

**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
(UNDER ADMINISTRATION)
ACN 092 311 469**

**TIMBERCORP SECURITIES LIMITED
(UNDER ADMINISTRATION) 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 CHESSE

SECOND AND THIRD PLAINTIFFS

ASIC'S SUBMISSIONS

Date of document: 16 June 2009
Filed on behalf of Australian Securities and
Investments Commission
120 Collins Street
Melbourne VIC 3000

Contact: Andrew Tregear
Telephone: 9280 3218
Facsimile: 9280 3545
Email: andrew.tregear@asic.gov.au

SUMMARY

1. On the basis of material provided to it at the time of filing these submissions, ASIC consents to the directions sought by Administrators.
2. All section references are to the *Corporations Act 2001* (Cth) unless otherwise stated.

POTENTIAL CONFLICT OF DUTIES

3. The issue has been raised that the Administrators may face potential conflict of duties in seeking to wind-up the fourteen olive and almond horticultural schemes named in the Administrators' Originating Process dated 4 June 2009 (the **Schemes**).

4. Section 601FC(1)(c) relevantly states:

(1) In exercising its powers and carrying out its duties, the responsible entity of a registered scheme must:

(c) act in the best interests of the members and, if there is a conflict between the members' interests and its own interests, give priority to the members' interests;

5. Section 601FD(1)(c) relevantly states:

(1) An officer of the responsible entity of a registered scheme must:

(c) act in the best interests of the members and, if there is a conflict between the members' interests and the interests of the responsible entity, give priority to the members' interests;

6. The Administrators have filed uncontested evidence that:

6.2. TSL is “hopelessly insolvent”¹;

6.3. the Schemes are “insolvent”²; and

6.4. “The administrators do not see any commercial alternative [to winding up the Schemes].”³

7. However, various parties (including the Administrators) have informed the Court that some of the Growers do not want the Schemes wound up⁴.

8. ASIC does not see the obligations in sections 601FC(1)(c) and 601FD(1)(c) as requiring a responsible entity or its administrators to act in manner that does not reflect practical reality. Further, in the absence of a practicable alternative to an application for winding up, the obligation to prefer the interests of scheme members over the interests of the responsible entity does not preclude the making of such an application simply because it may result in a benefit for the responsible entity or its creditors.

¹ Affidavit of Mark Anthony Korda sworn 4 June 2009 (**Korda Affidavit**): Paragraph 27.

² Korda affidavit: Paragraph 38.

³ Korda affidavit: MAK 5, page 2.

⁴ Korda Affidavit: paragraph 3.

9. Therefore, in the absence of sworn evidence that there is something that the Administrators, TSL or other parties could achieve both promptly and as a matter of practical reality to both:

- 9.1. Continue the operation of the Schemes; and

- 9.2. Facilitate the orderly and timely administration of TSL,

ASIC consents to the directions sought by Administrators.

APPOINTMENT OF A TEMPORARY RESPONSIBLE ENTITY

10. It has been put to the Court that ASIC could apply to the Court for the appointment of a temporary responsible entity for the Schemes pursuant to section 601FN.
11. Any temporary responsible entity would assume the rights, obligations and liabilities of TSL (see section 601FS).
12. ASIC repeats and relies on the matters raised in paragraph 6, namely that the Administrator has said that TSL is hopelessly insolvent and the Schemes are insolvent. Furthermore, at the time these submissions were filed, no party has identified itself as having the intention, skills and resources necessary to replace TSL as a temporary responsible entity of the Schemes.
13. For the reasons set out in paragraphs 11 and 12, ASIC does not intend at this time to apply to the Court for the appointment of a temporary responsible entity pursuant to section 601FN.
14. Furthermore, ASIC notes that it is open to a Grower to make an application to the Court for the appointment of a temporary responsible entity pursuant to Regulation 5C.2.02 of the *Corporations Regulations 2001* (Cth).

COSTS

15. ASIC is content for any costs ordered as a result of the application to be costs in the proceeding.
16. ASIC does not intend to make an application for costs in relation to this application.

Date: 16 June 2009

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St John Hibble

Counsel for ASIC

Douglas Menzies Chambers