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

LIST E

No. 7114 of 2009

IN THE MATTER OF TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION) ACN 092 311 469

TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION) ACN 092 311 469 IN ITS CAPACITY AS RESPONSIBLE ENTITY OF EACH OF THE MANAGED INVESTMENT SCHEMES LISTED IN SCHEDULE 1

FIRST PLAINTIFF

MARK ANTHONY KORDA AND LEANNE KYLIE CHESSER

SECOND AND THIRD PLAINTIFFS

ASIC'S SUBMISSIONS

Date of document: 14 July 2009
Filed on behalf of Australian Securities and Investments Commission

Contact: Andrew Tregear
120 Collins Street
Telephone: 9280 3218
Melbourne VIC 3000
Facsimile: 9280 3545
Email: andrew.tregear@asic.gov.au

SUMMARY

1. A new or temporary responsible entity takes on the full suite of statutory responsibilities for a scheme. This means that a new or temporary responsible entity must have the necessary resources to operate the scheme. Therefore any application

for the appointment of a new or temporary responsible entity must address the capacity of that entity to meet the financial commitments necessary to operate the scheme as well as its capacity generally to discharge the functions of an RE.

2. Managed investment schemes can be wound up on just and equitable grounds where:

   2.1. The original scheme arrangements have broken down;

   2.2. It is not possible for the scheme to continue in its current state; and/or

   2.3. The scheme is insolvent or investments of the scheme are in a questionable state.

3. Without an appropriate responsible entity to operate a scheme, the scheme should be wound up.

4. The Court has the power to order that a winding-up proceed in a different manner to that prescribed in a scheme's constitution so as to avoid complete cessation of a scheme's activities where it is shown that there is still some underlying viability in the Schemes that can realistically be salvaged.

5. All section references are to the *Corporations Act 2001* (Cth) unless otherwise stated.

ASIC'S ROLE

6. The Australian Securities and Investments Commission (**ASIC**) has participated in the applications seeking to wind-up the fourteen olive and almond horticultural schemes named in the Liquidators' Originating Process dated 4 June 2009 (the **Schemes**) as an amicus curiae.

7. In particular ASIC seeks to assist the Court:

   7.1. in determining how to deal with agricultural managed investment schemes where the responsible entity (**RE**) and/or the underlying scheme itself is, or may be, insolvent; and

   7.2. to achieve an appropriate balance between conflicting interests.

8. Therefore ASIC sees its role as an amicus curiae in these proceedings to be a friend of the court, an adviser of the court, and to make suggestions as to matters appearing on the record or in matters of procedure.

SHOULD A TEMPORARY OR REPLACEMENT RESPONSIBLE ENTITY BE APPOINTED?

The role of a temporary RE

9. As far as ASIC is aware, there are no reported cases that discuss in depth the appointment of a temporary RE pursuant to section 601FP. However, ASIC is aware of two cases where a court has appointed a temporary RE[1].

10. In *Gordon, in the matter of Heydon Park Ltd (ACN 082 041 076) (In Liquidation)* [2005] FCA 950 the Federal court of Australia appointed a temporary RE to two managed investment schemes where the previous RE was in liquidation and receivership. Hely J's reasons run to one paragraph (at [1]):

> *In this matter there is, at least, some doubt as to whether Heydon Park Ltd, which is in both receivership and in liquidation, continues to be the responsible entity for the Heydon Park Ginseng Project ARSN 101 443 216, and the Heydon Park Ginseng Project No 2 ARSN 107 685 263. I therefore have power under s 601FN of the Corporations Act 2001 (Cth), or alternatively under reg 5C.2.02 of the Corporations Regulations 2001 (Cth) to appoint a temporary responsible entity to each of those schemes. I am satisfied that Australian Hardwood Management Ltd has consented to being appointed as a temporary responsible entity. I am also satisfied that it is a public company that holds an Australian Financial Services Licence authorising it to operate these managed investment schemes. Furthermore, it is clear, in my view, that the interests of growers of the two projects would be furthered by the appointment of Australian Hardwood Management Ltd as their temporary responsible entity.*

11. In *Hunt v Mortgages North (Qld) Ltd* BC200102635 (Supreme Court of Queensland) a temporary RE was appointed due to the failure of the previous RE to have three directors as required.by section 201A(2).

12. In ASIC's submission neither of these cases provides any real assistance to the Court in relation to the issues raised in the present proceeding.

[1] ASIC is also aware that there have been some orders made for the appointment of temporary REs by consent. For example, in 2002 a temporary RE was appointed to a number of property schemes upon an application by ASIC, but the appointment was facilitated by the fact the previous RE had surrendered its dealer's licence and had entered into an enforceable undertaking with ASIC that it would step aside.

13. The exact role of a temporary RE is not beyond doubt. The *Explanatory Memorandum* to the *Managed Investments Bill 1997* says the following about the role of a temporary RE:

> *8.35 The temporary responsible entity will be required to take steps either to ensure that a new responsible entity is appointed by the members or, if this fails to occur, to apply to the Court to have the scheme wound up.*

14. The *Explanatory Memorandum* goes on to state that:

> *Where a new responsible entity is appointed, it will assume all the rights, obligations and liabilities that were vested in the former responsible entity, other than any right to indemnification held by the former entity or any liability for which the former entity would not have been indemnified out of scheme property (**proposed section 601FS**). The purpose of the section is to ensure that the former entity has the right to be reimbursed for expenses properly outlaid, or liabilities properly incurred, on behalf of the scheme.*

15. While the Explanatory Memorandum may be read as suggesting that a temporary RE (as opposed to a replacement RE) does not inherit the obligations of the previous RE, it is ASIC's view that any temporary RE would assume the rights, obligations and liabilities of Timbercorp Securities Limited (**TSL**) pursuant to section 601FS (and Division 3 of Part 5C.2).

16. ASIC's preferred interpretation of the role of a temporary RE is also consistent with:

    16.1. the definition of "responsible entity" in section 9:

    > *"responsible entity" of a registered scheme means the company named in ASIC's record of the scheme's registration as the responsible entity or temporary responsible entity of the scheme;* and

    16.2. the operation of section 601FC(2):

    > *The responsible entity holds scheme property on trust for scheme members.*

17. Indeed, in *Re Investa Properties Ltd and Another* (2001) 187 ALR 462, Barrett J of the NSW Supreme Court stated (at [13]) that:

> *Section 601FC(2) produces a legal result when two circumstances coincide. One is that a particular entity is the "responsible entity" of a particular registered managed*

investment scheme. The other is that particular property is "scheme property" of that scheme. The legal result of the coincidence of circumstances is that the entity holds the property and does so as trustee.

18. Justice Barrett considered this issue further in a paper delivered in 2008[2]. He said (p.11ff):

If there is going to be an appointment of a temporary responsible entity, there must first be some qualified company willing to be appointed, even if only temporarily. That, I suggest, will be a problem. When a new responsible entity takes office, it becomes, under s 601FS, the statutory inheritor of the rights, obligations and liabilities of the old responsible entity in relation to the scheme. The workings of that section were examined in both Investa Properties Ltd v Westpac Property Funds Management Ltd *(above) and* Syncap Management (Rural) Australia Ltd v Lyford *(2004) 51 ACSR 223. In our postulated situation, the successor will come to owe the debts that brought the old responsible entity undone and to have the rights of recoupment that were insufficient to allow it to continue. Simple replacement of the responsible entity in liquidation therefore does not seem a practical possibility. The automatic vesting of the non-viable combination of liabilities and inadequate rights of recoupment must mean that, in the real world, there will never be a new responsible entity.*

19. If a temporary RE is to be effective in its role it must have effective control of the Schemes. In contract based schemes, a temporary RE would be unable to do this without the operation of Division 3 of Part 5C.2 because many, if not all, of the underlying contracts would have the previous RE as the key contracting party.

20. The reach of Division 3 of Part 5C.2 is particularly important where the situation involves, as it does here, a previous RE that is said to be insolvent. If section 601FS did not catch a temporary RE, the external administrators of the previous RE might well be forced to disclaim or otherwise terminate much of the contractual substrate of the schemes during the tenure of the temporary RE. Furthermore, in that situation the rights of the previous RE to be indemnified out of the scheme's assets are protected by section 601FH. This would most likely lead to a rapid dissolution of the scheme

[2] "Insolvency of registered managed investment schemes" delivered to the Banking and Financial Services Law Association, Queenstown, New Zealand, July 2008.

and any remaining value leaving the temporary RE to do nothing but wind-up the scheme.

21. The operation of section 601FS also arguably protects the interests of scheme members from the creditors of an insolvent RE – if the right to indemnity and liabilities from a scheme are transferred to a temporary RE then that protects the assets of the scheme from the creditors of the previous RE. This would also mean that section 601FH would be of no avail to the liquidators of TSL as that entity would no longer be the RE of the Schemes.

22. It should be noted that section 601FS(2)(d) provides that some liabilities will stay with the previous RE. Whether a particular liability is transferred to a new RE may depend as a matter of fact on whether the particular Scheme's constitution allows for the RE to be indemnified in respect of that liability from scheme property: section 601GA.

Temporary RE versus a winding-up

23. The material before the Court at the time of filing these submissions does not squarely address the position of Growers if either:

    23.1. A temporary RE is appointed; or

    23.2. The Schemes are wound up.

24. It is ASIC's submission that the Liquidators' material should address this issue as far as practicable because:

    24.1. The Liquidator of TSL, as RE of the Schemes, has an obligation to act in the best interests of Growers;

    24.2. As an application has been made for the Court to appoint a temporary RE, both the Court and Liquidator are seized of the fact that a temporary RE is being put forward as an alternative to winding up;

    24.3. The Liquidator of TSL, as RE of the Schemes, has to make a decision about which option (ie: winding up or a temporary RE) is in the best interests of Growers; therefore

    24.4. The Liquidator should, to the extent possible, advise the Court and Growers as to what the immediately foreseeable effects of winding up versus the appointment of a temporary RE (including which, if any, liabilities would be

transferred to a temporary RE) would have on both the interests and obligations of the Growers under the Schemes,

Should a temporary RE be appointed to the Schemes?

25. If ASIC's submissions as to the application of Division 3 of Part 5C.2 to a temporary RE are accepted, then when a Court considers under section 601FP whether the appointment of a temporary RE is in the interest of members, the Court should be satisfied that the proposed temporary RE is in a position to take over a scheme financially, as well as comply with the relevant statutory obligations.

26. In other words, it cannot be in the interests of members to appoint a temporary RE which is incapable of running the Schemes while they are in office.

27. In Section 8 of the reply affidavits of Mr Korda sworn on 9 July 2009[3], he deposes as to the solvency of the Schemes on the basis of their ability to pay their debts as they fall due. In particular, Mr Korda deposes that KordaMentha's analysis of the cashflow and capital expenditure requirements for each of the Schemes up to the end of September 2009 suggests that each of the Schemes is insolvent or unable to meet their expenses as they fall due.

28. In some cases the funding shortfall posited by Mr Korda in his affidavits for the period up to the end of September 2009 runs into millions of dollars[4].

29. None of the material put forward by the applicants for a temporary RE to be appointed to the Olive Schemes squarely addresses the capacity of the proposed temporary RE

---

[3] Supplementary and Reply Affidavit of Mark Anthony Korda – 2001 Timbercorp Olive Project (sworn 9 July 2009); Supplementary and Reply Affidavit of Mark Anthony Korda – 2002 Timbercorp Olive Project (sworn 9 July 2009); Supplementary and Reply Affidavit of Mark Anthony Korda – 2003 Timbercorp Olive Project (sworn 9 July 2009); Supplementary and Reply Affidavit of Mark Anthony Korda – 2004 Timbercorp Olive Project (sworn 9 July 2009); Supplementary and Reply Affidavit of Mark Anthony Korda – 2006 Timbercorp Olive Project (sworn 9 July 2009); Supplementary and Reply Affidavit of Mark Anthony Korda – 2007 Timbercorp Olive Project (sworn 9 July 2009); Supplementary and Reply Affidavit of Mark Anthony Korda – 2008 Timbercorp Olive Project (sworn 9 July 2009); Supplementary and Reply Affidavit of Mark Anthony Korda – 2001 Timbercorp Almond Project (sworn 9 July 2009); Supplementary and Reply Affidavit of Mark Anthony Korda – 2002 Timbercorp Almond Project (sworn 9 July 2009); Supplementary and Reply Affidavit of Mark Anthony Korda – 2003 Timbercorp Almond Project (sworn 9 July 2009); Supplementary and Reply Affidavit of Mark Anthony Korda – 2004 Timbercorp Almond Project (sworn 9 July 2009); Supplementary and Reply Affidavit of Mark Anthony Korda – 2005 Timbercorp Almond Project (sworn 9 July 2009); Supplementary and Reply Affidavit of Mark Anthony Korda – 2006 Timbercorp Almond Project(sworn 9 July 2009); and Supplementary and Reply Affidavit of Mark Anthony Korda – 2007 Timbercorp Almond Project(sworn 9 July 2009).

[4] For example see: Supplementary and Reply Affidavit of Mark Anthony Korda – 2006 Timbercorp Olive Project (sworn 9 July 2009); Supplementary and Reply Affidavit of Mark Anthony Korda – 2007 Timbercorp Almond Project (sworn 9 July 2009).

to meet the expenses of each of the Schemes[5]. Furthermore, the Challis and Smith affidavits in relation to the Olive Schemes (the only deponents who name a proposed temporary RE) both depose that additional capital would be required to operate the underlying Olive Schemes[6].

30. At the time of filing these submissions no party has substantively challenged the cashflow and capital expenditure requirements for each of the Olive Schemes put forward by Mr Korda in his affidavits of 9 July 2009. That is, no substantive alternative budget has been put forward as an appropriate and achievable model for any of the Olive Schemes.

31. None of the material put forward by the applicants for a temporary RE to be appointed to the Almond Schemes squarely address the capacity of the proposed temporary RE to meet the expenses of each of the Schemes[7].

32. At the time of filing these submissions no party has substantively challenged the cashflow and capital expenditure requirements for each of the Almond Schemes put forward by Mr Korda in his affidavits of 9 July 2009. That is, no substantive alternative budget has been put forward as an appropriate and achievable model for any of the Almond Schemes.

33. In ASIC's submission it cannot be in the interest of members to appoint a temporary RE to any of the Schemes where:

    33.1. The evidence as to the interim funding required to operate the Schemes has gone without substantive challenge;

    33.2. A proposed temporary RE has not deposed with adequate evidence that it is financially capable of running any of the Schemes it proposes to take over; and/or

    33.3. A proposed temporary RE has not deposed with adequate evidence what additional funding or capital it would require to make it capable of running any of the Schemes it proposes to take over.

---

[5] Affidavit of Paul Challis (sworn 3 July 2009) in relation to the Olive Schemes; affidavit of Robert Smith (sworn 10 July 2009) in relation to the Olive Schemes; affidavit of Owen Lennie (sworn 8 July 2009) in relation to the Almond Schemes.

[6] Affidavit of Paul Challis (sworn 3 July 2009) at paragraph 7(c); affidavit of Robert Smith (sworn 8 July 2009) at paragraphs 12 and 18.

[7] Affidavit of Owen Lennie (sworn 8 July 2009).

Process of appointing a temporary RE under the Corporations Act

34. Application has been made pursuant to Regulation 5C.02.2 of the *Corporations Regulations 2001* (Cth) for the appointment of a temporary RE to the Schemes. That regulation provides:

> *ASIC, or a member of a registered scheme, may apply to the Court for the appointment of a temporary responsible entity of the scheme if ASIC or member reasonably believes that the appointment is necessary to protect scheme property or the interests of members of the scheme.*

35. ASIC perceives a lacuna in the legislation in relation to an application pursuant to Regulation 5C.02.2, namely:

    35.1. Part 5C of the *Corporations Regulations 2001* (Cth) does not provide any power for the Court to actually appoint a temporary RE; and

    35.2. Division 2 of Part 5C.2 of the Corporations Act 2001 (Cth) (section 601FP in particular) only provides for the appointment of a temporary RE pursuant to sections 601FL or 601FN – not pursuant to Regulation 5C.02.2.

36. Relevantly, section 601FN provides that:

> *ASIC or a member of the registered scheme may apply to the Court for the appointment of a temporary responsible entity of the scheme under section 601FP if the scheme does not have a responsible entity that meets the requirements of section 601FA.*

37. The requirement in section 601FA is that the RE be a public company that holds an Australian financial services licence (**AFSL**) authorising it to operate a managed investment scheme.

38. Therefore, as a matter of fact the Schemes still have an RE (TSL) that, despite being in liquidation, satisfies the requirement in section 601FA. Consequently, the threshold requirement for an application under section 601FN is not met.

39. Because TSL is in liquidation, it is open to ASIC to cancel their AFSL pursuant to section 915B(3)(b). However, where an AFSL holder goes into liquidation, ASIC considers whether revocation of licence (or of parts of it) is appropriate, having regard

to (among other things) the effect of revocation on the interests of the people to whom the financial services are provided.

40. If the Court is persuaded that a temporary RE should be appointed to any of the Schemes, ASIC proposes the following solution:

    40.1. Regulation 5C.02.2 is valid to the extent that the Court is seized of an application to appoint a temporary RE

    40.2. If the Court decides that it would grant that application but for the fact that it has no power to do so, then ASIC could cancel the relevant authorisations of the AFSL and the Court could then treat the Regulation 5C.02.2 application as a 601FN application and grant it.

WINDING UP ON JUST AND EQUITABLE GROUNDS

When can a registered managed investment scheme be wound up on just and equitable grounds?

41. There is a proper basis to wind up a registered managed investment scheme on just and equitable grounds where:

    41.1. The original scheme arrangements have broken down: *ASIC v Knightsbridge Managed Funds Ltd* [2001] WASC 339 at [64] (appeal dismissed in *Kay v ASIC* (2002) 43 ACSR 229).

    41.2. It is not possible for the scheme to continue in its current state. For example: where the RE is being wound up and there is no active management (*Cumulus Wines Pty Ltd v Huntley Management* (2004) 50 ACSR 58 at [26] – [27] at per Austin J) or there is no practicable prospect of a temporary or replacement RE to take over the scheme financially as well as comply with the relevant statutory obligations (*Re PWL -- ACN 084 252 488 Ltd; Ex Parte PWL Ltd (Formerly Palandri Wines Ltd) (Administrators Appointed) [No 2]* [2008] WASC 232 (at [18]).

    41.3. The scheme is insolvent (*Shepard v Downey* (2009) 69 ACSR 530 at [114] per Judd J) or investments of the scheme are in a questionable state: *ASIC v Chase Capital Management Pty Ltd* (2001) 36 ACSR 778 at [82] – [83] per Owen J.

42. The actual decision as to whether it is proper to wind up a registered managed investment scheme on just and equitable grounds will depend on the facts in each case.

Should the Schemes be wound up on just and equitable grounds?

43. It is uncontested that TSL (the RE to the Schemes) is insolvent and in liquidation[8].

44. Due to its insolvency, TSL cannot continue to operate the Schemes.

45. The Schemes cannot operate without a functioning RE.

46. Therefore, irrespective of the viability of individual Schemes (about which ASIC makes no comment), the Schemes cannot continue without an appropriate temporary or replacement RE and should be wound up, subject to the issues raised in paragraphs 47 to 52.

Does a winding up order necessarily spell the end for a scheme?

47. Section 601NF(2) provides that:

> *The Court may, by order, give directions about how a registered scheme is to be wound up if the Court thinks it necessary to do so (including for the reason that the provisions in the scheme's constitution are inadequate or impracticable).*

48. ASIC considers that section 601NF(2) gives the Court the power to order that a winding-up proceed in a different manner to that prescribed in the scheme's constitution. In particular, the Court has power to craft its relief so as to avoid complete cessation of a scheme's activities where it is shown that there is still some underlying viability in the Schemes that can realistically be salvaged.

49. In *Re GDK Financial Solutions Pty Ltd and Others; Australian Securities and Investments Commission v GDK Financial Solutions Pty Ltd and Others* (2006) 236 ALR 699 Finkelstein J held (at [20]) that:

> *Although the winding-up order permits investors to insist that steps be taken for the scheme to be brought to an end, if all the investors are in agreement the winding up need not follow the same steps as the winding up of a company. If the scheme has*

[8] See, for example, the Supplementary and Reply Affidavit of Mark Anthony Korda – 2001 Timbercorp Olive Project (sworn 9 July 2009) at paragraphs 3 and 9.3.

failed, the company model is likely to be the only appropriate method for the winding up. I think that is what Keane JA must have had in mind when he said in Mier v F N Management Pty Ltd *[2005] 1 Qd R 339 ; (2005) 56 ACSR 93 ; [2005] QCA 408 at [15]–[16] (*Mier*) that the winding up of a managed investment scheme should follow the same path as the winding up of a company. But this will not always be appropriate, especially when the scheme is a successful commercial venture. In that event all that might be required is a reorganisation or reconstruction that will alter the relationship between the parties to ensure that their continued association is lawful. This was recognised in* Warne v GDK Financial Solutions Pty Ltd*;* Billingham v Parbery *(2006) 24 ACLC 1000 ; [2006] NSWSC 259. See also* Australian Securities and Investments Commission v Atlantic 3 Financial (Aust) Pty Ltd *(2003) 47 ACSR 52 ; [2003] QSC 265.*

50. In *GDK* itself the winding up order was crafted so as to preserve the existing agreements in the interim. In *Lake Coogee Estate Management Pty Ltd v Australian Securities and Investments Commission* [2007] FCA 692 the Court ordered that the winding up of an unregistered managed investment scheme was to include the completion of the scheme[9].

51. Some of the affidavits put forward in support of the appointment of a temporary RE point to the existence of proposals to manage some of the Schemes but stop short of actually putting forward a temporary RE[10]. If the Court could be persuaded that there was merit in ordering that the winding up proceed in a particular fashion, then those proposals may still be put into effect.

52. In considering how the Schemes should be wound up the Court should consider, to the extent that it is reasonably possible, what immediate effect the winding-up will have on the Growers' interests and obligations under the Schemes: *Macquarie Capital Advisers Ltd and Anor v Brisconnections Management Co Ltd (as responsible entity for the Brisconnections Investment Trust and the Brisconnections Holding Trust) and Ors* [2009] QSC 82 at [68]. For example, the Court should be placed in a position to consider:

    52.1. How will the Growers interests in the Schemes, or the property of the Schemes and/or the crops be affected by ordering a winding-up?

[9] Order 4.1 stated: *The winding up of the Scheme is to involve Scheme Completion*.

[10] See affidavit of Paul Riordan (sworn 3 July 2009) and affidavit of Owen Lennie (sworn 8 July 2009).

52.2. Will there be any obligations on Growers to continue to make payments even if the Schemes are wound up?

COSTS

53. ASIC is content for any costs ordered as a result of the application to be costs in the proceeding.

54. ASIC does not intend to make an application for costs in relation to this application.

Date: 14 July 2009

I G Waller SC

Owen Dixon Chambers

St John Hibble

Douglas Menzies Chambers

Counsel for ASIC