

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

LIST E

SCI 2009 10699

BETWEEN:

**BOSI SECURITY SERVICES LIMITED (ACN 009 413 852) as trustee for
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
(ACN 005 357 522) and BOS INTERNATIONAL (AUSTRALIA) LIMITED
(ACN 066 601 250) and WESTPAC BANKING CORPORATION
(ACN 007 457 141)**

Plaintiff

and

**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
(ACN 005 357 522) & ORS (according to the attached Schedule)**

Defendants

CERTIFICATE IDENTIFYING EXHIBIT

Date of document: 3 March 2010
Filed on behalf of: the Second, Third and Fourth Defendants


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This is the exhibit marked '**MAK-53**' now produced and shown to MARK ANTHONY
KORDA at the time of swearing this affidavit on 3 March 2010.

Before me:


LUCY HANNAH KIRWAN
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Level 21, 333 Collins Street
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An Australian Legal Practitioner within the
meaning of the Legal Profession Act 2008

Exhibit 'MAK-53'

Copy of Opinion of Charles Scerri QC

In the Matter of:

Proposed Resolutions at Meetings of Certain Timbercorp Almond Schemes

MEMORANDUM OF ADVICE

1. I am instructed on behalf of the Liquidators of Timbercorp Securities Limited (ACN 092 311 469) (In Liquidation) in relation to certain proposed resolutions.
2. The resolutions are to be considered at meetings on 31 July 2009 of members of 7 Timbercorp Almond registered managed investment schemes.
3. There are 8 resolutions. The discussion below is on the assumption that each resolution is passed by the requisite majority. Where I refer below to the Scheme, or to a resolution, growers or the Constitution, I refer in case to the resolution, growers or the Constitution relating to each scheme.
4. In my opinion:
 - a. Resolutions 1, 2(i), 2(ii), 3, 4 and 8 will not be effective to amend the Constitution or otherwise to alter the legal rights or obligations of the members of the Schemes (growers), or the legal rights, powers and obligations of Timbercorp Securities Limited (TSL) as the Responsible Entity of the Schemes;
 - b. Resolution 2(iii) would be effective to amend sub-clause 13.7(d) of the Constitution;
 - c. Resolution 5 will be effective to adjourn consideration of Resolutions 6 and 7; and
 - d. If Resolutions 6 and 7 are not adjourned, but are passed, Resolution 6 will be effective but Resolution 7 will not be, and the Corporations Act requires that if TSL is removed, a new Responsible Entity must be appointed at the same meeting. Resolution 7 will not satisfy that requirement.

Resolution 1

5. This is "... a resolution that the Scheme continue and not be wound up".
6. In my opinion, such a resolution is of no legal effect because it cannot prevent the winding-up of the Scheme in accordance with the Constitution or the Corporations Act. The resolution is no more than an aspirational expression of opinion, without legal force. This seems to be recognised by the proponents of the resolution: they say in their explanatory statement "The purpose of this resolution is to gauge the opinion of growers about continuing the scheme. The resolution is not binding on the responsible entity but may be persuasive."

Resolution 2

7. This is a special resolution "that the constitution of the Scheme be modified as follows:

(i) Inserting after Clause 11 the following clause:

"11A Responsible Entity's additional powers
The Responsible entity has the power to:

- a. borrow, for the limited purpose provided in sub-clause (d) below (and repay such borrowing and pay interests and costs in relation to such borrowing from monies (sic) in the Agency Account);
- b. grant security over the moneys in the Agency Account, for the limited purpose provided in sub-clause (d) below;
- c. advance funds using the moneys in the Agency Account, for the limited purpose provided in sub-clause (d) below;
- d. seek out, negotiate and implement any restructure proposal and working capital funding proposal to be approved by Growers by ordinary resolution."

(ii) Inserting after Clause 14 the following clause:

"14A Responsible entity's entitlements

The Responsible Entity is entitled to pay or be reimbursed for expenses reasonably and properly incurred in relation to sub-clause 11A(d) out of the Agency Account."

(iii) replacing the words, "five months after 30 June each year" in sub-clause 13.7(d) with the words "eleven months after 30 June each year".

8. According to the proponents' explanatory statement, the purpose of this resolution is "...to amend the constitution. The purpose of the amendment is to allow the responsible entity to use the proceeds of the 2009 crop for the purposes of working capital in the production of the 2010 crop and for the purposes of a long term restructure of the scheme (whether alone or together with other schemes)."
9. It will be seen that the proposed new Clause 11A and Clause 14A both assume that, by special resolution, the requisite majority of members has power to authorise the Responsible Entity to deal with moneys in the Agency Account without the consent of the growers for whom the moneys are held. In my opinion, this assumption is incorrect. Clause 12.2 of the Constitution relevantly provides that "... the Responsible Entity must hold the moneys standing to the credit of the Participant Grower in the Agency Account for the Participant Grower to be dealt with in accordance with the provisions of [the Constitution]". That is, the Responsible Entity is obliged to hold the moneys on trust for the growers. It would be a breach of trust for the Responsible Entity to deal with moneys in the Agency Account Inconsistently with the accrued rights of members. The majority do not have power (by the passing of the proposed special resolution) to authorise such a breach of trust, and to take away the accrued rights of any grower in the moneys in the Agency Account without the grower's consent. Neither the Constitution nor the Corporations Act confers any such power. The Constitution cannot be validly amended to take away those rights against the wishes of each grower concerned.
10. In addition, Resolution 2 is, in my opinion, legally uncertain and therefore ineffective. The uncertainty arises because each of the proposed new sub-paragraphs (a), (b) and (c) depends upon an unspecified 'restructure proposal'. The only definition of the proposal is that the proposal be approved by ordinary resolution. But this provides no certainty. Resolution 2 is, in

effect, a blank cheque, the details of which would be completed by the passing of a later, ordinary resolution. This approach is legally defective because the Constitution may not be amended by an ordinary resolution. Resolution 2 is an invalid attempt to amend the Constitution indirectly by a (later) ordinary resolution.

Resolution 3

11. This reads "Subject to Resolution 2 being passed, an ordinary resolution approving a working capital funding proposal in the terms put to such meeting".
12. The form of the resolution is curious in that it depends for its content upon another, unspecified resolution.
13. In my opinion, this resolution is uncertain and therefore ineffective because the "working capital funding proposal" is not identified. Secondly, the resolution refers to another "ordinary resolution approving" the unidentified proposal. It is not clear to me what purpose Resolution 3 is supposed to achieve. It does not purport to approve any proposal. It cannot be notice of the proposed "ordinary resolution" approving the proposal, because the "proposal" and therefore the resolution have not been identified. Further, the proposed "approval" resolution is another blank cheque of which no notice has been given.

Resolution 4

14. This reads:

Subject to Resolution 2 being passed, an ordinary resolution:

- (i) that it is in the best interests of Growers to have the opportunity to consider a restructure proposal which may or may not include all or any of the following:
 - (A) converting Growers' interests to ownership interests;
 - (B) the issue of listed or unlisted securities in exchange for Grower's interests; and
 - (C) the convening of meetings under section 411 of the Corporation Act for Growers to approve a compromise of their contractual claims against Timbercorp Securities Limited (In Liquidation) ACN 092 311 469 and related bodies corporate as defined in the Corporations Act.

- (ii) that the Responsible Entity take or cause to be taken all necessary and incidental actions to allow the restructure proposal to be submitted to Growers for their consideration at one or more meetings of Growers (whether in their capacity as members of the scheme, creditors of the Timbercorp Group (all in Liquidation) or otherwise".

15. The form of this resolution is also curious. It also does not purport to affect the legal rights of members of the schemes. If passed it will operate as no more than as an expression of the views of the persons attending the meeting. This is recognised in the explanatory statement which says "this resolution may not be binding..". In my opinion, Resolution 4 would not have any legal effect.

Resolution 5

16. This reads "A resolution that proposed resolutions 6 and 7 be held over to an adjournment of the meeting".

17. In my opinion, the Scheme meeting can resolve validly to adjourn the meeting, and to defer the consideration of Resolutions 6 and 7 to the adjourned time. Therefore, Resolution 5 will be effective if passed.

Resolutions 6 and 7

18. These resolutions need to be considered together.

19. Resolution 6 is "An extraordinary resolution that TSL be removed as responsible entity."

Resolution 7 is "An extraordinary resolution choosing a company to be the new responsible entity".

20. A fatal flaw with these resolutions is that section 601FM of the Corporations Act requires that if a Responsible Entity is removed by the members of the Scheme, a new Responsible Entity must be appointed 'at the same meeting'. Resolution 7 is ineffective to appoint a new Responsible Entity to replace TSL. To achieve that result, it is necessary that there be duly passed a

resolution that identifies the new Responsible Entity, which the Corporations Act requires to be a Responsible Entity that has consented to be appointed.

Resolution 8

21. This reads "Alternatively, a resolution that the TGG prosecute the Interlocutory Processes forthwith". Again the form of this resolution is curious. In fact, it is difficult to discern what this resolution is supposed to mean, or achieve, or how it could conceivably affect the rights of the members of the Scheme. In any event, it is clear, in my opinion, that it does not amend the Constitution or otherwise affect the legal power, rights or obligations of growers or TSL under the Scheme.



Charles Scerri

Chancery Chambers,

Melbourne

27 July 2009