FC. One duty is that the responsible entity must act in the best interests of members and, if there is conflict between the members' interests and the entity's own interests, it must give priority to the members' interests: s 601FC(1)(c). This duty overrides any conflicting duty an officer of the responsible entity has under Pt 2D.1: s 601FC(3). Part 2D.1 contains the general duties owed by directors and other officers of a corporation. Included among them is the duty to act with reasonable care and diligence (s 180), the duty of good faith (s 181), and the obligation to not use their position to improperly gain an advantage (s 182).
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> 10. The Corporations Act also imposes duties upon an officer (which would include a liquidator) of a responsible entity: see s 601FD. The duties are similar to those owed by the responsible entity. Like the obligations of the responsible entity, the duties of an officer override

98 [2009] FCA 901

any conflicting duty the officer has under Pt 2D.1: s 601FD(2).

> 11. The liquidators seem to be of the opinion that by reason of ss 601FC and 601FD they are required to look after the interests of investors even if that be at the expense of other creditors. In my view that is wrong. There is nothing in ss 601FC or 601FD that overrides the liquidator's duty to those interested in the winding up. It would be quite extraordinary were that to be the case...

An important consequence of the fiduciary position of the Liquidators in relation to the company, its creditors and members is that the Liquidators have imposed on them the duty to act at all times with complete impartiality between the various persons interested in the property and liabilities of the company. Thus the interests of the Growers are not the only or primary consideration of the Liquidators.

97 Secondly, WAG contended that the Liquidators cannot be acting in the best interests of Growers because the schemes have been treated collectively by the Liquidators and not separately as they should, having regard to the fiduciary duties that the Liquidators owe separately to members of each scheme. It was contended that the result of treating the schemes collectively is that some schemes will receive less for the trees than other schemes. Some schemes will receive as low as 10% of the market value of the trees whereas other schemes will receive an amount that exceeds market value of those trees. This contention assumes that by treating the schemes collectively, the Liquidators are not treating each scheme separately and are not acting in the best interests of the members of each scheme. However, the fact that there are several schemes does not mean that the Liquidators cannot deal with them collectively. The question is not whether the Liquidators are dealing with the schemes collectively but whether the Liquidators are treating the schemes as if they were all one scheme. In my view the Liquidators must treat the schemes separately for the purpose of distribution of sale proceeds to the Growers in each particular scheme.[99]

98 It is relevant here that in treating the schemes collectively, the Liquidators took into account that the schemes are not a going concern and were of the view that the GFP

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99 *Trio Capital Limited (Admin App) v ACT Superannuation Management Pty Ltd & Ors* (2010) 79 ACSR 425; [2010] NSWSC 941.

offer was the best offer that emerged from the sale process, which included seeking expressions of interest for the acquisition of the land encumbered by the Growers' rights. The Liquidators gave a comprehensive explanation as to why they considered that it is in the best interests of the Growers to proceed with the sale to GFP. That explanation included that there is no party willing to take over as RE of the schemes, the trees cannot be managed or maintained without a RE or some form of manager, the assets are wasting and losing value, the Liquidators are without funds apart from a personal loan, and that the GFP revised offer was the second highest offer received, with serious concerns about the ability of the highest bidder to complete the transaction on time or at all.

99 It is also relevant that the Liquidators gave consideration to whether the amount payable to the Growers should be determined on a plantation-by-plantation basis or on a project-by-project basis and also gave consideration as to how the proceeds should be allocated amongst the Growers on a scheme-by-scheme basis. In answering that question they needed to consider whether it was appropriate for the proceeds of sale to be pooled.

100 The evidence bears out that the Liquidators have not treated the schemes as if they are all one scheme but have looked to the separate interests of the Growers in each scheme.

101 Thirdly, WAG relied on an independent expert, Mr Blair, who opined that the value of the trees determined by Poyry was too low and that the value of the trees determined by M3 Property was too high and, based on that evidence, that the amount that the Growers are to receive for their trees is an even smaller proportion of the market value and therefore not in their best interests. I do not accept the contention that the value of the trees determined by Poyry was too low. The fundamental difference between the expert evidence of Mr Blair on the one hand and Poyry on the other is that Mr Blair was instructed to assume that the present scheme arrangements will run to full term whereas as Poyry and M3 Property conducted

their respective valuations of the trees and the land on the assumption that the schemes will not continue following the sale to GFP. Mr Blair however generally agreed with Poyry and M3 Property's valuations if the operative assumption is that the land and the trees are to be valued on the basis that the Growers' interests are to be extinguished and the assets sold on an unencumbered basis. In my view, that is the correct assumption to be made. The completion of the amended sale contracts is predicated upon the extinguishment of the Growers' rights and the release of the security over the charged assets. The land and trees, if sold pursuant to the main sale contracts, will not be encumbered by those rights and securities.

102 Furthermore, Mr Blair conceded that the schemes are not a going concern unless Growers or a new RE agreed to make the additional funding available which Poyry had determined was required in order to meet the immediate and future management costs associated with the continued maintenance work required in order to keep the schemes viable and unless a new RE was appointed. An essential foundation for the viability of the schemes is the provision of a further $336m in funding ($123m net present value). The evidence of the expert from Poyry, Mr Dickinson, was that unless funding is received for each specific scheme, those schemes will not be viable. There is no evidence before the Court that the Growers will make funding of this magnitude available. Nor is there evidence before the Court that a new RE is willing to replace WFL. PSL has agreed to work with WAG to determine whether it may be willing to take over as RE of some of the schemes, but at present there is no proposal on foot and no more than a possibility that a proposal may eventuate at some unknown time in the future. Accordingly, the assumption that the schemes should be valued on a going concern basis is not made out on the evidence.

(b) Main Sale contracts: leasehold land

103 In relation to the sale of WFL's leasehold interest in the Forestry NSW land, GFP did not allocate a value to the land, but rather an amount for the trees. Under the GFP

sale contract what GFP is acquiring is a novation of the "Basic Contract for Forestry Management of Forests NSW Land" between Forestry NSW and WFL ("the Forestry NSW Basic Contract"), along with assignments of ancillary agreements including the Forestry NSW leases and a Forestry Rights Deed ("the Ancillary Documents"). Both the Forestry NSW basic contract and the Forestry NSW leases are property and/or rights of WFL that are within the scope of the Receivers' appointment. The Poyry trees valuation concluded that the trees on the plantations on the Forestry NSW leasehold land have a negative value.

104 The Receivers' position is that they ought properly be entitled to receive the full amount of the consideration to be paid by GFP in respect of the FNSW Land and trees because, although an amount has been allocated by GFP in relation to the trees, WFL prepaid license fees to Forestry NSW in an amount which is approximately double the amount that GFP allocated to the trees. By accepting the novation of the Forestry NSW Basic Contract, GFP will take the benefit of the remaining period in respect of which the license fees were prepaid, which is 27 months out of 63 months. The Receivers say that the outcome is consistent with the trees standing on the Forestry NSW leases having a negative value and that they ought properly be entitled to receive the full amount of the consideration to be paid by GFP in respect of the Forestry NSW land and trees.

105 The Receivers and the Liquidators have agreed that the consideration should be shared in the proportions of 30% in favour of WFL and 70% in favour of the Receivers. It was submitted that this compromise provides a favourable outcome for Growers in schemes conducted on the Forestry NSW lease land, especially having regard to Poyry's view that the trees on those plantations have a negative value.

106 As I am of the view that the leasehold is not scheme property, the Liquidators are acting reasonably in the circumstances in reaching that commercial compromise with the Receivers.

(c) HVP Sale contract

107 The amount payable by HVP under the HVP sale contract is for the acquisition of the trees growing on the land that WFL leased from HVP (and related entities) ("the HVP leases"), and for the full surrender of the HVP leases and the sub-leases of the HVP land from WFL to the Growers. The terms of the HVP sale contract are set out in a document described as the "Final Implementation Deed". Clause 3.1 of that agreement provides that the purpose of the Deed is "to provide a clear exit for the parties and the Growers from the current arrangements in relation to the [HVP] Land" with the effect that HVP will hold the land as absolute owner "free and clear" of the interests of WFL and the Growers in the HVP land.

108 The Receivers are a party to the HVP contract because WFL's rights and claims under the HVP leases fall within the scope of the charge and the Receivers' appointment and it is a condition precedent to the Deed that the Receivers and secured creditors provide releases in connection with the surrender of the HVP leases. The Receivers and secured creditors would not give their consent to the sale without upfront agreement with the Liquidators on the amount that they would receive out of the sale proceeds. Negotiations between the Liquidators and the Receivers concluded with an agreement that the secured creditors would be entitled to 70% of the consideration referrable to the surrender of the leases and releases to be given by the Receivers and that the Growers would be entitled to 30% of the consideration referrable to the trees grown on the HVP land. This allocation was made a term of the HVP sale contract.

109 The apportionment represented a commercial compromise between the Receivers and the Liquidators to enable the HVP sale contract to proceed. In assessing the appropriateness of the apportionment, the Liquidators had regard to Poyry's valuation of the trees grown on the land which they considered was the maximum value of the Growers' claim on the basis that the HVP leases are not scheme property (which was the advice that the Liquidators had received). The Liquidators also had

regard to the quantum of a potential claim by WFL against HVP for recovery of prepaid rent relating to the unexpired term of the HVP leases, which was within the scope of the charge and the Receivers' appointment for which the Receivers and secured creditors have to give a release under the HVP contract.[100] The Liquidators considered that this was the maximum value of the Receivers' claim. As at the date of the Receivers' appointment the unused portion of the rent paid upfront by WFL was approximately $31.7m.

110 The Liquidators consider that the deal embodied in the HVP sale contract is in the best interests of Growers given that HVP has a right to terminate the HVP leases and forestry management agreements (under which HVP provided forestry services to WFL) for breaches of those agreements by WFL, including WFL's failure to pay maintenance fees and direct costs to HVP in an amount of $2.9m, and given that WFL is unable to rectify the breaches because it is insolvent. If HVP terminated the leases, WFL and/or the Growers would have three months to remove the trees from the HVP land and all interests would terminate after that time. The Liquidators took advice that Growers could only claim relief against forfeiture or step into WFL's rights as lessee if they agreed to pay all outstanding amounts to HVP immediately and agreed to continue to pay ongoing fees and costs for the remainder of the HVP leases (and the Liquidators estimate that those costs are more than the value of the trees). The Liquidators also took advice that, on the basis that the HVP leases are not scheme property, the Receivers had a claim against HVP for the value of the prepaid rent relating to the unexpired term of the HVP leases (or that this sum represented what an arm's length third party would pay WFL for the assignment of its rights under the HVP leases). In the view of the Liquidators, the Growers are better off with the deal that has been struck with the Receivers as there is a risk that the Receivers have a claim to the whole of the proceeds as constituting a payment for the value of the surrender of the leases and the releases of any claims arising in connection with the HVP leases because the trees have no economic value, if land

100 *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359; *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457; *Dies v British & International Mining and Finance Corp Ltd* [1939] 1 K.B. 724; *Stockloser v Johnson* [1954] 1 Q.B. 476.

holding costs are taken into account. Poyry, in valuing the trees, had not included land holding costs as the rent had been prepaid.

111 The Receivers' position was that no part of the consideration was attributable to the acquisition of the trees because the trees have a negative value, if land holding costs are taken into account. The Receivers contended that the consideration was for the surrender of the HVP leases, and that as those leases are not scheme property, they are entitled to receive the full amount of the consideration payable by HVP under the HVP sale contract. Nevertheless the Receivers were prepared to agree to a compromise in order to achieve a settlement but would not accept less than 70% of the consideration.

112 It was argued for WAG, on the other hand, that the proposed apportionment was not justified and is not in the best interests of the Growers. In addition to the contention that the HVP leases are scheme property, it was contended that the consideration that HVP has agreed to pay grossly undervalues the interests of the schemes. This argument was predicated on the proposition that the amount of consideration which HVP will pay under the HVP sale contract does not factor in the unused rent portion for which HVP may be liable to repay to WFL.

113 The formal offer from HVP in fact expressly stated that the amount which it offered was determined without attributing any rental cost to the trees because the rental charge had been paid up front and that the value of its offer for the trees was based on a valuation of the trees which incorporated the cost of access to that land on an ongoing basis. HVP's stated position was that the trees had negligible economic value without the access rights on a ongoing basis due to the young age of the trees.

114 The evidence showed that the Receivers and the Liquidators recognised that WFL had a potential claim for reimbursement of the unused rent[101] and that HVP and the Liquidators recognised that it would be necessary for the Receivers and the secured lenders to give appropriate releases to WFL to surrender the HVP leases in order for

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101 *Sandtara Pty Ltd v Abigroup Ltd* (1996) 42 NSWLR 491.

HVP to retain the benefit of the upfront rent and to provide the clean exit that HVP sought. This was reflected in the offer conditions set out in the preliminary HVP offer which made it a condition of that offer and of the subsequent HVP offer that WFL and the Receivers provide a full and final release of HVP and its related parties.

115 Accordingly, the evidence bears out that the quantum of the HVP offer reflected the substantial value of the releases to be obtained from the Receivers on behalf of WFL. In the Final Implementation Deed, the substantial value of those releases to HVP is reflected in the stated purpose of the deed and the forms of releases that WFL and the Receivers will give in favour of HVP.

116 In the circumstances I am satisfied that there is a legal foundation supporting the proposed apportionment. I am also satisfied that that the Liquidators have acted reasonably in reaching the commercial compromise with the Receivers as to the proposed allocation of sale proceeds.

117 As to the allocation of the 30% of the proceeds as amongst the Growers, the Liquidators formed the view that the fairest and most equitable distribution will occur if the proceeds are held on trust and pooled and distributed to Growers in each scheme with the proceeds from the main sale contracts. The reason is that the schemes on the HVP leased land are also conducted on other parcels of land. The constituent documents governing the affected schemes provide for pooling and distribution on a scheme-by-scheme basis. Importantly, distribution of harvest proceeds is not made dependant on where a Grower's Woodlot is situated. These Woodlots are allocated to a Grower without the right of a Grower to specify the location of the Woodlots or to reject the allocation of the Woodlots. In the circumstances I consider that the Liquidators are justified and are acting reasonably in holding the proceeds due to the affected Growers on trust until those proceeds can be pooled and distributed with the other proceeds.

Willmott Forests Premium Timberland Fund No. 1

118 This fund was established as a unit trust managed investment scheme which had a two-limbed investment strategy. The Timberland Fund was established to undertake African mahogany forestry activities in the Northern Territory and to acquire and lease out North Coast land on which other WFL Forestry schemes would be conducted. Those activities were intended to provide returns to Growers through the harvesting of African mahogany and from rental income and the proceeds of sale from the North Coast land in which the fund invested. In this registered scheme, there is a clear nexus between the contributions made by the growers in the fund, the purchase of the relevant North Coast land and the use of that land to provide financial returns to Growers in that registered scheme. This contrasts markedly with the other schemes where the common enterprise underpinning the scheme was confined to forestry operations and did not include generating financial returns from rental income or from the sale of land. Accordingly, the North Coast land purchased by the Timberland Fund is scheme property and the Liquidators and Receivers accept that the proceeds of sale attributable to the value of that land should be distributed to the Growers in that scheme. The liquidators are justified in treating this scheme differently to the other schemes.

Sale process

119 Next, Senior Counsel for WAG sought to impeach the sale process and expression of interest campaign by arguing that the Liquidators "all along" wanted to sell the land unencumbered by the Growers' rights and that there was no real interest in replacing WFL as RE or in selling the land on an encumbered basis. It was put that:

> This is highlighted by the rushed expression of interest and sales campaign and the arbitrary rejection of those who expressed interest to assume the role of RE.[102]

120 Mr Crosbie was not cross-examined and there was no basis for making that submission on the evidence. The evidence bore out that the land was advertised for

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102 Outline of Submissions of WAG (Intervener) at [64].

sale on an encumbered as well unencumbered basis in the context of the need for urgent funding in order to continue to maintain the plantations, without which the plantations were at risk of wastage and impairment with the consequential diminishing in value of the trees. The evidence also bore out that the Liquidators did not "arbitrarily" reject the expressions of interest to assume the role of RE. The only expressions of interest in assuming the role of RE involved restructures of the schemes to obtain the immediate funding required and were subject to due diligence investigations in circumstances where the Liquidators did not have the funds available to continue maintaining the plantations and where no bidder would commit to taking over as RE.

121 I am satisfied on the basis of the evidence before the Court that the Liquidators engaged in a robust sale process.

Termination of the Growers' interests

122 Each of the constitutional powers inserted in the Constitutions and Investment Deeds of the registered schemes and the professional investor schemes is conditioned upon WFL obtaining Court approval before exercising its power to terminate any of the project agreements. In my view the Liquidators are justified in terminating the project agreements for the following reasons. First, WFL is hopelessly insolvent and incapable of continuing to manage the schemes. Secondly, the schemes themselves will not generate revenue until the first thinning is able to be carried out, which is several years hence in most, if not all, instances. Thirdly, the land and trees are wasting and are at risk of fire in the absence of adequate ongoing maintenance arrangements. Fourthly, I am satisfied that the Liquidators and Receivers have conducted robust sale processes and obtained the best prices reasonably available for the land and the trees from financially able purchasers. Finally, no viable restructuring proposal has been advanced in relation to the schemes, other than the 1995-1999 scheme, or the professional investor schemes. There is no viable alternative that offers the prospect of comparable returns to

Growers.

Disclaimer of contracts

123 For the same reason I am of the view that the Liquidators are justified in disclaiming the project documents of the contractual and partnership schemes. The forestry management agreements are onerous and unprofitable. Under these agreements WFL is required to establish, maintain and harvest the Growers' trees in circumstances where the terms of those management agreements are generally for 25 years. In most cases WFL will not receive any fees for doing so until the harvest of the trees and WFL would need to contribute $123m in net present value over the life of the schemes in circumstances where WFL does not have the requisite funds to do so.

Other discretionary factors

124 WAG raised three other matters, which it was argued were against the Court making the directions and orders sought in these applications.

125 The first matter is that WAG is pursuing with PSL the option to have PSL replace WFL as the RE for the unregistered professional investor schemes and the registered schemes. PSL has given its conditional consent to act as RE but the nature of the conditions make it clear that there is no actual proposal nor any binding commitment on the part of PSL. On 24 February 2012 WAG sent notices to members of the registered schemes and the professional investor schemes seeking authorisations to convene a meeting of members of those schemes. The notices sent to the Growers did not contain any particulars about any proposed restructuring or the resolutions that will be put to the Growers at those meetings to consider and vote on. WAG apparently received sufficient responses to support the convening of those meetings, which are yet to be called. But it is apparent that there is no restructuring proposal to put to the Growers. In the circumstances, neither the fact that some Growers have given authority to WAG to request the convening of the meetings nor

the fact of the Heads of Agreement entered into between WAG and PSL provide justification for not making the orders and directions sought.

126 The next matter was that the termination of the project documents will amount to a default under the loan agreements that some Growers entered into with the in-house financier of the schemes. This will have the effect of bringing forward the repayment date of the loans which it was argued, would produce a loss and inconvenience to the Growers by the direct conduct of WFL which must act in their best interests. It was also contended by WAG that the Liquidators should have brought this matter to the attention of the Court in making their applications because the applications are effectively *ex parte* hearings and the Liquidators therefore are subject to the obligation to make full and true disclosure of all material facts.

127 I do not think that these matters warrant the Court declining to make the orders and directions sought. First, because the applications were conducted as *inter partes* applications, not as *ex parte* applications and the matter has been brought to the attention of the Court on behalf of the Growers affected. Secondly, I would not conclude that the orders and directions sought should not be made because an incidental consequence of those orders and directions is that some Growers will have the time for repayment of their loans accelerated. The reasoning of Finkelstein J in *Timbercorp Securities Limited v WA Chip & Pulp Co Pty Ltd*[103] is apposite.

128 Finally, it was argued for WAG that the Court should direct that the proceeds be held on trust pending a further apportionment hearing similar to what occurred in *Re Timbercorp Securities Limited (in liq)*,[104] in the event that the Court rejected WAG's submissions and determined to approve the sale and the entry into the implementations deed and make the orders sanctioning the termination of the scheme documents. There are two primary reasons for not acceding to that submission. The first reason is that it is a term of the main sale contracts and of the HVP sale contract that the Liquidators allocate and distribute the proceeds of the

103 [2009] FCA 901.
104 [2009] VSC 590.

GFP sale and the HVP sale as between the Growers, the secured creditors and WFL's unsecured creditors in the manner that the Liquidators propose and those contracts are conditional upon the Court authorising the Liquidators to distribute the proceeds as between the Liquidators and the Receivers in accordance with the contractual terms. Secondly, for the reasons given, I am satisfied that it is just and beneficial that the Court approve the completion of the sale and approve the exercise by the Liquidators of the power to terminate and disclaim the project agreements on the basis of the proposed allocations.

Conclusion

129 Accordingly, the ten questions are answered as follows:

1. Are the questions that arise for determination in the applications suitable for determination pursuant to s 511 of the Act? *Yes.*

2. Are the Liquidators able to disclaim the Growers' leases with the effect of extinguishing the Growers' leasehold estate or interest in the subject land? *No.*

3. Have the Liquidators demonstrated on the material that they have acted reasonably and prudently in conducting the sale process and in entering into the main sale contracts and the HVP contract? *Yes.*

4. Is the allocation between land and trees justified having regard to the parties' legal rights; specifically is any of the land owned by WFL scheme property in respect of the schemes? *The allocation between land and trees is justified on the basis that WFL does not hold its interest in the freehold and leasehold on which the scheme are conducted on trust for the members of the schemes.*

5. Is the allocation of the sale proceeds from GFP between land and trees as proposed by the Liquidators, reasonable in the circumstances? *Yes.*

6. Having regard to the insolvency of the Willmott Group, the viability of the schemes and the existence of alternatives to the proposed sale, is the

extinguishment of the Growers' interests pursuant to the Liquidators' powers under the relevant constitutions and their statutory power under s 568(1), as the case may be, justified? *Yes.*

7. Is the apportionment between Growers of the sale proceeds from GFP and HVP (in respect of their interests in trees) as proposed by the Liquidators reasonable and justified having regard to the constituent documents of the various schemes? *Yes.*

8. Is the allocation of the sale proceeds of the HVP land between the Liquidators' portion (in respect of trees) and the Receivers' position (in respect of the surrender of the head lease) justified in the circumstances? *Yes.*

9. Is WFL's leasehold interest in the HVP land scheme property in respect of any of the schemes conducted upon the HVP land? *No.*

10. Are the Liquidators justified in recovering their costs from the assets in the manner they propose? *This question was stood over for further argument.*

130 Orders will be made in each application in the terms of the proposed orders and directions sought, apart from the order giving effect to the recovery of the Liquidators' costs.

SCHEDULE OF PARTIES

No. 6816 of 2011
No. 6762 of 2011

BETWEEN:

WILLMOTT FORESTS LTD (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 063 263 650)	First Plaintiff
CRAIG DAVID CROSBIE IN HIS CAPACITY AS LIQUIDATOR OF WILLMOTT FORESTS LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 063 263 650)	Second Plaintiff
IAN MENZIES CARSON IN HIS CAPACITY AS LIQUIDATOR OF WILLMOTT FORESTS LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 063 263 650)	Third Plaintiff
BRYAN WEBSTER, MARK KORDA and MARK MENTHA IN THEIR CAPACITY AS RECEIVERS AND MANAGERS OF WILLMOTT FORESTS LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 063 263 650)	Interveners
WILLMOTT GROWERS' GROUP INC.	Intervener
WILLMOTTACTIONGROUP INC.	Intervener

CERTIFICATE

I certify that this and the 63 preceding pages are a true copy of the reasons for Judgment of Davies J of the Supreme Court of Victoria delivered on 3 April 2012.

DATED this third day of April 2012.

Associate