

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

LIST E

SCI 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 OF THE ORIGINATING PROCESS AND IN ITS CAPACITY
AS MANAGER OF THE UNREGISTERED MANAGED INVESTMENT
SCHEME LISTED IN SCHEDULE 2 OF THE ORIGINATING PROCESS
First Plaintiff

MARK ANTHONY KORDA
Second Plaintiff

LEANNE KYLIE CRESSER
Third Plaintiff

CERTIFICATE IDENTIFYING EXHIBIT

Date of document: 4 December 2009
Filed on behalf of: the Plaintiffs

Prepared by:
ARNOLD BLOCH LEIBLER
Lawyers and Advisers
Level 21
333 Collins Street
MELBOURNE 3000

Solicitor's Code: 54
DX 38455 Melbourne
Tel: 9229 9999
Fax: 9229 9900
Ref: 01-1499489

(Leon Zwier - lwier@abl.com.au/
Bridgette Toy-Cronin - btoycronin@abl.com.au)

This is the exhibit marked "**MAK-4**" now produced and shown to **MARK ANTHONY KORDA** at the
time of swearing his affidavit on 4 December 2009.

Before me:

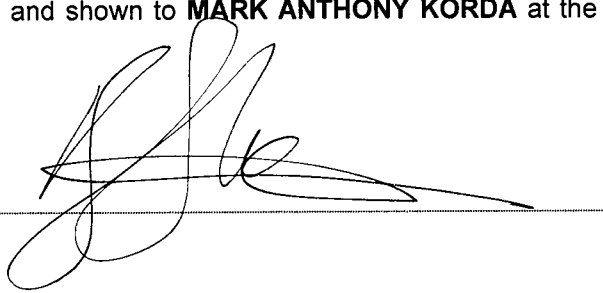


Exhibit "MAK-4"
Transcript and Orders of Pagone J SCI 2009 9299

BRIDGET ELLEN SLOCUM
Arnold Bloch Leibler
Level 21, 333 Collins Street
Melbourne 3000
An Australian Legal Practitioner within the
meaning of the Legal Profession Act 2004

LIST A
S CI 2009 09299

Plaintiffs

of Australia.



appropriately in

1 The Second and Third Plaintiffs are acting reasonably and appropriately in
entering into, or procuring:

- (a) the Sixth and Twelfth Plaintiffs;
- (b) the Second and Fourth Plaintiffs in their capacity as liquidators of the Seventh, Eighth, Ninth and Tenth Plaintiffs;
- (c) the Second, Fourth and Fifth Plaintiffs in their capacity as liquidators of the Eleventh Plaintiff; and
- (d) the First Plaintiff as responsible entity of the managed investment schemes listed in Schedule 1 and 2 to this Order (**Forestry Schemes**),

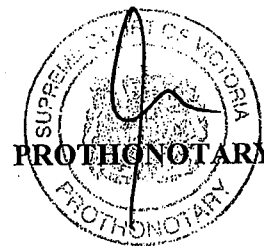
to enter into and perform the Sale and Purchase Deed in general (including in the First Plaintiff's capacity as responsible entity and as agent and attorney of the Growers in the Forestry Schemes), including to terminate or surrender

each relevant Grower sub-lease in accordance with the Sale and Purchase Deed exhibited as MAK-14 to the Second Affidavit of Mark Anthony Korda sworn on 30 September 2009.

- 1 The Second and Third Plaintiffs are acting reasonably and appropriately in procuring the First Plaintiff as responsible entity of the Forestry Schemes to pay the Commonwealth Bank of Australia (CBA) from the proceeds of sale arising from the Sale and Purchase Deed such amount as is required to cause the CBA to either release or assign all of its securities over the Timbercorp Group Companies (as defined in the First Affidavit of Mark Anthony Korda sworn 29 September 2009).
- 2 Exhibits MAK-4 and MAK-12 to the First Affidavit of Mark Anthony Korda sworn 29 September 2009 and exhibit MAK-14 to the Second Affidavit of Mark Anthony Korda sworn on 30 September 2009 be kept confidential.

DATE AUTHENTICATED: 6 October 2009

MB 6/10/09



SCHEDULE OF PARTIES

**TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION) (ACN 092 311 469)
IN ITS CAPACITY AS RESPONSIBLE ENTITY OF EACH OF THE
MANAGED INVESTMENTS SCHEMES LISTED IN SCHEDULE 1
AND IN ITS CAPACITY AS MANAGER OF THE UNREGISTERED
MANAGED INVESTMENTS SCHEME LISTED IN SCHEDULE 2**
First Plaintiff

MARK ANTHONY KORDA
Second Plaintiff

LEANNE KYLIE CHESSER
Third Plaintiff

MARK FRANCIS XAVIER MENTHA
Fourth Plaintiff

CLIFFORD ROCKE
Fifth Plaintiff

TIMBERCORP LIMITED (IN LIQUIDATION)
Sixth Plaintiff

TIMBERCORP PLANTATIONS 2002 IAB PTY LTD (IN LIQUIDATION)
Seventh Plaintiff

TIMBERCORP PLANTATIONS PTY LTD (IN LIQUIDATION)
Eighth Plaintiff

TIMBERCORP LANDS PTY LTD (IN LIQUIDATION)
Ninth Plaintiff

TIMBERCORP PROPERTIES LIMITED (IN LIQUIDATION)
Tenth Plaintiff

TIMBERCORP FORESTRY PTY LTD (IN LIQUIDATION)
Eleventh Plaintiff

TIMBERCORP LOT INVESTMENTS PTY LTD (IN LIQUIDATION)
Twelfth Plaintiff



SCHEDULE 1

REGISTERED MANAGED INVESTMENT SCHEMES

1. 1997 Timbercorp Eucalypts Project (ARSN 112 309 234);
2. 1998 Timbercorp Eucalypts Project (ARSN 112 309 216);
3. 1999 Timbercorp Eucalypts Project (ARSN 085 827 872);
4. 2000 Timbercorp Eucalypts Project (ARSN 091 172 093);
5. 2001 Timbercorp Eucalypts Project (ARSN 094 392 000);
6. 2002 Timbercorp Eucalypts Project (ARSN 098 233 571);
7. 2003 Timbercorp Eucalypts Project (ARSN 103 183 446);
8. 2004 Timbercorp Eucalypts Project (ARSN 108 099 645);
9. 2004 Timbercorp Timberlot (Single Payment) Project (ARSN 108 336 830);
10. 2005 Timbercorp Timberlot (Single Payment) Project (ARSN 111 683 491); and
11. 2007/2008 Timbercorp Timberlot (Single Payment) Project (ARSN 122 510 981).

SCHEDULE 2

UNREGISTERED MANAGED INVESTMENT SCHEMES

1. 1999 Timbercorp Eucalypts Double Rotation Project (Private Offer) (Unregistered).



TRANSCRIPT OF PROCEEDINGS

SUPREME COURT OF VICTORIA

MELBOURNE

COMMERCIAL JURISDICTION

WEDNESDAY 30 SEPTEMBER 2009

BEFORE THE HONOURABLE JUSTICE PAGONE

In the matter of: TIMBERCORP

- - -

MR L ZWIER appeared on behalf of the Plaintiffs.

MR G T BIGMORE QC appeared on behalf of Timbercorp Growers
Group and Growers Reference Group..

MR L GLICK SC with MS S CIPRIANO appeared on behalf of the
Commonwealth Bank of Australia.

Victorian Transcription Services Pty Ltd.
Tel: (03) 9670 4342

1 MR ZWIER: Your Honour, I appear on behalf of the plaintiffs.
2 HIS HONOUR: Mr Zwier.
3 MR BIGMORE: If it please Your Honour, I appear on behalf of
4 members of unincorporated bodies called the Timbercorp
5 Growers Group and the Growers Reference Group.
6 HIS HONOUR: Yes.
7 MR BIGMORE: And I hesitate to give Your Honour a list of
8 names, but we certainly don't represent every grower in
9 relation to the forestry schemes.
10 HIS HONOUR: Well, do you represent the members of those
11 two groups, do you?
12 MR BIGMORE: Yes.
13 HIS HONOUR: And presumably you know who they are.
14 MR BIGMORE: Eventually, Your Honour, yes.
15 HIS HONOUR: Yes.
16 MR GLICK: Good morning, Your Honour, I appear with
17 Ms Cipriano for the Commonwealth Bank of Australia.
18 We are not a party, but we are a security holder, and
19 we thought we would - - -
20 HIS HONOUR: You are affected.
21 MR GLICK: Affected, yes, Your Honour.
22 HIS HONOUR: Yes, thank you, Mr Glick.
23 MR ZWIER: Your Honour, thank you for accommodating us on
24 short notice. As Your Honour might appreciate, the
25 Timbercorp liquidations are precariously balanced. I
26 thought I might just before I opened give Your Honour a
27 little of the background. Your Honour may appreciate
28 that the Timbercorp companies are all in liquidation.
29 They have 700 leases of property which are in default.
30 There is insufficient funds in the liquidation to
31 enable lease payments to be paid. Timbercorp

1 companies carry on horticultural and forestry projects.
2 The horticultural projects are wasting with the
3 effluxion of time without funds being expended, and the
4 forestry assets also require funding to continue and
5 funding to be injected urgently, otherwise landlords
6 will move upon their rights and the growers may be
7 severely prejudiced because some of the leases,
8 external leases, have provisions that say that upon
9 termination for non-payment of rent, the trees revert
10 back to the landlords. And that's an issue which this
11 court will be dealing with in the context of another
12 matter concerning Plantation Land Limited.

13 Your Honour, the application this morning,
14 commenced by originating process, is to seek a
15 direction in advance of signing a sale and purchase
16 deed, that the liquidators are justified in doing so,
17 because there is some controversy about the proposed
18 sale and purchase deed.

19 I should add, Your Honour, at the outset, that we
20 may seek leave to amend the originating process because
21 of an issue that's just arisen really a short time ago,
22 Your Honour. I might just take you to the issue
23 because it's relevant to the relief that's sought.

24 Currently the applicants are Timbercorp
25 Securities Limited and Timbercorp Limited, but there
26 are other parties who are proposed to be parties to the
27 sale and purchase deed, other companies in the
28 Timbercorp group, and that's referred to in the
29 affidavit of Mark Korda. The other parties, Your
30 Honour, are Timbercorp Plantations 2002 IAB Pty Ltd (In
31 liquidation); Timbercorp Plantations Pty Ltd (In

1 liquidation); Timbercorp Lands Pty Ltd (In
2 liquidation); Timbercorp Properties Limited (In
3 liquidation); Timbercorp Forestry Pty Ltd (In
4 liquidation); Timbercorp Lot Investments Pty Ltd (In
5 liquidation), as well as the liquidators. And that's
6 referred to in paragraph 10 of Mr Korda's first
7 affidavit.

8 Your Honour, those who are acting in the sale and
9 purchase transaction for the liquidations from Corrs
10 have drawn to my attention this morning, shortly before
11 court, the provisions of section 477(2)(b). Section
12 477(2)(b) is in the provision of the Act dealing with
13 powers of liquidators. It limits the powers of
14 liquidators to enter into agreements which have
15 obligations that go beyond three months, without
16 approval of either the court or the committee of
17 inspection.

18 Now, some of the companies which I have referred
19 to do not have committees of inspection, so that in
20 order to give effect to the contract the liquidators
21 would in any event require to bring an application for
22 approval for those entities to enter into the agreement
23 in any event, and that will be a requirement of the
24 purchaser.

25 So that what the liquidators had in mind, if the
26 court were disposed to grant them leave to do so, is to
27 amend the application to add as plaintiffs each of the
28 entities referred to, and then on the basis of the
29 material that's presently before the court, if the
30 court were minded to make the direction, the
31 liquidators would ask if the court would also make an

1 order under section 477(2)(b) in relation to the
2 additional parties so that there's no issue of power
3 for the liquidators to enter into the sale and purchase
4 deed.

5 I apologise to our friends at the Bar table, it's
6 an issue which has really been brought to my attention
7 a very short time ago.

8 Your Honour, the obligations which extend beyond
9 three months in the unexecuted sale and purchase deed
10 concern matters which need to be completed by a sunset
11 date of 31 December 2009.

12 HIS HONOUR: Yes.

13 MR ZWIER: There are certain warranties contained in clause
14 19.3 of the sale and purchase deed, and there are also
15 some issues concerning proceed sharing arrangements in
16 relation to the non-refundable deposit, which is
17 referred to in schedule 12 of the sale and purchase
18 deed which extend beyond the three months. I am
19 indebted to partners of Corrs for providing me
20 instructions in relation to those issues.

21 I can hand to Your Honour a copy of the sale and
22 purchase deed, the unexecuted document, which is a
23 confidential exhibit.

24 HIS HONOUR: Well, is it an exhibit?

25 MR ZWIER: It's not yet before the court. It's an exhibit
26 to Mr Korda's second affidavit.

27 HIS HONOUR: Have I seen a second affidavit?

28 MR ZWIER: No, I am going to take Your Honour to the material
29 shortly.

30 HIS HONOUR: Thank you.

31 MR ZWIER: In support of the application, there are two

1 affidavits of Mr Korda. The first was sworn by
2 Mr Korda yesterday, and the second was sworn by
3 Mr Korda today. The second affidavit deals
4 principally with two matters: one, presenting to Your
5 Honour the most recent iteration of the sale and
6 purchase deed as a confidential exhibit, and to update
7 Your Honour as to what occurred in the Federal Court
8 this morning before Justice Finkelstein.

9 HIS HONOUR: The second affidavit is over two pages and has
10 four paragraphs.

11 MR ZWIER: It's very brief, Your Honour.

12 HIS HONOUR: I don't think it says anything about
13 Justice Finkelstein.

14 MR ZWIER: I'm sorry, when I had spoken to the solicitors who
15 were preparing it, I had intended it would deal with
16 what occurred before Justice Finkelstein this morning
17 as well. I have been elsewhere engaged since, and
18 haven't had an opportunity to read it myself. But I
19 knew that it was going to put the sale and purchase
20 deed before Your Honour.

21 I might just for the moment update Your Honour on
22 what occurred before Justice Finkelstein this morning,
23 having mentioned it.

24 HIS HONOUR: Yes.

25 MR ZWIER: As Your Honour may have seen from the first
26 affidavit, Justice Finkelstein had previously extended
27 the date by which the liquidators had to decide whether
28 or not to disclaim the leases until today.

29 HIS HONOUR: Yes.

30 MR ZWIER: And he'd done so on the basis to give the
31 liquidators an opportunity to embark upon the very

1 process they have undertaken on in relation to
2 forestry: a sale process, or recapitalisation process.
3 And all of it has come to a head literally in the last
4 few days. And what His Honour Justice Finkelstein
5 this morning did, was extended the date to make a
6 decision on disclaiming those leases until 3 November
7 this year, that being one day after the proposed
8 settlement date under the sale and purchase deed that
9 has been presented to Your Honour.

10 So His Honour Justice Finkelstein has enabled the
11 liquidators to preserve the status quo for a further
12 period of time. What was drawn to His Honour's
13 attention is that once the sale and purchase deed is
14 signed, there will be a non-refundable \$15 million
15 payment made by the purchaser which will enable the
16 leases to be paid until 2 November, which is an
17 important element of this transaction.

18 As Your Honour will appreciate from the material
19 which I will take you to shortly, the leases are
20 valuable leases to the growers and to the stakeholders.
21 If the leases are lost, and the rights to trees on the
22 properties are lost, then the growers as well as other
23 stakeholders will suffer damage.

24 If I can perhaps hand up to Your Honour a copy of
25 the order that His Honour Justice Finkelstein made this
26 morning. It's not been sealed by the court, but a
27 copy, as I understand, is on its way to the court to be
28 sealed.

29 Your Honour, if I could just take you to the
30 first affidavit of Mr Korda which was sworn yesterday,
31 and take Your Honour through that.

1 HIS HONOUR: Yes, I have read it.

2 MR ZWIER: Your Honour, the issue that I thought I might just
3 briefly touch upon, one of the issues of controversy in
4 relation to the transaction, is obviously the
5 extinguishment of grower rights. As Your Honour will
6 see, the responsible entity of the various schemes
7 obtained a direction enabling the constitutions to be
8 amended to enable the responsible entity to extinguish
9 grower rights to consummate a transaction.

10 HIS HONOUR: Is it your understanding that the proceeding
11 this morning is going to be opposed?

12 MR ZWIER: My understanding is that the growers have a
13 concern about a couple of aspects of the transaction,
14 that being one matter I want to touch upon. My
15 understanding also is that the CBA is here to represent
16 its position because one aspect of the controversy with
17 the growers concerns the CBA.

18 HIS HONOUR: Well, the CBA is not a party, and hasn't
19 sought leave to be a party. So that all that Mr Glick
20 was doing was explaining why it is that he has decided
21 to sit at the Bar table rather than at the back of the
22 court. Mr Bigmore similarly hasn't sought to be made a
23 party, although his position is referred to in
24 Mr Korda's affidavit of yesterday, particularly
25 paragraph 43, so that at the moment there seems to be
26 an application by you, a foreshadowed application that
27 you want to extend the number of applicants, and at the
28 moment I don't quite know what Mr Bigmore and Mr Glick
29 want to do beyond being able to hear more clearly.

30 MR ZWIER: Perhaps I can assist you a little, Your Honour.
31 The liquidators in the Timbercorp group stand like the

1 umpire trying to umpire between the various
2 stakeholders. And the liquidators of the Timbercorp
3 group have a transaction which they recommend to every
4 stakeholder.

5 HIS HONOUR: I know what's going on. What I am really
6 asking about is do I need to clarify with Mr Bigmore,
7 and/or Mr Glick, whether they want to be heard on some
8 aspect, and if so what? You may know the answer to
9 that question, in which case I don't need to trouble
10 them, and you can keep batting on.

11 MR ZWIER: My understanding, and I am happy to be corrected
12 by Mr Bigmore if I am wrong, is that the concern the
13 growers have is not with the overall transaction, their
14 concern is that the payment that has been made to the
15 CBA is unfair; that is, the CBA are going to be paid an
16 amount of money from the sale proceeds which exceeds
17 the value of the security that they have taken over the
18 land. In other words, the land component of the
19 transaction, I think from memory is about \$132 million.

20 HIS HONOUR: Yes.

21 MR ZWIER: And what they are going to be taking at settlement
22 is about \$25 million more than that, and so the growers
23 say that's unfair because it's really coming out of the
24 proportion that comes that should go to us for our
25 trees.

26 HIS HONOUR: Well, although Mr Bigmore may not know who all
27 of his clients are, he presumably knows who some of
28 them are, and at the moment none of them seem to be
29 parties to this proceeding.

30 MR ZWIER: No, they are not joined to the proceeding.

31 HIS HONOUR: So far he hasn't asked for leave to be heard,

1 all he has done is inform me that he is here and who he
2 represents. Now, I am perfectly happy to keep batting
3 on listening to you, but it would be most disruptive if
4 at some point I am going to be told that there's some
5 application to be joined as a party, and that there may
6 be some opposition.

7 MR ZWIER: Well, Your Honour, it might be convenient to hear
8 from the other parties as to where they stand.

9 HIS HONOUR: All right, well, let's do it in reverse order.

10 Mr Glick, I assume that you are not seeking to be
11 joined as a party, you are perfectly happy for this to
12 go through and to get your money.

13 MR GLICK: We are, Your Honour. And we were here really
14 only to announce an interest as a secured creditor, and
15 Mr Zwier has put it accurately, of course, and the
16 affidavit, paragraphs 34, 35, 36 down to 43,
17 substantially accurately represent the position of the
18 Commonwealth Bank. If Your Honour pleases.

19 HIS HONOUR: Yes. And I also assume that I am right that
20 if Mr Bigmore seeks leave to upset the apple cart, you
21 might then wish to be a party.

22 MR GLICK: That's so, Your Honour. So we are really a
23 reaction to see what the growers do.

24 HIS HONOUR: Yes. Well, Mr Bigmore?

25 MR BIGMORE: Thank you, Your Honour. We do seek to be heard
26 under order 2.13. Our position is that from what we
27 understand of the arrangement that's tentatively being
28 proposed by Mr Zwier to be entered into with the
29 purchaser, the allocation of \$197.7 million in respect
30 of growers, and \$132 million odd in respect of land
31 rights, is acceptable. So the groups that represent

1 the various growers have indicated, and they instruct
2 me, that that element of the transaction is
3 satisfactory. However, I certainly haven't seen the
4 sale and purchase deed, so I am not in a position to
5 look at the detail.

6 HIS HONOUR: Yes.

7 MR BIGMORE: I don't think Your Honour has either.

8 HIS HONOUR: Well, it's in front of me now.

9 MR BIGMORE: It's a confidential exhibit number 14, and we
10 don't have a copy of it.

11 HIS HONOUR: No. I do, though.

12 MR BIGMORE: Yes.

13 HIS HONOUR: Now, under the order that you seek to be
14 heard, what is it that you want to be heard as?

15 MR BIGMORE: As representing some growers.

16 HIS HONOUR: But do you wish to be made a party?

17 MR BIGMORE: No.

18 HIS HONOUR: So you wish to be heard as simply making
19 submissions without participating in, for example, the
20 evidence?

21 MR BIGMORE: That would be so, yes.

22 HIS HONOUR: Yes, all right.

23 MR BIGMORE: Yes, things may change as we go, of course,
24 depending on what happens. It's very hard to
25 participate in the evidence or decide not to
26 participate in the evidence when one doesn't know what
27 the documents actually contain. Equally we don't know
28 the detail of the arrangement that the Commonwealth
29 Bank and the liquidator would enter into, we only have
30 the affidavit description of it, which gives us enough
31 idea to be able to say that we oppose it.

1 HIS HONOUR: You oppose what?

2 MR BIGMORE: At the moment we have a situation where the
3 Commonwealth bank says it will not discharge its
4 mortgages over the land unless it's paid the whole \$150
5 million odd.

6 HIS HONOUR: Yes.

7 MR BIGMORE: Therefore whichever entity it is that the
8 liquidator would, or entities that would be the
9 transferors of the titles to the land, are all being
10 controlled by Mr Korda, would not be able to complete a
11 sale to any purchaser.

12 HIS HONOUR: Yes.

13 MR BIGMORE: Presumably the sale and purchase agreement
14 provides that clear title must be given.

15 HIS HONOUR: Yes.

16 MR BIGMORE: I assume all those things, it seems highly
17 likely.

18 HIS HONOUR: Yes.

19 MR BIGMORE: That being the case - - -

20 HIS HONOUR: You are going to come around to answer the
21 question, I take it?

22 MR BIGMORE: Yes, I am, Your Honour. The growers say - - -

23 HIS HONOUR: No, no, Mr Bigmore, I need to get into my head
24 the content of what you said. You said that you
25 oppose it. All I am asking you is give me content:
26 what is the "it" that you are opposing?

27 MR BIGMORE: The "it" is the arrangement described in the
28 affidavit at paragraphs 37-43, between the liquidator
29 and the Commonwealth Bank.

30 HIS HONOUR: And that opposition is simply for you to tell
31 me that you oppose it, or do you want to oppose it by

1 material?

2 MR BIGMORE: We don't need material. The material that -
3 well, it depends to a certain extent on the level of
4 background that's in the existing exhibits. It may be
5 that there's not quite enough to fully inform Your
6 Honour of the background.

7 HIS HONOUR: You need to focus on this point: you have got
8 until 1 o'clock, I don't mean you, the proceeding has
9 got until 1 o'clock. I am trying to work out whether
10 in the time available we are going to be able to make
11 something meaningful, or whether in view of the
12 position that you may or may not have, that's going to
13 be a pointless exercise.

14 MR BIGMORE: I didn't know we only had until 1 o'clock. If
15 we only have until 1 o'clock I would respectfully
16 submit that it's a pointless exercise. Because one of
17 the problems that we have is we don't know the detail.
18 It may be that there is a - - -

19 HIS HONOUR: That might make it a "pointful" exercise.

20 MR BIGMORE: Yes. Your Honour, where we are coming from in
21 relation to the - - -

22 HIS HONOUR: You see, you don't want to be a party, I
23 understand that, you don't want to rely upon material,
24 I understand that. At the moment it looks as though
25 Mr Zwier has a pretty clear run, and all you want to do
26 is let me know that you are unhappy. Well, I know
27 that.

28 MR BIGMORE: Yes.

29 HIS HONOUR: And on that basis it seems as though we might
30 be able to accommodate it all in the short space. If,
31 however, what you want to do is you want access to

1 material, or want to make submission about material
2 that you currently don't have, then there's no point
3 even beginning the process today because there will be
4 a big song and dance about it. It all depends upon
5 you knowing what you want to do.

6 MR BIGMORE: My instructions are clear, this much I can tell
7 Your Honour: we are not in a position to agree on
8 behalf of growers generally, and we disagree on behalf
9 of the growers we do represent, with a proposal where
10 their existing rights, which we would say is a right to
11 receive the \$197.7 million, or to have that amount
12 credited to the agency account under the constitutions.

13 HIS HONOUR: Yes.

14 MR BIGMORE: Is being compromised in a way where they would
15 end up with assigned rights from the Commonwealth Bank
16 where we don't even know what those rights are, or the
17 prospects of realisation might be.

18 HIS HONOUR: Yes.

19 MR BIGMORE: Bearing in mind that the growers that I am
20 speaking about globally, not just the ones that we
21 represent today, are the growers who are the members of
22 the forestry schemes. The alternative security is
23 over land owned by Olive Land, which is another
24 Timbercorp entity, and the growers in respect of the
25 olive schemes are some of the same people, also
26 different people, and no doubt in different interests
27 in any event. So - - -

28 HIS HONOUR: Yes, well, it's all very interesting to know
29 about the olive people and different people. My focus
30 is a different one, and that is it may be that your
31 instructions are, make sure the court knows that we are

1 not happy about this and we oppose it, end of story.
2 In which case you have done your duty and we can go on
3 to hear the matter. Your instructions may be, we are
4 so opposed about this that we want to have access to
5 material and put material before the court, and there
6 isn't enough time to do it today. That's a different
7 proposition. I can't know what your instructions are,
8 only you can.

9 MR BIGMORE: Yes.

10 HIS HONOUR: If they are the former, Mr Zwier should get
11 back on his feet and start telling me the proceedings,
12 and I am informed, as I was already informed, because
13 the affidavit of Mr Korda quite properly made clear
14 your clients' unhappiness about the way things were
15 being, unsurprisingly.

16 MR BIGMORE: Yes.

17 HIS HONOUR: But I can't know your instructions, only you
18 can know those instructions, and if they are the
19 latter, then even if you had the whole day it probably
20 wouldn't be sufficient for you.

21 MR BIGMORE: I think that's probably right. Our
22 instructions are certainly the latter. There's
23 another aspect that I wanted to raise that doesn't
24 appear to be before Your Honour, and that is that one
25 of the landlords in relation to the forestry schemes,
26 Plantation Land, has terminated its lease or leases, I
27 am not sure of all the facts of this, but there is a
28 proceeding in the court by our learned friend
29 Mr Zwier's client for relief against forfeiture of that
30 lease.

31 HIS HONOUR: Yes.

1 MR BIGMORE: That proceeding would appear to, from my
2 instructions would appear to overlap in some way with
3 the sale and purchase deed, because on our analysis
4 something like 20 or \$30 million of the \$197.7 million
5 would be, as it were, a windfall gain to Plantation
6 Land, which is an arm's length entity from Timbercorp
7 and growers, of course. And if that amount somehow
8 comes off the \$197.7 million, there are serious issues
9 because there are particular growers in relation to
10 earlier schemes who would be directly affected by that,
11 and indeed our instructions at the moment are that
12 notwithstanding that the liquidators on behalf of the
13 intermediate tenant have made an application for relief
14 against forfeiture, it would seem appropriate for
15 growers, or at least a grower, to get the ball moving,
16 make an application for relief against forfeiture.

17 Now, I understand there is a proceeding pending
18 in relation to that, and I don't have too many details
19 about it. But if that is the case, then title cannot
20 be made pursuant to the sale and purchase deed, as we
21 understand it, unless and until that proceeding is
22 determined.

23 HIS HONOUR: Yes, all right. Well, Mr Zwier, back to you.
24 It sounds as though you might be better informed now
25 than you were when you started 20 minutes ago.

26 MR ZWIER: I am, Your Honour. And, Your Honour, I want to
27 bring it to commercial reality: the most important
28 aspect of this application is keeping the buyer happy
29 and getting the transaction completed.

30 HIS HONOUR: I follow that.

31 MR ZWIER: If the buyer falls over, then there is going to be

1 Armageddon. There will be competing claims from
2 everyone, there will be landlords moving on their
3 leases; it's going to be a mess the likes of which the
4 court has not seen before in the context of managed
5 investment schemes adversely affecting somewhere
6 between 10 and 15,000 people.

7 HIS HONOUR: Yes.

8 MR ZWIER: And affecting secured creditors and unsecured
9 creditors.

10 HIS HONOUR: Yes, a veritable tsunami in the forest, I
11 understand that.

12 MR ZWIER: Thank you, Your Honour.

13 HIS HONOUR: Now, let's get, however, to the obligations
14 that I have as a judge.

15 MR ZWIER: Can I deal with the two points Mr Bigmore has
16 made, and I will deal with them in reverse order. The
17 issue with PLL is an important issue. The relief
18 application has been dealt with in the context of the
19 document Your Honour has in this way: the trees on the
20 PLL land have been valued at \$22 million. If the
21 liquidators are able to obtain relief from this court,
22 then the trees will pass to the purchaser and the
23 consideration will flow back to the growers. If they
24 are unable to do so, then that \$22 million will be
25 deducted, that's the value of the trees, and I don't
26 think there's an issue about how that value has been
27 calculated in terms of the growers and us; in other
28 words, it's a fair calculation.

29 The key to the relief application is to have a
30 viable respectable solvent taker of the lease. If we
31 do not consummate the transaction before we apply for

1 relief, we may be foredoomed to fail in relation to the
2 relief because it will be a company in liquidation with
3 no money seeking relief from forfeiture, or some
4 growers saying they will want relief for certain parts
5 of it, and that application will be mired in a mess as
6 well. It won't a tsunami, it will be a little wave.

7 But Your Honour will appreciate that the key to
8 protecting the growers' interest is to get the
9 direction and the approvals today to assist my friends
10 in relation to the relief application.

11 HIS HONOUR: All this sounds wonderful, my only concern is
12 what happens where after I have heard you Mr Bigmore
13 gets up again and says, as I apprehend he is now going
14 to do, "Well, it's all very well, but the court can't
15 make a decision against the interests of somebody
16 without giving that person an opportunity to be heard."
17 What do I do then?

18 MR ZWIER: Well, I haven't read what Justice White did in New
19 South Wales in relation to Macquarie Airport, but I
20 think where the party came along saying they wanted to
21 postpone a meeting or an event, the court asked that
22 party whether it was willing to provide an undertaking
23 as to damages, which is unlimited in nature, and if a
24 respectable solvent viable party is prepared to provide
25 an undertaking as to damages, then I would be saying to
26 Your Honour that Your Honour ought to be minded in
27 those circumstances to adjourn it, to enable them to do
28 so. The liquidators do not want to jeopardise this
29 transaction, and it will jeopardise the transaction
30 otherwise.

31 And if these people who Mr Bigmore represents are

1 respectable, solvent and viable, they will rush to Your
2 Honour with an undertaking as to damages as the price
3 to pay for more time. And otherwise Your Honour
4 shouldn't entertain an application to put this matter
5 off, given the urgency and the impact on creditors at
6 large.

7 HIS HONOUR: I don't think at the moment there's any
8 application to put it off. I think at the moment the
9 application is, if there is one, that I may be told
10 that I am not in a position to answer the question that
11 you wish me to answer because a party who wishes to be
12 heard today can't be heard today because they haven't
13 been given the information from the moving party in
14 order to deal with it today. The problem might be
15 yours rather than theirs.

16 MR ZWIER: Well, Your Honour, let me address it then slightly
17 differently. When the orders were obtained from
18 Justice Finkelstein to amend the constitution, part of
19 the process of amending the constitution was to keep
20 Mr Fernon and his firm, and those he represents, fully
21 apprised of developments; that is fully apprised of the
22 sale process, the bidders from A through to G or
23 whatever the letters are, to keep them fully informed
24 of the process all the way through so this would never
25 come to them as a shock at the last moment. And, Your
26 Honour, it's not rocket science for a secured creditor
27 to say "I am not going to release my security unless I
28 am paid out in full." That has always been on the
29 cards.

30 And as the affidavit makes clear, the CBA has not
31 varied from that position from day one, despite the

1 best efforts of the liquidator to get CBA to do so.
2 CBA will say, acting in its own best interests, that
3 unless we are paid out we are not prepared to assign
4 securities or provide title. And as Mr Bigmore fairly
5 conceded, again it's fairly obvious that a purchaser is
6 not going to buy unless the title is clear.

7 The arrangement that Mr Korda has proposed in
8 relation to procuring the repayment of the shortfall as
9 defined in the affidavit, is just a purely pragmatic
10 commercial sensible arrangement. But what he also
11 say, Your Honour, and Your Honour should be aware of
12 this, is that he says "Even if I couldn't get back that
13 \$25.5 million shortfall, the deal's a no brainer. I
14 would be recommending to do it anyway, because it is so
15 much better than what else is out there, that we ought
16 to be doing it. There's certainty, it's not
17 conditioned upon finance." The one condition which is
18 outstanding is FIRB approval, but it is likely to be
19 forthcoming, and therefore what Mr Korda says is "Even
20 if this arrangement is difficult or not perfect, it's
21 commercially a sensible way to go forward."

22 HIS HONOUR: Mr Zwier, you are falling back into the path
23 that you find an open door so that you are pushing
24 against something that doesn't exist. I understand
25 Mr Korda's evidence, I have read it. The point is
26 only one of whether the process that's about to be
27 undertaken, given Mr Bigmore's position, is one that
28 will be frustrated; frustrated because a court might in
29 certain circumstances say "Well, all I have got is one
30 side. It sounds pretty good, but I haven't heard the
31 other."

1 In any event, we'd better not waste any more
2 time. The clock is ticking, and I have read the
3 affidavit, and the second affidavit is sufficiently
4 short that I have read that too.

5 MR ZWIER: Thank you, Your Honour. Your Honour, I don't
6 know if the court would be assisted by Mr Korda giving
7 any evidence on any issues that Your Honour thought
8 required amplification.

9 HIS HONOUR: I don't think that I have anything that I need
10 clarification about so far as evidence is concerned, so
11 I won't be making such a request.

12 MR ZWIER: Your Honour, the - - -

13 HIS HONOUR: Whilst you are on your feet, it might be
14 desirable for somebody from your office to be preparing
15 the form of application that you foreshadowed about the
16 joinder of additional parties, so that the court file
17 is prepared. You have got that, have you?

18 MR ZWIER: No, Your Honour, I will cause that to be prepared
19 now and hopefully delivered to the court.

20 HIS HONOUR: Hopefully before we finish in the morning.

21 MR ZWIER: Yes, Your Honour.

22 Your Honour, if I could just hand up to Your
23 Honour draft orders that were prepared before we were
24 enlivened to the issue concerning section 447(2)B.

25 HIS HONOUR: Yes.

26 MR ZWIER: Your Honour, what the liquidators are seeking
27 today is a direction - - -

28 HIS HONOUR: Don't I have this?

29 MR ZWIER: No, Your Honour, there's an additional paragraph
30 added, paragraph 2, from the originating process.

31 HIS HONOUR: I see.

1 MR ZWIER: Directed specifically to the issue of the
2 Commonwealth Bank. I should clarify one issue in
3 relation to Mr Korda's affidavit and the Commonwealth
4 Bank too, and it is this: I think, Your Honour, in
5 paragraph 40 there's reference to, in his first
6 affidavit, to cross-collateralisation of the various
7 facilities.

8 HIS HONOUR: Yes, there is.

9 MR ZWIER: Mr Korda would wish to correct that to say that
10 there are sufficient securities to enable the CBA to be
11 paid in full. There may be an issue in relation to
12 the extent of the cross-collateralisation, it's one of
13 which I am not familiar, but I am told that on any
14 scenario by virtue of the various mortgages that the
15 CBA has, the CBA would be paid out its debt in full,
16 and therefore I should correct paragraph 40, but draw
17 to your attention Mr Korda's instructions - I am told
18 it's 36.

19 HIS HONOUR: Well, 36 talks about cross-collateralisation.

20 MR ZWIER: Yes, I am sorry, it's 36.

21 HIS HONOUR: So are you saying that paragraph 36 is wrong?

22 MR ZWIER: It's incorrect. It should be that there is
23 sufficient securities to enable the debt to be paid in
24 full.

25 HIS HONOUR: Well, I am happy to delete paragraph 36, but
26 its deletion means there's an absence of evidence. So
27 I hate to do this in a painful way, but you will have
28 to call him to give evidence.

29 MR ZWIER: Okay, well, I will need to call Mr Korda, Your
30 Honour.

31 <MARK ANTHONY KORDA, sworn and examined:

1 MR ZWIER: Mr Korda, could you please tell the court your
2 full name, work address and occupation?---Mark Anthony
3 Korda, 333 Collins Street, registered liquidator.

4 Mr Korda, could you please explain to His Honour a little
5 about the nature of the securities the CBA has which
6 would enable the CBA to be repaid the amount which is
7 sought to be repaid from the proceeds of the
8 sale?---So, Your Honour, there's been quite a number of
9 banks involved, and the CBA's position has security
10 over both the forestry assets and the olive assets, and
11 it's colloquially I guess referred to as
12 cross-collateralisation. Our legal advice from Corrs
13 who represent the land owning companies, Arnold Bloch
14 Leibler represent the responsible entity, is that in
15 fact the situation, rather than call it
16 cross-collateralisation, is the CBA has various
17 mortgages, and it also has various mortgages which are
18 all money mortgages, and our legal advice is that on
19 the sale of assets they would be repaid in full.

20 I have got no further questions, Your Honour.

21 HIS HONOUR: Yes.

22 MR BIGMORE: Since Mr Korda is there, I wonder if I could ask
23 a question to try and clarify that?

24 HIS HONOUR: Well, I am not sure that you are -
25 Mr Bigmore, you have got to do this according to the
26 book. You can apply for leave to be involved in the
27 proceeding, but you have got to be clear about the
28 basis upon which you are seeking the leave, and the
29 consequences of doing so.

30 MR BIGMORE: Yes.

31 HIS HONOUR: Now, what do you want to do?

1 MR BIGMORE: Your Honour, we are applying for leave under
2 order 2.13 to be heard. In other cases under that
3 rule I have observed that participation in the
4 cross-examination of witnesses has occurred; I have
5 never seen a case where there's been a
6 cross-examination as to credit or anything, I am not
7 proposing that, I am just proposing cross-examination
8 to elaborate.

9 HIS HONOUR: Let's look at the rule. Mr Korda, if you
10 wouldn't mind staying where you are for the minute.
11 Which chapter is it in?

12 MR BIGMORE: Chapter 5, the Corporations Rule 2.13.

13 HIS HONOUR: Now, order 2.13 may permit me to grant leave
14 to a person who claims to be a creditor to be heard in
15 a proceeding, without becoming a party.

16 MR BIGMORE: Yes.

17 HIS HONOUR: Now, is that what you are seeking?

18 MR BIGMORE: Yes.

19 HIS HONOUR: And who is it that I am giving that leave to?

20 MR BIGMORE: A grower. I suppose I need only mention one of
21 the growers.

22 HIS HONOUR: I need a human, I think.

23 MR BIGMORE: Yes, you need a human. In all the other cases
24 we have had a human. We can have Mr Fernon on this
25 occasion, my instructor, which might be the most
26 convenient human seeing he is actually here.

27 HIS HONOUR: And what's his name?

28 MR BIGMORE: Michael Fernon.

29 HIS HONOUR: And do we need any more particulars and
30 details like an address?

31 MR BIGMORE: Clarendons Lawyers, the address of which is

1 level 17, Rialto North Tower.

2 HIS HONOUR: Do you have a piece of paper, perhaps a
3 business card? Does your client have a business card?

4 MR BIGMORE: Would that cover the undertaking?

5 HIS HONOUR: I don't think a credit card is necessary, but
6 - - -

7 MR BIGMORE: No, no, it's unusual, a solicitor, but I will
8 have that - - -

9 HIS HONOUR: No, give it to me again. Michael Fernon.

10 MR BIGMORE: Michael Fernon, of Clarendon Lawyers, level 17,
11 Rialto North Tower, Melbourne, who is a grower in one
12 of the schemes.

13 HIS HONOUR: Well, he needs to be a creditor. Is he a
14 creditor?

15 MR BIGMORE: The growers claim that for breach the - - -

16 HIS HONOUR: I can give leave to a creditor, a contributory
17 or officer of a corporation, is he one of those?
18 Otherwise it's an officer of a creditor, a contributory
19 or a corporation, or another interested person.

20 MR BIGMORE: We are certainly an interested person.

21 HIS HONOUR: Well, you say certainly. He is interested
22 because of?

23 MR BIGMORE: Because he is a member of a scheme, one of the
24 forestry schemes referred to in the proceeding.

25 HIS HONOUR: All right. Mr Zwier, are you content with
26 all of that?

27 MR ZWIER: Yes, Your Honour.

28 HIS HONOUR: All right. Well, I will grant leave to
29 Michael Fernon of Clarendon Lawyers, level 17, Rialto
30 North Tower in Melbourne to be heard in this proceeding
31 without becoming a party as an interested person.

1 MR BIGMORE: Thank you, Your Honour. I wonder if I could
2 just clarify a couple of things in relation to the
3 Commonwealth Bank securities?

4 HIS HONOUR: Yes.

5 MR BIGMORE: Thank you, Your Honour.

6 <CROSS-EXAMINED BY MR BIGMORE:

7 Mr Korda, in relation to the almond schemes, I have seen a
8 number of deeds of covenants and of documents like that
9 with the ANZ Bank and the Bank of Scotland, but are
10 there documents like that in relation to the
11 Commonwealth Bank?---I can't recall, I would have to
12 defer to my lawyers.

13 All right. You yourself haven't seen any documents relating
14 to the recognition by the bank of the position of
15 growers?---Not relating to the Commonwealth Bank
16 securities, no.

17 I take it that in relation to the forestry schemes, the
18 Commonwealth Bank lent about \$89 million, is that the
19 case?---I think that the figure is approximately 83.
20 83?---Yes.

21 In relation to the olive schemes how much was lent by the
22 Commonwealth Bank?---Approximately 50.

23 And the bank is now owed a total of 152?---Correct.

24 So is the difference interest?---There will be interest,
25 costs, also they are owed money under a swaps facility,
26 and a treasury facility, various other facilities.

27 And those facilities, have they got anything to do with the
28 land on which - were those facilities used to develop
29 the land on which the schemes are conducted?---I don't
30 believe so.

31 So that would be general accommodation of the Timbercorp

1 group?---Yes, so they are facilities to various of the
2 Timbercorp groups that are either secured by specific
3 mortgages or money mortgages.

4 And in the cross-collateralisation process, Timbercorp
5 Securities Limited has made itself as liable as anybody
6 else in the group, hasn't it?---Could you say that
7 again?

8 Timbercorp Securities Limited is one of the
9 cross-collateralising mortgagors, is that
10 right?---Well, Timbercorp - I will just get the right
11 entity, Timbercorp Securities Limited is the
12 responsible entity, and my understanding is it has
13 given no mortgages to the Commonwealth Bank.

14 So any scheme property in respect of which Timbercorp
15 Securities Limited is the responsible entity has not
16 been charged to the bank in any way, has it?---That's
17 correct.

18 And the scheme property includes the trees, doesn't
19 it?---Well, there's a lot of debate what scheme
20 property is, but let's say yes, it includes the trees.

21 Yes. Yes, I understand. No further questions, if Your
22 Honour pleases.

23 HIS HONOUR: Yes, thank you. Yes, thank you, you are free
24 to go.

25 <(THE WITNESS WITHDREW).

26 MR ZWIER: Your Honour, in the document I handed up a short
27 time ago there was an additional paragraph, an
28 additional direction that the liquidators were seeking.
29 In essence it's a direction that we thought we ought to
30 seek from Your Honour this morning in light of the
31 controversy created concerning the payment for the

1 Commonwealth Bank of Australia. As Your Honour has
2 heard from Mr Korda and is aware from reading the
3 affidavit, if the Commonwealth Bank of Australia is not
4 paid out in full it won't release its securities.
5 It's a condition precedent to the sale and purchase
6 deed that free and clear title be passed, and the
7 transaction can't be completed.

8 And, Your Honour, because of the controversy
9 that's been created by the growers in relation to that
10 one issue, the liquidators thought that they would seek
11 an additional direction concerning the making of the
12 payment to the Commonwealth Bank lest someone might
13 seek to hold them accountable for having done so at the
14 settlement.

15 I should amplify for Your Honour that obviously
16 once the transaction settles, there will be a great
17 deal of work to be undertaken to determine who will
18 receive what amount of money and when, and that will be
19 a separate issue. In the absence of reaching some
20 agreement with the interested parties, it may require a
21 further application to be made to the court for a
22 direction as to how to dispose of the proceeds, because
23 trees have differing values according to their years
24 and weight, and different scheme members will have
25 different rights, and certainly if we can't fix the
26 Plantation Land issue, then of course there will be
27 other issues that will arise about adjusting for that
28 \$22 million.

29 This is not dealing with how the proceeds were
30 distributed, we are only seeking a direction in
31 relation to the making of the payment to the

1 Commonwealth Bank so to clear the way for settlement to
2 take place should it be necessary to do so.

3 Your Honour, if I could just take you briefly to
4 the authorities on when the court ought to make
5 directions. If I could take Your Honour to one of the
6 Ansett cases, I think it's reported 40 Australian
7 Companies and Securities Reports at page 433. It's a
8 decision of Justice Goldberg. I understand a folder
9 of the cases was filed this morning.

10 HIS HONOUR: I haven't seen them.

11 MR ZWIER: I think it's tab 2 in that folder, Your Honour.

12 It's the Ansett decision. If I could just take you to
13 paragraph 44 on page 444.

14 HIS HONOUR: Yes.

15 MR ZWIER: "When liquidators and administrators seek
16 directions from the court in relation to any decision
17 they have made ... (reads) ... fair disclosure of all
18 relevant facts and circumstances to the court." His
19 Honour then cites a passage of Justice McLelland in Re
20 G B Nathan & Co, which sets out some of the historical
21 antecedents, and His Honour observes in that paragraph:
22 "It is a question of making full and fair disclosure to
23 the court of material facts ... (reads) ... for an
24 alleged breach of duty which might be brought against
25 them."

26 Your Honour will appreciate that what the
27 liquidators are seeking to do is to extinguish the
28 rights of growers of the forestry plantations, remove
29 any proprietary claims they might have so they can pass
30 to the purchaser free title, and those who are
31 represented today in court are not all of the growers,

1 there may be some growers who aren't happy about it,
2 but Your Honour will appreciate they have undertaken a
3 robust sale process, they have a well positioned
4 purchaser, but it is nonetheless legally controversial
5 to extinguish rights of third parties, particularly in
6 circumstances where not every third party can be heard.

7 Your Honour, if I could take you also to the
8 decision of Justice Finkelstein in Re Pasminco, which
9 is reported at 49 Australian Companies and Securities
10 Reports at page 470. I think it's tab 4 in the cases
11 that Your Honour has. If I could take you to the
12 bottom of page 471, marked in paragraph 2 of the
13 judgment of His Honour Justice Finkelstein: "The power
14 of the court to direct an administrator to act or
15 refrain from acting ... (reads) ... how he should
16 exercise the discretionary power."

17 Then later on at paragraph 7 of His Honour's
18 judgment on page 473: "I have referred to the trustee
19 cases because it is appropriate to ... (reads) ...
20 under section 447D", and he quotes Re G B Nathan Co Pty
21 Ltd (in liq), which I think was referred to in Justice
22 Goldberg's earlier decision. "The court's power to
23 give directions to liquidators and administrators maybe
24 wider than for trustees ... (reads) ... should be
25 interpreted as widely as possible to give effect to
26 that intention."

27 Your Honour, the only other passage I wanted to
28 take you to is one from Re J W Murphy & P C Allen; Re
29 BPTC Ltd (in liq), which is reported in 19 Australian
30 Companies and Securities Reporter page 569. There's a
31 passage at the bottom of page 570: "It is to be

1 emphasised that an application for directions under the
2 former provisions is ... (reads) ... rights of
3 persons external to the winding up."

4 Then there's a passage of Justice Northrop from
5 ASC v. Melbourne Asset Management Nominees referred to:
6 "Justice Northrop expressed the view that section
7 479(3) of the Corporations Law did empower the court to
8 make binding orders in nature of judgments determining
9 rights. That view expressed by His Honour appears to
10 me, with respect, to be founded on misconception of the
11 directions."

12 So that we are not seeking an ultimate
13 determination of substantive rights, but a direction
14 that the liquidators are justified in entering into an
15 agreement the effect of which will extinguish rights.
16 And of course Your Honour will appreciate that the
17 purchaser can get very limited warranties because the
18 companies are in liquidation, and it will certainly
19 provide some comfort to a purchaser to know that the
20 liquidator has obtained the protection of the court for
21 the decision to extinguish the rights.

22 Your Honour, I am not sure that I can take the
23 matter much further than to say that the material
24 demonstrates the urgency, the liquidators have been
25 holding this liquidation together with chewing gum and
26 sticky tape, they have not had the money to pay rents,
27 and this is a seminal and important moment in the
28 liquidation which will see benefits passed down to not
29 only creditors, but also to growers and investors in
30 relation to a transaction where I think the growers who
31 are represented on the committee of inspections, as

1 Your Honour will have seen from the affidavit, were
2 fair enough to acknowledge that the ultimate sale price
3 is really a reasonable price in the circumstances and,
4 Your Honour, if it's of any assistance, I was at that
5 meeting. I think that in the post global financial
6 crisis period the price obtained is a good price, and
7 therefore all that's sought from Your Honour is a
8 direction in relation to both the entering into the
9 agreement and the payment to the Commonwealth Bank, as
10 well as the additional relief under section 477(2)B,
11 approving the transaction because it extends beyond
12 three months.

13 If Your Honour pleases, those are my submissions.

14 HIS HONOUR: Just before you get too carried away with your
15 eloquence, what does the word "justify" entail?

16 MR ZWIER: Your Honour, I think the word "justified" is a
17 word which Justice Robson, the very first Timbercorp
18 application, told us he liked and requested us to
19 insert into his very first order. I have a copy of
20 that order which His Honour Justice Robson made. It
21 was he who I think requested this in the context of
22 Timbercorp, to insert the word "justified" in relation
23 to the direction that we were then seeking, as being
24 the appropriate form of relief that the court should
25 grant.

26 HIS HONOUR: Yes.

27 MR ZWIER: It was made in relation to 447D, being the
28 directions power of an administrator, at a time when
29 the current liquidators were then voluntary
30 administrators.

31 HIS HONOUR: Yes. Are you going to come back to answering

1 my question?

2 MR ZWIER: I understand it means that in essence it's proper,
3 and there are good grounds for the liquidators entering
4 into the agreement which has the effect of terminating
5 those rights.

6 HIS HONOUR: And let's assume that it means that, what is
7 the basis upon which you say they are justified in
8 taking away the rights of other people?

9 MR ZWIER: Well, first, Your Honour, they have been granted
10 the power to do so under the constitution. So they
11 have the power to take away those rights under the
12 constitution. And Your Honour will appreciate that
13 that power was given to them by direction of
14 Justice Finkelstein.

15 HIS HONOUR: Well, it might be desirable to go to those
16 powers one at a time, or these points one at a time.

17 MR ZWIER: Yes, Your Honour, it's referred to in the
18 affidavit of Mark Korda.

19 HIS HONOUR: Yes. Presumably there's a constitution
20 somewhere in the exhibits?

21 MR ZWIER: The amendment to the constitution was in fact -
22 it formed part of the order. If I could take Your
23 Honour to Exhibit MAK9.

24 HIS HONOUR: Yes.

25 MR ZWIER: So Your Honour will see that again
26 Justice Finkelstein used the expression "justified" in
27 procuring the amendments, and then Your Honour will see
28 that with the seal of the court is the actual deed poll
29 which was subsequently executed by which that variation
30 to the constitution was made.

31 HIS HONOUR: Where's the power?

1 MR ZWIER: If you go to the deed, which is Schedule 2,
2 there's a deed poll, Your Honour.

3 HIS HONOUR: Yes.

4 MR ZWIER: If I could take you through the recitals.

5 HIS HONOUR: Yes, just where is the power?

6 MR ZWIER: It's paragraph 2, which is an amendment to
7 paragraph 11F of the constitution, by the insertion of
8 a new FA, "to assign, terminate, surrender or otherwise
9 deal with any sublease." And, Your Honour, Exhibit
10 MAK10 records the lodgement of the variation to the
11 constitution with the Australian Securities and
12 Investment Commission.

13 Now, my understanding from those who practice in
14 this area is it that it doesn't take effect until
15 lodged with the Australian Securities and Investment
16 Commission. Your Honour will see in Exhibit MAK10 the
17 actual executed deed polls are there included in the
18 form of the order made by Justice Finkelstein.

19 HIS HONOUR: All right. So the first reason why you say
20 it's justified is because you have got the power to
21 terminate.

22 MR ZWIER: Yes, Your Honour. Secondly, Your Honour, the
23 transaction, according to the liquidators, is that it's
24 in the best interests of all the stakeholders, that is,
25 there has been a robust sale process conducted over a
26 number of months which has produced a satisfactory
27 reasonable return for the stakeholders. Your Honour
28 has seen the material, and Your Honour has had the
29 benefit of the comparison between the various bidders
30 which I think Your Honour will see is contained in
31 Exhibit MAK12.

1 HIS HONOUR: Yes.

2 MR ZWIER: If I could just, without disclosing the contents
3 of that document, but the purchaser is described as
4 purchaser C, and Your Honour will see under "Funding
5 status" on the left-hand side there's a reference to
6 "other bidders". And when Your Honour looks on the
7 other side of the document, Your Honour will appreciate
8 that insofar as that critical issue of funding status
9 is concerned, the bid that's presently being dealt with
10 is far superior on that criteria than anything else.
11 And in part that's why Mr Korda has deposed to the fact
12 that even if \$25 million were to be lost to the
13 growers, he would still recommend this transaction to
14 them.

15 HIS HONOUR: Yes.

16 MR ZWIER: Your Honour, Mr Korda, the third reason, is an
17 experienced liquidator who has dealt with numerous
18 large liquidations and transactions, and Your Honour
19 should be comforted by the fact that he deposes in the
20 material that he recommends this transaction. So that
21 commercially, which is not the role of the court, the
22 court shouldn't make commercial decisions, he is saying
23 as a liquidator he commercially believes this is the
24 best result for the stakeholders.

25 Fourthly, Your Honour has heard about the tsunami
26 effect that will arise if this transaction is lost;
27 that is, it may fall into a complete dispute between
28 landholders, tenants, growers, secured creditors,
29 disputes between secured creditors, different
30 liquidators, and therefore not only in a positive sense
31 is it attractive, but it's also very attractive because

1 it avoids the catastrophic things that might otherwise
2 flow.

3 Your Honour has also heard that if Your Honour
4 makes this direction today, and approves this
5 transaction today, that all of the landlords will have
6 their rents paid up until 2 November. And, Your
7 Honour, whilst a number of the landlords are
8 well-powered and positioned corporations, there are
9 about 50 farmers who are dependent upon income from the
10 land which they have leased. And so Your Honour will
11 see that one of the benefits of this transaction is
12 even if there is no completion, the farmers will be
13 paid their unpaid rents until 2 November.

14 Your Honour will also appreciate that insofar as
15 the secured creditor is concerned it holds the
16 security, and the transaction cannot be consummated
17 unless free title is passed. And so whilst Mr Korda
18 has attempted to try and have the secured creditor
19 limit the claim against the forestry assets, his
20 attempts have failed, and as I have said in fairness to
21 the Commonwealth Bank, they have never resiled from
22 their position throughout. Their position has simply
23 been that unless they are paid out in full they will
24 not release or sign the securities. And, Your Honour,
25 if I were acting for a bank I would probably do no
26 different.

27 Your Honour, the other reason that the
28 liquidators would seek the direction is they have
29 involved growers all the way through this process and
30 kept them fully informed. They have kept not only the
31 grower group representatives informed, but they have

1 had a website keeping all interested parties fully
2 informed. In addition, Your Honour, the Australian
3 Securities and Investment Commission has been served
4 with the process, and it has not come to court seeking
5 to oppose this application, or to draw any act, matter,
6 fact or thing to Your Honour's attention as being
7 relevant.

8 So, Your Honour - - -

9 HIS HONOUR: What evidence do I have - apart from the
10 physical absence of ASIC, where do I have evidence of
11 that? I thought there was some communication from ASIC
12 about something.

13 MR ZWIER: I think the last paragraph of Mark Korda's
14 affidavit sworn last night dealt with the parties who
15 had been given notice of this application.

16 HIS HONOUR: There are no parties to the application.

17 MR ZWIER: Paragraph 49.

18 HIS HONOUR: I see, yes, ASIC.

19 MR ZWIER: And, Your Honour, the court will be aware from
20 other applications, or may be aware, that the
21 Australian Securities and Investment Commission has
22 regularly attended court. In relation to the
23 application before Justice Finkelstein, I did receive
24 an email from ASIC where they said that their position
25 I think was neutral. I didn't receive such a
26 communication from ASIC other than an acknowledgment of
27 receipt of the - perhaps it was in relation to the
28 other application, I should withdraw that.

29 HIS HONOUR: In relation to the application that you had
30 before me last Friday, there was some communication
31 from ASIC, I think supplied by you, that they were not

1 going to participate because their view in that
2 proceeding was that the interests that they would
3 otherwise be protected were adequately protected by
4 people who were actual parties. There's no comparable
5 position here.

6 MR ZWIER: No, Your Honour. Could I just no more than tell
7 Your Honour that the materials were served upon ASIC.
8 We were directed to serve them upon one of its
9 solicitors, and we have done so, as well as another who
10 was unavailable. And, Your Honour, I have no doubt
11 that if ASIC had concerns they would be here, and they
12 would be voicing those concerns to Your Honour.

13 HIS HONOUR: Yes.

14 MR ZWIER: So Your Honour should also take comfort from the
15 fact that ASIC has not objected to the directions that
16 are being sought, although in fairness, Your Honour, I
17 have not foreshadowed to ASIC the proposed amendment in
18 relation to approval under section 477(2)B. But, Your
19 Honour, I would say that there is no substantive
20 difference between what we are seeking by way of
21 direction under section 511, and relief under section
22 477(2)B.

23 Your Honour, unless I can be of any further
24 assistance, those are my submissions.

25 HIS HONOUR: Just one final matter, Mr Zwier, the urgency;
26 why today?

27 MR ZWIER: Well, I could tell Your Honour it's Jim Smith's
28 birthday and he is the American out here managing the
29 process, but that wouldn't be helpful.

30 HIS HONOUR: That's likely to have the matter adjourned for
31 quite some time, though, isn't it?

1 MR ZWIER: No, no, but, Your Honour, the reason for today is
2 the \$15 million payment is absolutely critical to get
3 to landlords to preserve the properties. And the
4 minute the court makes the direction, it paves the way
5 now for signature, it paves the way for the payment of
6 the cash to the landlords to help protect the
7 properties to enable the transaction to be completed to
8 maximise a return to growers.

9 HIS HONOUR: And why today?

10 MR ZWIER: I am reminded by those handling the sale
11 transaction from Corrs, Mr Stragalinos, that the next
12 major quarter rent payment falls due tomorrow, and
13 therefore there's been a real push to have the
14 transaction completed by today to provide comfort in
15 relation to the next quarter of rent that falls due for
16 payment.

17 HIS HONOUR: And what if nothing happens today?

18 MR ZWIER: Well, I'm sorry, it's due today, not tomorrow.

19 HIS HONOUR: Yes. And what happens if it's not paid
20 today?

21 MR ZWIER: Well, there's always a risk of fragmentation, Your
22 Honour. If we don't start paying the rents, some
23 landlords might opportunistically, like PLL, seek to
24 serve notices of default, seek to move into possession,
25 and thereby indirectly - - -

26 HIS HONOUR: Where does Mr Korda deal with this in his
27 affidavit?

28 MR ZWIER: I will just have a look at Mr Korda's affidavit.
29 I think in paragraph 44 he deals with rental payments
30 becoming due on 30 September. And he points out in
31 paragraph 45 that it's hopelessly insolvent, unable to

1 make the payments.

2 HIS HONOUR: Yes.

3 MR ZWIER: So in that paragraph he sets out some of the
4 background. But it's true the neutrality that he has
5 managed this process, and I should explain that to Your
6 Honour too. What Mr Korda did at the outset of this
7 liquidation was go to the court and seek a direction as
8 to whether or not by taking a neutral position he was
9 incurring as an expense of the liquidation a lease
10 cost. If he had been incurring a lease expense, which
11 would have ranked to a priority under section 556(1)A
12 or subsection DD, he would have had to disclaim all the
13 leases. But what he did was he took a position of
14 neutrality saying "I am not going using or occupying
15 the land, and thereby I am not incurring an expense."

16 However, when Mr Korda moved from neutrality to
17 engaging in a sale process, I think it's unarguable
18 that he has a problem with use and occupancy for the
19 period of time where he is purporting to deal with that
20 land. And that's what he is purporting to do.

21 The best protection Mr Korda can get is to make
22 sure that the rents are paid for the sale process
23 period, and that's why those paragraphs were inverted
24 there, Your Honour. He needs to get this payment
25 through, otherwise there's a risk he has incurred a
26 cost and expense in liquidation ranking to a priority
27 under 556(1)A or DD which he otherwise can't meet.

28 So, Your Honour, it's time critical to get the
29 direction from the court. I appreciate it's a
30 complicated matter, and it's difficult to absorb all
31 the material, but time is of the essence.

1 HIS HONOUR: On this particular issue, Mr Zwier, the point
2 is that there's not much material at all. That is to
3 say, on the criticality of the date of 30 September,
4 beyond the fact that in paragraph 44 I am told some
5 money is due today, I am not told anything about
6 dramatic consequences that may or may not follow.

7 MR ZWIER: Your Honour, that's a perfectly fair point, and if
8 it's an omission it's because those who have been
9 working day and night on the contract, in the
10 preparation of material, did overlook it. If Your
11 Honour would be assisted by calling Mr Korda so he
12 could explain some of it, I would seek Your Honour's
13 leave to do so.

14 HIS HONOUR: It's not for me. I am just anticipating, I
15 think, what Mr Bigmore may end up saying, and it's he
16 that may be saying that you haven't established enough
17 to warrant such a draconian step with tsunami effects
18 for his clients if the matter is done today rather than
19 tomorrow or the day after.

20 MR ZWIER: Well, I will wait to hear what Mr Bigmore says
21 about that.

22 Your Honour, I can do no more than say that this
23 administration has been held together with chewing gum
24 and sticky tape. As Your Honour will appreciate, it's
25 reaching a climax around these days, and Mr Korda has
26 come to the court in accordance with authorities
27 seeking advice, assistance and direction. He has
28 explained the difficulties he has encountered, I can do
29 no more than say that, Your Honour.

30 HIS HONOUR: All right. Well, Mr Bigmore, what do you
31 want to say?

1 MR BIGMORE: Your Honour, I cannot say very much about
2 whether Your Honour should tell Mr Korda that he is
3 justified in entering into an agreement that I haven't
4 seen.

5 HIS HONOUR: But you know something about - you have seen
6 his affidavit, I take it?

7 MR BIGMORE: I have seen the affidavit. We don't have
8 Exhibit 14, which is the sale and purchase deed that
9 apparently is what is contemplated being executed, but
10 we wonder why it is so confidential that Mr Fernon and
11 I can't look at it. But we are not allowed to, and
12 that's that. Your Honour has it, and to the extent
13 that Your Honour sees no trouble with it, well of
14 course Your Honour may well indicate to Mr Korda that
15 he is justified in signing it.

16 That's not really our problem, because if it
17 contains the sorts of figures that we have mentioned to
18 Your Honour this morning, then the growers are content
19 that \$197.7 million represents a fair price for the
20 surrender of their rights. The problem is paragraph
21 2, which Mr Zwier candidly admitted ASIC has not had an
22 opportunity to comment on, nor have we, apart from the
23 fact that we saw the affidavit late yesterday. It
24 seems that the \$197.7 million is subject to two
25 incursions: the first incursion I mention, which is
26 the fact that there's \$22 million, apparently, that may
27 go to Plantation Land as a windfall if relief against
28 forfeiture is not granted in respect of the property
29 that they lease into these schemes. The second amount
30 of money is the \$25 million that the Commonwealth Bank
31 insists it receive effectively from growers' money.

1 As I understand the growers' position, they would
2 prefer that not to occur. They are not in a position
3 to, certainly we are not in a position to advise them
4 as to whether it is a good deal or not. We don't know
5 whether taking an assignment of the Commonwealth Bank's
6 securities is something that we ought to do
7 commercially, let alone how that would be effected
8 legally. We don't have any detailed agreement for the
9 assignment of those securities that we could consider,
10 nor do we in fact know what those securities are.
11 There may be numerous documents, as Mr Korda admitted,
12 which relate to the cross-collateralisation of various
13 liabilities, not just the \$89 million that was lent
14 into the forestry schemes.

15 So to advise the forestry growers, the members of
16 all those schemes, that that would be a commercially
17 desirable outcome is impossible, and again just
18 intuitively it seems to be highly undesirable because
19 we would be giving up something that we say we have a
20 right to. Now, we have a right, subject to Plantation
21 Land's termination of its lease, we have a right to go
22 and take the timber. That right endures, and the
23 growers believe that the \$197 million represents a fair
24 return as an alternative to actually going and taking
25 the timber.

26 In relation to more recent schemes, of course,
27 the timber would need to grow a bit before anyone would
28 be bothered taking it, and that of course relates to
29 the question of tenure. Again we think we have rights
30 in relation to tenure.

31 We don't see that the Commonwealth Bank has any

1 pre-emptive right in relation to that. We sit in a
2 position where Mr Korda has the power to terminate our
3 leasehold interests, and therefore our rights in
4 relation to the timber, but he ought not to exercise
5 that power in a situation where what's happening is you
6 have two powers against each other; you have the
7 Commonwealth Bank saying "We won't discharge our
8 security unless we get collaterally secured money", and
9 Mr Korda should be saying "We won't release the
10 growers' rights unless they get an appropriate return."

11 Now, all that's happened is that Mr Korda says to
12 Your Honour "The whole \$25 million should go to the
13 Commonwealth Bank and the growers effectively give up
14 the point." There doesn't appear to be any commercial
15 negotiations between growers and bank involved in that
16 process.

17 Again, Mr Korda says in his affidavit that he
18 believes that it's still in the best interests of
19 growers on the basis that they may not get as much as
20 \$197 million less \$25 million, and presumably also the
21 \$22 million for Plantation Land if it turns out badly
22 in that regard. But we don't know that that's right.

23 HIS HONOUR: No, but if there's a competition of rights as
24 between the growers and the bank in respect of the \$25
25 million, the order that is sought would not have the
26 effect of authorising or sanctioning or preventing you
27 from arguing that there's been a preference.

28 MR BIGMORE: It wouldn't, Your Honour, no, I agree, with
29 respect. But what it does foreclose is the ability of
30 the growers to say that they would rather have their
31 existing rights than forego \$25 million on a security

1 over Olive Land.

2 HIS HONOUR: Well, this really is why I asked the question
3 about "justified".

4 MR BIGMORE: Indeed, Your Honour.

5 HIS HONOUR: Because although - - -

6 MR BIGMORE: With respect, our learned friend is correct,
7 Justice Robson has been deploying the word in a number
8 of orders.

9 HIS HONOUR: Yes, and it may be that they were all
10 perfectly appropriate in those other orders.

11 MR BIGMORE: Yes. But in this case it's really a commercial
12 justification that Mr Korda is seeking, not a legal -
13 there's no legal controversy to quell. The
14 competition between the bank and the growers is not a
15 legal competition, because the growers don't have any
16 rights in respect of the land, the freehold land, the
17 bank doesn't have any rights in respect of the scheme
18 property. The two are mutually exclusive. It's a
19 question of putting a commercial judgment to work and
20 deciding how to allocate the amounts.

21 Now, in this case the purchaser has done so,
22 apparently.

23 HIS HONOUR: But if one were to substitute for the word
24 "justified" some word such as "reasonably and
25 appropriately" which picks up the words of Justice
26 Goldberg in the Ansett case, then the comfort such as
27 it is that the liquidator can get under the power is
28 conferred upon the liquidator, and your position
29 vis-a-vis the Commonwealth Bank is maintained; that is
30 to say, if they are not entitled to the money as
31 against you, then you can make your claim.

1 MR BIGMORE: They will be entitled to the money against us if
2 our rights are terminated or surrendered. And that's
3 what Mr Korda is doing in respect of our rights. He
4 is seeking the approval of the court to determine -
5 the only controversy is whether our right should be
6 terminated for this amount of money.

7 HIS HONOUR: That's the first order.

8 MR BIGMORE: It's really both orders, because he is saying in
9 relation to the first order \$197 million, and we say
10 that's not so bad. In relation to the second order he
11 says "Well, we will discount that by another 25" - or
12 25 plus 22, I am not sure how that works - "in relation
13 to the amount that we would ultimately receive." And
14 he is saying that that's commercially justifiable, and
15 he asks Your Honour to rubber stamp it.

16 HIS HONOUR: But the rubber stamping would be subject to
17 any entitlement that you might have to say that the
18 Commonwealth Bank ought not to have received a
19 preference above you.

20 MR BIGMORE: The entitlement that we would - that an
21 individual grower may seek to say is that you should
22 not have terminated or surrendered my right in relation
23 to my timber and my occupancy rights in these
24 circumstances because you didn't get enough money for
25 me. So imagine one of the sub-tenants whose land is
26 on land originally leased by Plantation Land, which has
27 terminated the intermediate lease. In that case the
28 sub-tenant might be left with a right to apply under
29 the Property Law Act for relief against forfeiture, but
30 find that his rights have been terminated or
31 surrendered by Mr Korda pursuant to these agreements

1 that we haven't seen. In that situation, the tenant
2 may well say to Mr Korda "You shouldn't have done it."
3 Mr Korda will say "But I did it in accordance with the
4 court's approval", and it would be very difficult for
5 that person to take his complaint much further.

6 HIS HONOUR: Yes.

7 MR BIGMORE: That's the nature of the problem that we
8 foresee. We can only foresee it in broad in
9 generalised terms, we can't address Your Honour
10 specifically without access to Exhibit 14, and access
11 to the Commonwealth Bank securities and the proposed
12 deed of assignment that's to be granted.

13 When don't see (a) why we should be denied access
14 to these documents, and I just mean Mr Fernon and
15 myself, nor do we see why we can't have a couple of
16 days in which to look at them and respond.

17 HIS HONOUR: Well, I am not aware, because you haven't put
18 in material, of you having sought access to the
19 documents on that limited basis, and you having been
20 denied it.

21 MR BIGMORE: No, there's no material, but I can tell Your
22 Honour that I have asked for it and I have been refused
23 it.

24 HIS HONOUR: Well, now, Mr Bigmore, as you doubtlessly
25 know, if you wish to lead evidence there's a process,
26 and the process that's not allowed is you telling me
27 from the Bar table.

28 MR BIGMORE: Well, Your Honour, I call for the exhibit.

29 HIS HONOUR: You call for what exhibit?

30 MR BIGMORE: Exhibit 14.

31 HIS HONOUR: Now, I can deal with the call for an exhibit,

1 and that, however, won't amount to the proposition that
2 you were putting to me of some previous request which
3 had been denied.

4 MR BIGMORE: The exhibit came into existence this morning,
5 this morning. I didn't see the affidavit until I got
6 to court.

7 HIS HONOUR: But we are not talking about it as an exhibit,
8 are we? We are talking about the thing which is being
9 exhibited; that's your complaint.

10 MR BIGMORE: Yes. I don't know when it came into existence,
11 I haven't seen - of course all I know is that it became
12 an exhibit this morning.

13 HIS HONOUR: Well, Mr Bigmore - - -

14 MR BIGMORE: But I call for it.

15 HIS HONOUR: You are going back to you giving evidence from
16 the Bar table. Well, Mr Zwier, what do you want me to
17 do about the call?

18 MR ZWIER: Your Honour, the difficulty is that we would need
19 to get the consent of the proposed purchaser to let a
20 third party look at it. The second difficulty we have
21 with Mr Fernon is he wears different hats. He has
22 represented, as I understand it, some of the parties
23 interested in acquiring it, and it's vital that the
24 terms and conditions of that contract not be circulated
25 to those parties.

26 If Your Honour thought it would assist us to make
27 it available we will do it, Your Honour, but the
28 liquidators' focus is purely on getting the direction
29 as soon as they can. My only concern, Your Honour, is
30 that if you show any lawyer a legal document, they will
31 pick at it, look at it, and express views on it

1 forever. And if you show two lawyers you can double
2 forever, which I understand Your Honour will say is not
3 possible.

4 HIS HONOUR: Mr Zwier, attractive though that submission
5 may be, and intuitive as it may sound, if one were to
6 adopt that submission in any case then there would be
7 no lawyers appearing before this court ever again. So
8 we can dismiss that one as being unhelpful.

9 MR ZWIER: Your Honour, the issue is obtaining the consent of
10 the purchaser. It's a confidential document, and the
11 second issue is Mr Fernon's different hats.

12 It may be that confining it to Mr Bigmore and no
13 one else it may be convenient.

14 HIS HONOUR: Yes.

15 MR ZWIER: But the critical issues for the direction are the
16 extinguishment of the rights for valuable
17 consideration. And Mr Bigmore knows that. I mean,
18 the real world is there is a lump of money, he knows
19 what the lump of money is. It's the extinguishment of
20 the right. There's an issue with the CBA. And, Your
21 Honour, the mechanism to repay it bringing it back to
22 the real world is so that the growers won't be out of
23 pocket. So in the real world what Mr Korda has done
24 is he is getting Mr Bigmore his \$197 million. And
25 what Mr Bigmore says is "If we get the \$197 million we
26 are happy."

27 So, Your Honour, in the absence of consent, I
28 can't consent to making it available to Mr Bigmore.
29 If Your Honour is inclined to direct us to do so, I
30 would urge Your Honour to do for Mr Bigmore only.
31 But, Your Honour, my principal submission is that the

1 key issues about that contract, being consideration,
2 extinguishment, conditions precedent, have been spelled
3 out in chapter and verse in the affidavit, and there is
4 really no utility to make the confidential terms of the
5 bargain otherwise available to anyone else.

6 In due course, Your Honour, in due course to
7 provide comfort to every party, of course the contract
8 will have to be made available to everyone when it's
9 signed, because it will form part of the order. So it
10 will be readily available once the order is made,
11 whatever confidence about it will vanish the moment
12 Your Honour makes the order. And then if Mr Bigmore
13 wishes to make complaint about it, or give advice about
14 how he thinks it could have been done better, then of
15 course he can do so.

16 HIS HONOUR: Yes, thank you, Mr Zwier.

17 MR ZWIER: Your Honour, could I correct one thing?

18 HIS HONOUR: Yes.

19 MR ZWIER: Those who were acting in the transactions, there
20 are parts of that deed that are highly sensitive
21 commercial aspects. What I indicated to Your Honour
22 was ultimately the document will be publicly available.
23 What they say to me is that they would like to redact
24 from it certain very confidential details about the
25 nature of the business and so forth, but not the key
26 issues which Your Honour has had to deal with today.

27 HIS HONOUR: Well, I have been, as you may have gather by
28 the silence, I have been looking at the document to see
29 whether there is anything in it that would prevent my
30 showing it to Mr Bigmore for a short period of time,
31 and as at this moment I have not seen anything of that

1 character. On the other hand, with the exception of
2 one or two generally theoretical points, I haven't seen
3 anything that Mr Bigmore is likely to be able to make
4 any submissions about.

5 But it's conceivable that when I get further in
6 that some of the confidential stuff that you want to
7 take out is the very material that might conceivably be
8 useful for Mr Bigmore to see. I don't know, because I
9 haven't got there yet. You will just have to wait.

10 MR BIGMORE: I have been thinking as I go, Your Honour, and I
11 wonder about this - - -

12 HIS HONOUR: It's always a good start.

13 MR BIGMORE: If the proposed agreement does not effect an
14 immediate termination or surrender of growers' rights
15 but simply comprises a promise to terminate or
16 surrender, then our rights are not immediately taken
17 away. That would then leave us with the order in
18 relation to the assignment of the Commonwealth Bank
19 securities. One of the other things of course we
20 would want to look at would be what those securities
21 are, and whether we can say to the growers that there's
22 some utility in either agreeing to this, or there might
23 be some argument as to why it shouldn't be agreed to
24 and so on.

25 HIS HONOUR: Yes.

26 MR BIGMORE: But there's nothing emerged which suggests that
27 order number 2 in the revised proposed orders is
28 immediately necessary today. If the agreement is
29 worded on the basis that it will only be settled if the
30 Commonwealth Bank gets all its money, if the growers'
31 rights are surrendered, then all it is at the moment is

1 to promise to do something in the future with the
2 purchaser promising to do something as well. If the
3 question can remain for a couple of days as to whether
4 or not the growers should make their \$25 million
5 available to the Commonwealth Bank, then we can deal
6 with that in a more leisurely fashion, and the
7 liquidator can get the direction that he asked for last
8 night without the second order that he's thought of
9 this morning.

10 HIS HONOUR: Now, do you mind putting that in the form of
11 what it is that you are asking me to do?

12 MR BIGMORE: If Your Honour looks at the document, and I
13 appreciate I am effectively requesting legal advice on
14 a document that I haven't seen. But if Your Honour
15 looks at the document and finds that growers' rights
16 would not be immediately terminated or surrendered
17 today, or within the next couple of days, then we still
18 have rights to protect, and we still have the
19 opportunity to address the making of the second order,
20 which is the diversion of the forestry scheme members'
21 \$25 million to the Commonwealth Bank in exchange for
22 something we haven't seen, which comprises a right
23 against other land - - -

24 HIS HONOUR: I think you should assume on the basis of the
25 affidavit that you have seen, that entering into the
26 contract would probably extinguish your rights pursuant
27 to the amended constitution which sought for a contract
28 to do just that.

29 MR BIGMORE: Yes. Which leaves us in a position where if
30 our rights are immediately extinguished upon the
31 signing of this document with the approval of the

1 court, then we have no rights to bargain with, can our
2 opportunity to address Your Honour on the question of
3 whether or not the liquidators are justified in paying
4 the Commonwealth Bank with some of the proceeds, \$25
5 million of the proceeds which represent the growers'
6 rights, be permitted, or condoned by the court?

7 One of the things that's curious about this
8 application, Your Honour, is that Mr Korda has said,
9 with the agreement to the extent that it can be
10 obtained in a plebiscite of the growers, a price which
11 represents a fair return for their interests. That
12 price is \$197 million odd. He then says that
13 notwithstanding that, if instead of the growers getting
14 that money immediately they end up with something else,
15 something less by \$25 million, or maybe more, depending
16 on the Plantation Land situation, they are still - it
17 is still a fair return for growers. But it can't be
18 both ways. Either our rights are worth \$197 million
19 or they are worth something else, and he is telling
20 Your Honour that they are worth \$197 million, but he is
21 saying in the same breath, well, we shouldn't get that,
22 we get something else that we haven't got the
23 opportunity to consider.

24 HIS HONOUR: Thank you. Mr Zwier, you have indicated that
25 your client might wish to redact some parts of this.
26 If you just confine yourself to the contents which are
27 the first few pages, there doesn't seem to be anything
28 in the first - - -

29 MR ZWIER: Your Honour, I will seek instructions about that.
30 But if it's for the purpose of only showing Mr Bigmore
31 the first few pages today - - -

1 HIS HONOUR: No, no, I am not suggesting only the first few
2 pages, I am asking you to have a look at the first few
3 pages, because the first few pages are contents. So
4 showing him the first few pages will be of no value
5 whatsoever. All I am saying to you about the first
6 few pages is that the first few pages seem to summarise
7 the bulk of the contract and in my perusing of the
8 contract there didn't seem to be anything startling in
9 that that one couldn't share with Mr Bigmore on a
10 confidential basis.

11 Then one goes to the schedules which begin (v),
12 and that's in the great vast bulk of the pieces of
13 paper that I have got in front of me. Going through
14 the table of contents, at the moment running through
15 that list nothing leaps out of the page as being of its
16 nature especially difficult, except possibly page 53,
17 but I am not sure. So what is it that you wanted to
18 redact?

19 MR ZWIER: Your Honour, the solicitors from Corrs are more
20 familiar with the contract, if I could just confer with
21 them for a moment.

22 HIS HONOUR: Of course.

23 MR ZWIER: Your Honour, there are some conditions in this
24 that require, I will talk a little cryptically, that
25 require third parties' consents.

26 HIS HONOUR: Yes.

27 MR ZWIER: And some of those third parties are in
28 negotiations with us. Those third parties may not
29 appreciate the relative importance or unimportance of
30 those negotiations now.

31 HIS HONOUR: Yes.

1 MR ZWIER: If that were disclosed, that would be prejudicial.
2 So take, for example - - -
3 HIS HONOUR: But we are not talking about disclosing, we
4 are talking about a limited ability for a member of the
5 inner Bar to have a peak at the documents upon his
6 undertaking that he won't breathe a word of it to
7 anybody, and limit his knowledge of it only to assist
8 me in reaching my decision.
9 MR ZWIER: Not a problem, Your Honour. I misunderstood you.
10 No problems, Mr Bigmore, all yours.
11 MR BIGMORE: If I might have a moment, Your Honour?
12 HIS HONOUR: Yes, but not very long.
13 MR ZWIER: Your Honour, Mr Bigmore has raised an issue with
14 me which if I could just deal with it perhaps on the
15 transcript, it might resolve the issues between us.
16 Just in terms of timing.
17 HIS HONOUR: Yes.
18 MR ZWIER: The proposal is to complete the transaction on 2
19 November.
20 HIS HONOUR: Yes.
21 MR ZWIER: The proposal is that the rights will not be
22 extinguished without the cash, so we extinguish the
23 rights at the time of settlement. In the meantime, we
24 are applying to the court to resolve the PLL relief
25 from forfeiture application before settlement. Your
26 Honour might recall me saying to Your Honour on Friday
27 that it was critical that the court heard the relief
28 from forfeiture application before settlement of the
29 contract.
30 HIS HONOUR: I do.
31 MR ZWIER: And therefore it's the liquidators' intention, and

1 the growers may join the liquidators in that
2 application, to have the relief application resolved
3 before Justice Judd on or about 14 or 15 October to be
4 set down so that that issue can be sorted out before
5 there's any extinguishment of any rights.

6 HIS HONOUR: Well, except that, as I understand it, once
7 the contract is entered into rights will have been
8 created, and potentially rights will have been
9 extinguished. So that the entering into the contract
10 is a critical event. I don't know that you are
11 proposing not to enter into the contract before 15
12 October.

13 MR ZWIER: If Your Honour made the direction today that the
14 parties will execute today - - -

15 HIS HONOUR: Exactly.

16 MR ZWIER: To get the money through.

17 HIS HONOUR: Exactly.

18 MR ZWIER: But the money that comes through is non-refundable
19 in a sense it will go through to the landlords. It
20 will not be until settlement that the rights are going
21 to be extinguished by the liquidator, because for any
22 number of reasons settlement mightn't occur. If the
23 purchaser defaults in its obligations which there's no
24 reason for the liquidators to think that's even a
25 possibility, it's a well capitalised entity, it's a
26 global player, it's well funded, but if for example
27 they didn't settle, they would never terminate the
28 rights. And the way it works in the contract is it is
29 an obligation to be provided on or before the
30 completion date, and Mr Bigmore I think would be
31 comforted by me saying that the liquidators won't

1 extinguish the rights until shortly before or on
2 completion.

3 HIS HONOUR: All right. Well, Mr Bigmore, are you
4 comforted?

5 MR BIGMORE: It certainly improves the situation enormously,
6 Your Honour, because we are concerned that the
7 liquidators' application for relief against forfeiture
8 may not succeed. We as growers are contemplating how
9 we might improve the chances of relief against
10 forfeiture being granted because we have rights under
11 the Property Law Act which as sublessees we are
12 entitled to apply, co-ordinating an application of that
13 nature, whether it be as a representative proceeding or
14 a test case is perhaps one of the hurdles that we face.
15 But be that as it may, if our rights were extinguished
16 forthwith, those rights that are extinguished would
17 include the right to approach the court for relief
18 against forfeiture, and we would not have standing in
19 the next month or so to approach the court in that
20 regard.

21 Now, I understand I think it's 14 and 15 October
22 have been allocated for the hearing of that
23 application. We are hoping that we can accelerate our
24 activities in order to be there on that occasion with
25 our own application for relief against forfeiture. So
26 long as we have got standing when we got there, that
27 will be all right.

28 HIS HONOUR: Are you able to accelerate your activities to
29 tell me whether you are comforted?

30 MR BIGMORE: We are comfortable to that extent, yes. But we
31 are still not comfortable with the bank's position,

1 because we haven't seen the bank securities that we are
2 supposed to be inheriting.

3 HIS HONOUR: All right. But you have now seen Exhibit
4 MAK14.

5 MR BIGMORE: Yes.

6 HIS HONOUR: And I assume that you, like me, take the view
7 that there is nothing in the document that isn't
8 effectively outlined in the affidavit, that bears upon
9 my question, that is?

10 MR BIGMORE: Your Honour's question is impossible to answer
11 because I haven't read the entirety of the document.
12 I haven't had time to study it appropriately.

13 HIS HONOUR: No.

14 MR BIGMORE: So I can't agree to that.

15 HIS HONOUR: No, but you can at least tell me that you
16 haven't, in what you have seen, seen anything that
17 requires a change to the position.

18 MR BIGMORE: No, I can say that, Your Honour, certainly.

19 HIS HONOUR: And what you could do with me is you could
20 look at the table of contents and see what we are told
21 in the table of contents one will find, and by
22 reference to that, and then the lengthy list of
23 schedules, which is on page (v), you will see what I
24 assume to be a list of documents many of which you
25 already know about.

26 MR BIGMORE: Yes.

27 HIS HONOUR: So that of a document numbering several
28 hundred pages we can assume that there are critically
29 only a few that will need focusing upon if one has to
30 make a quick decision.

31 MR BIGMORE: Yes. That's so, Your Honour.

1 HIS HONOUR: And the critical ones are at the beginning,
2 really. So casting our eye together on the agreed
3 terms, the interpretation provisions, one can see a
4 form of drafting that has become all too common with
5 largely information that is of a kind one would expect.
6 One focuses upon such defined terms as excluded assets
7 because it might conceivably be helpful, or forestry
8 assets because it might be conceivably helpful, and
9 pass over them. Then one goes to - I think we can
10 pass over most - yes, value allocation on page 11 might
11 excite interest, and then one says, "Well, that doesn't
12 excite much interest." So one then goes to the
13 operative terms, paragraph 2, clause 2, you see the
14 deposit?

15 MR BIGMORE: Yes.

16 HIS HONOUR: That's to be expected, more or less.

17 MR BIGMORE: Yes.

18 HIS HONOUR: Then you have got conditions to completion.

19 MR BIGMORE: Condition 3.1(c), Your Honour, is of particular
20 importance to us.

21 HIS HONOUR: Yes.

22 MR BIGMORE: And there's a definition which goes with that,
23 of course.

24 HIS HONOUR: Indeed it does, but that's in the affidavit,
25 though, isn't it?

26 MR BIGMORE: Yes.

27 HIS HONOUR: So we knew about that.

28 MR BIGMORE: Yes.

29 HIS HONOUR: Yes.

30 MR BIGMORE: Well - - -

31 HIS HONOUR: That's what I'd asked you about, remember?

1 MR BIGMORE: The timing, we didn't know about the timing.
2 HIS HONOUR: No, but we could have assumed the worst
3 possible timing, couldn't we, from your point of view?
4 MR BIGMORE: I feared the worst possible timing.
5 HIS HONOUR: Yes.
6 MR BIGMORE: I am now assured by Mr Zwier, as Your Honour has
7 - - -
8 HIS HONOUR: That it's not so bad.
9 MR BIGMORE: That it's the best possible timing.
10 HIS HONOUR: Quite. So things are better for you.
11 MR BIGMORE: Getting better, yes.
12 HIS HONOUR: Yes. Then you have got clauses of a kind
13 that you would expect, like reasonable endeavours,
14 waivers, et cetera. Clause 4, you would be surprised
15 if it wasn't there. And clause 5, you would be
16 surprised if it wasn't there. Then you have got
17 clause 6 that requires you to pause for a moment or
18 two, and that's unsurprising. 7 is unsurprising.
19 And clause 8 requires a moment of digestion, but that
20 is consistent with what we have been told in the
21 affidavit.
22 MR BIGMORE: Yes.
23 HIS HONOUR: Then clause 9 should give you comfort. 10,
24 11, 12 look like boilerplate provisions to a large
25 extent.
26 MR BIGMORE: Yes.
27 HIS HONOUR: 13 is unexceptional. As is the rest of it,
28 as far as I could see.
29 MR BIGMORE: Again, I am not - I haven't found the provision
30 in relation to the PLL or the PLL leases.
31 HIS HONOUR: Yes, I saw that before.

1 MR BIGMORE: But I saw that they were defined, and I heard
2 what Mr Zwier said earlier as to the provision for it.
3 HIS HONOUR: Well, the PLL leases I think may be dealt with
4 all by the interpretation provisions, is that not
5 right, Mr Zwier?
6 MR BIGMORE: Yes, that's so, but I expected to find an
7 adjustment to the purchase price in relation to that,
8 and I haven't found that yet, Your Honour. I am sure
9 it's there.
10 HIS HONOUR: Well, you might find - is it page 53 that
11 might be what you are looking for?
12 MR BIGMORE: Perhaps it's in the schedule.
13 HIS HONOUR: Well, the numbering is a bit difficult.
14 MR BIGMORE: I don't think I need delay Your Honour in
15 relation to that, I am sure it's to be found there
16 somewhere, but I must say I haven't found it spelt out
17 yet.
18 HIS HONOUR: All right.
19 MR BIGMORE: I accept what Mr Zwier says about that, there
20 might be an adjust to the price if Plantation Land gets
21 the windfall of the timber.
22 HIS HONOUR: Right. All right, well, perhaps if I can
23 then ask you whether there's anything else that you - -
24 -
25 MR BIGMORE: No.
26 HIS HONOUR: Thank you for that.
27 MR BIGMORE: So, Your Honour, I can only make the submission
28 in relation to the Commonwealth Bank securities that we
29 cannot say that they are of any value to us, let alone
30 \$25 million worth, unless and until we see them and
31 work out what the securities are that we would be

1 getting.

2 HIS HONOUR: Yes, thank you. Mr Zwier, I presume you have
3 got your exhibit back?

4 MR ZWIER: Yes, Your Honour.

5 HIS HONOUR: I regrettably just need a moment or two to
6 sort out some notes, and I have some difficulties
7 immediately. Is there any overwhelming reason why we
8 can't resume at 4.15?

9 MR ZWIER: No, Your Honour, we would be indebted if you can
10 do that.

11 HIS HONOUR: We will adjourn until 4.15 then.

12 LUNCHEON ADJOURNMENT

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1 UPON RESUMING AT 4.15 PM:

2 MR GALVIN: If Your Honour pleases, I appear with Mr Bigmore,
3 my name is Galvin.

4 HIS HONOUR: I see, thank you.

5 (RULING FOLLOWS)

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1 (FOLLOWING RULING)

2 HIS HONOUR: I do not know whether I need to reserve costs,
3 Mr Zwier.

4 MR ZWIER: Your Honour, there's only one other minor issue.
5 As I understand, section 477(2)B, it's relief that is
6 directed to the liquidators of each company rather than
7 the companies in liquidation. If I could hand up to
8 Your Honour a form of the proposed order that we think
9 complies with the Act in relation to section 477(2)B.

10 HIS HONOUR: Yes. Have the other counsel seen this?

11 MR ZWIER: Yes, they have, Your Honour. And I don't know if
12 Your Honour wants me to file the amended originating
13 process?

14 HIS HONOUR: I do. So what's different?

15 MR ZWIER: I thought that the form of the order that I handed
16 up spelled out that it was the liquidators of the
17 various entities that were going to be granted the
18 relief under section 477. Sorry, have I handed up the
19 right one?

20 HIS HONOUR: Well, the words are different, but it doesn't
21 seem to be different in the respect that you are now
22 putting.

23 MR ZWIER: I am sorry, what I am told is that the form of
24 order in the amended originating process is the one
25 that I want to hand up to Your Honour. That's the
26 correct one, in preparing the draft order - - -

27 HIS HONOUR: You have given me the originating motion,
28 thank you.

29 MR ZWIER: That's the amended originating motion.

30 HIS HONOUR: Yes, thank you.

31 MR ZWIER: And there are additional parties added to it.

1 HIS HONOUR: Yes.

2 MR ZWIER: Being the various liquidators.

3 HIS HONOUR: Yes, that's why you needed to have the
4 originating motion, that's why I wanted it, thank you.

5 MR ZWIER: And if you look at the first order that we seek,
6 it refers to approving the entry by the various first
7 to fifth plaintiffs who are the liquidators of the
8 first and sixth to twelfth plaintiffs. Your Honour,
9 perhaps the best thing for me to do is to stand the
10 matter down to sort this out with my friends. I don't
11 think there's any dispute between us that we need to
12 get relief. It just appears that from the papers that
13 have been prepared there's some mix up between the
14 originating motion and the draft orders.

15 HIS HONOUR: I am happy enough for you to stand the matter
16 down, but just so that you don't have to keep coming
17 backwards and forwards, because that's not going to
18 happen, that is to say, I am not going to come
19 backwards and forwards. The only variations that it
20 seems to me you should seek from the orders that you
21 put to me this morning are that the word "justified
22 "has got to go, and that you should add "other
23 individuals" before the word "are". That, as I see
24 it, are the only other changes that are consequential
25 upon 477(2)B.

26 MR ZWIER: Your Honour, I think that we would be content with
27 that.

28 HIS HONOUR: So if you have got the order that you handed
29 me this morning.

30 MR ZWIER: Yes, Your Honour, I have got the form of the order
31 from this morning.

1 HIS HONOUR: Yes.

2 MR ZWIER: We can make those changes and perhaps email them
3 to Your Honour's chambers.

4 HIS HONOUR: You don't need to recite the basis upon which
5 the order has been made, so there's no point relying
6 upon the words in the amended originating motion. All
7 you need to do is identify who it is that is being
8 permitted.

9 MR ZWIER: Yes, Your Honour.

10 HIS HONOUR: That's all.

11 MR ZWIER: Okay.

12 HIS HONOUR: Quite simple.

13 MR ZWIER: Thank you, Your Honour.

14 HIS HONOUR: All right.

15 MR ZWIER: If Your Honour pleases.

16 HIS HONOUR: Now, I wasn't proposing to order costs at all.
17 Who am I reserving costs for and against whom?

18 MR ZWIER: Well, I expect that an arrangement has been made
19 between the liquidators and the representatives of the
20 growers for the liquidators to pay them.

21 MR GALVIN: If that's the case, I am not sure I am aware of
22 that. But if that's the case we wouldn't have any
23 problem with it, of course, we wouldn't ask Your Honour
24 to reserve any costs, it wouldn't be necessary. If
25 that's the understanding, if our costs are to be
26 accommodated by the liquidators, then I don't seek any
27 order for reservation or any order for costs.

28 HIS HONOUR: If the parties have reached an agreement about
29 costs, then that's a matter for them to deal with. If
30 they have not reached agreement about costs, I remind
31 you that you are not a party.

1 MR GALVIN: Of course, sir, yes.

2 HIS HONOUR: And I am not sure that I - perhaps I can order
3 costs in your favour, but I think we will just leave
4 costs out of the equation for the moment. If you need
5 to come back to court on the basis that somebody has
6 breached some agreement, you can do so.

7 MR GALVIN: Thank you, Your Honour. I should say that the
8 costs order would be more in the nature of payment of
9 costs out of a common - on a common fund type basis
10 rather than a costs as against a party. But I hear
11 what Your Honour says. If Your Honour pleases.

12 MR ZWIER: Can I just thank Your Honour again for doing this
13 matter so quickly and efficiently today, Your Honour.

14 HIS HONOUR: Always pleased to help, Mr Zwier.
15 Adjourn the court, please.

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