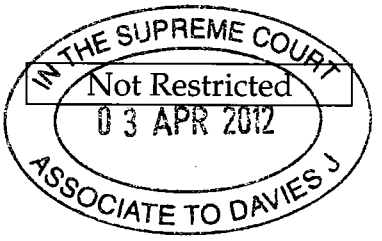
IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL COURT
CORPORATIONS LIST



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