

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-67**' now produced and shown to MARK ANTHONY KORDA at the time of swearing this affidavit on 3 March 2010.

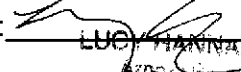
Before me: 
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An Australian Legal Practitioner within the
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Exhibit 'MAK-67'

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TRANSCRIPT OF PROCEEDINGS

O/N 113461

FEDERAL COURT OF AUSTRALIA

VICTORIA REGISTRY

FINKELSTEIN J

No. VID 595 of 2009

**IN THE MATTER OF TIMBERCORP SECURITIES LIMITED
(IN LIQUIDATION)**

MELBOURNE

9.16 AM, TUESDAY, 18 AUGUST 2009

MR P. CRUTCHFIELD appears for the plaintiffs
MR G. BIGMORE QC appears with MR M. GALVIN for Mr David Sidney
Butterfield and the Timbercorp growers group

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- MR BIGMORE: Yes.
- HIS HONOUR: I try and explain in short terms that turns the law of liquidation on its head.
- 5 MR BIGMORE: Well, your Honour, all we have been able to work on so far is section 601FD(1), and I presume your Honour has reconciled 601FD with the liquidation provisions and - - -
- 10 HIS HONOUR: That's exactly what I have done.
- MR BIGMORE: - - - come to a paramountcy conclusion.
- 15 HIS HONOUR: I have come to the conclusion that a liquidator's primary responsibility is to everybody who is interested in a liquidation, and it is in stark breach of his obligation to favour one group over another, and I think I say in short form he should readjust his views, and nothing you're going to do is going to make me direct the liquidator to act otherwise than impartially between everybody.
- 20 MR BIGMORE: Yes.
- HIS HONOUR: There you go.
- 25 MR BIGMORE: It probably doesn't make much difference to the thrust of our submissions, your Honour, in - - -
- HIS HONOUR: Well, let's deal with those parts of your submissions which will make a difference to what I'm going to do.
- 30 MR BIGMORE: What we're concerned about is that the sale of the assets in which the growers are interested is - or the proceeds of all the interests are divided in such a way that our interest is respected. So that if, for example, somebody buys the land with all the trees and so on - - -
- 35 HIS HONOUR: Yes.
- MR BIGMORE: - - - then our interest in the trees will represent a particular percentage of that.
- 40 HIS HONOUR: That's fair enough.
- MR BIGMORE: Now, that should not be simply left to the determination of anyone who offers to buy simply to apportion as between our interest and other interests. It's something that Mr Korda must negotiate.
- 45 HIS HONOUR: With whom?

MR BIGMORE: With the purchasers.

5 HIS HONOUR: Well, there's two ways of doing that, I suppose, taking as the example a purchaser who is going to buy everything, including the interests of growers. The price could be apportioned between vendor and purchaser, or the proceeds can be put aside and a proper apportionment worked out at a later stage.

MR BIGMORE: Yes. We're happy with that as well, because - - -

10 HIS HONOUR: You might be happy with it, but what's the legally correct way of doing it? I don't care what you're happy with.

15 MR BIGMORE: Either way is correct. If Mr Korda takes it upon himself to negotiate with the purchaser the apportionment, then he leaves himself open to criticism by either side of the equation later on. If the proceeds are held so that our interests are preserved, then we do not have a complaint, a legal complaint.

20 HIS HONOUR: Well, the proceeds are going to be held in any event, because when I read your affidavits I gained the impression that your growers think they'll get the sale proceeds for the timber free of any encumbrance. Now, they might be right, or they might be wrong about that. There's a good chance that they're wrong, and I certainly wouldn't let the liquidator give to anybody, including your clients, all of the money - - -

25 MR BIGMORE: Yes.

HIS HONOUR: - - - until somebody decides that they're entitled to all of the money.

30 MR BIGMORE: Yes.

HIS HONOUR: And it might be that there are very many expenses that come off the top. I frankly don't know, and probably you don't know either.

35 MR BIGMORE: No.

HIS HONOUR: But, certainly, nobody is going to get their hands on the cash, if any cash is produced, until all the claimants are sorted out.

40 MR BIGMORE: Yes.

HIS HONOUR: There might be none. I suspect there will be lots.

45 MR BIGMORE: Yes. Now, your Honour, one of the things we are concerned about, of course, is that if it proceeds this way - if Mr Korda determines that he will terminate our subleases - - -

HIS HONOUR: Yes.

MR BIGMORE: - - - and then sells what he's got after that - - -

5 HIS HONOUR: There's no sensible way in which he would do that. Part of the consideration would be the termination of the sublease. That's how you get your share of the money.

MR BIGMORE: Yes, yes.

10 HIS HONOUR: That's a mechanical exercise about which I would have thought there would be no dispute whatsoever. It's a drafting of a contract point.

MR BIGMORE: Yes.

15 HIS HONOUR: And, if you like, I can get an assurance from the liquidators that they'll bring the contract to me before it's executed, or make it conditional on court approval - I don't care.

20 MR BIGMORE: Yes.

HIS HONOUR: But what you're talking about is machinery. How do you draft a contract for the sale of a leasehold interest, and how you make good title. All right. How do you want to deal with that?

25 MR BIGMORE: Pardon me, your Honour. Yes. My instructors indicate that I should submit that the process should be brought to your Honour for approval before the contract is completed.

30 HIS HONOUR: The contract?

MR BIGMORE: Yes.

35 HIS HONOUR: I'd assumed that that would happen in the ordinary course, but who knows?

MR BIGMORE: Yes.

40 HIS HONOUR: But it wouldn't be a bad idea if there was some broad agreement reached that - well, there's various ways - who knows what's going to happen. But I'm working on the assumption that you're not going to get anybody to step in and become a responsible entity and pick up the bill for all past debts.

MR BIGMORE: Yes.

45 HIS HONOUR: That I regard as, I suppose, a theoretical possibility, but a forlorn hope.

MR BIGMORE: Yes.

HIS HONOUR: Although I see from your affidavits that there's plenty of people who vote on the basis that they think that everything is going to come back to life.

5

MR BIGMORE: If there's some potential that Gunns and -- or the TC growers would take ---

10 HIS HONOUR: Yes. But when I read Gunns' letter I didn't see them picking up a \$27 million tab for unpaid rent.

MR BIGMORE: Which they would have to do.

HIS HONOUR: That's exactly right. That's why ---

15

MR BIGMORE: I understand that, your Honour. Yes.

20 HIS HONOUR: That's the reason why I'm not interested in plebiscites or Athenian democracy, because it doesn't tell me anything about the real world. So that what you're going to have is a contract, which is likely to be a sale of land contract, because it is land. I haven't picked up the relevance of the company. I just don't know. I think you said there was going to be some -- or the affidavit says there's going to be shares in some company sold as well.

25 MR BIGMORE: Yes.

HIS HONOUR: I have got no idea what that company does or ---

MR BIGMORE: It will ---

30

HIS HONOUR: --- what role it has.

MR BIGMORE: There'll be a lot of detail in that, your Honour, I'm sure. But we can check.

35

HIS HONOUR: Yes. But I have got an idea how it fits in, and then there's going to be leases which will be assigned, and presumably there's going to be -- and somebody is going to pay a price for all of that.

40 MR BIGMORE: Yes.

HIS HONOUR: And there'll be an obligation under the contract for the relevant Timbercorp company and the leasing ---

45 MR BIGMORE: Yes.

HIS HONOUR: - - - whatever the leasing company is, is buy a part of the owning company - - -

MR BIGMORE: Yes.

5

HIS HONOUR: - - - to procure good title to the timber by getting the leases surrendered - subleases.

MR BIGMORE: Surrendered. That's right.

10

HIS HONOUR: Now, that can be done in two ways. You could say you will get every grower to execute a sublease.

MR BIGMORE: Well, the responsible entity will do it.

15

HIS HONOUR: I regard that as an absurd proposition because it won't happen.

MR MORRIS: The responsible entity has power as attorney to do that, assuming that the power is there, or is added to the constitution - - -

20

HIS HONOUR: Correct.

MR BIGMORE: - - - by the amendment that's put forward.

25

HIS HONOUR: And my object was to make it abundantly clear - there's an argument that the power is there.

MR BIGMORE: Yes.

30

HIS HONOUR: I agree with that.

MR BIGMORE: Yes.

35

HIS HONOUR: But I didn't want a prospective purchaser saying, "I'm going to take the risk about this, and then I'll give you half of what it's worth" - - -

MR BIGMORE: Agree with that.

40

HIS HONOUR: - - - "and I'll wear the risk." If I make it abundantly clear, then the purchaser can't come along and say, "I'll give you anything other than proper value," because he's not buying a risk. Doesn't have the risk of dealing with a couple of thousand growers saying, "They're my trees, and you might have paid something to the responsible entity or the lessee - you know, the relevant Timbercorp company." I could - it's a much harder exercise and not absolutely clear that it's within power, but it's possible that I could also - and I think it's unnecessary, myself - I could add a power that, as agent, the relevant Timbercorp company sell all the wood, but I thought that was unnecessary, by the surrender process.

45

MR BIGMORE: I think that's right, with respect, your Honour.

HIS HONOUR: But if you think you get more money that way, then I'll take that on board as well.

5

MR BIGMORE: Yes, I understand. One wouldn't have thought so. If you surrender the lease then the wood - - -

10 HIS HONOUR: I don't think so, because I think once the lease - there is a - there's a lapse, isn't there, but it's picked up by 7(1). I think that once a lease is surrendered the tenant has got a couple of days within which to go and get the timber.

MR BIGMORE: Yes, I suppose.

15 HIS HONOUR: And as long as the settlement date - so the sequence of events under a properly structured contract, would be contract on terms; satisfy the terms, that is, procure the surrender; wait for the relevant two or three day - or period, whatever it is, so that there's a clear extinguishment of anybody's rights over the timber, or wood, or however it's defined in these agreements; and then the purchaser
20 knows he is getting full and clear title. And if there is a hiccup and if the purchaser says, "I'm worried about something," he can always come back and it can be fixed, but all that the contract needs to say is that the price which is being paid is for both freehold, leasehold, and timber.

25 And you can - I couldn't care what the mechanism is by which the apportionment is going to be determined, that is, dividing it between leasehold - and I think you're in a better position not to leave it to private agreement between the liquidator and whoever the purchaser is, Gunns or anybody else. I would either agree on a formula, because there is a formula discussed. I wouldn't buy that formula unless I was sure
30 that other creditors' interests are not going to be thereby prejudiced because the formula might not be a reasonable one, or you might just leave it to be determined. I don't know. Lots of ways that it can be done.

MR BIGMORE: Yes, well, so long as it is determined in due course, either by
35 agreement or by your Honour's order, then that would seem logical. What we're concerned about is - and I don't know whether there are any taxation implications in all of this. I had enough trouble trying to get on top of what I have got on top of, but presumably a purchaser and a vendor of these sorts of assets might negotiate an apportionment as between themselves. We would not accept that as binding on the
40 growers if for some reason - - -

HIS HONOUR: No, no, there might be good - that's exactly why I would treat an apportionment by vendor and purchaser as the least desirable approach, because
45 there will be good revenue reasons to up the capital side and down - or increase the revenue on revenue accounts.

MR BIGMORE: There might be.

HIS HONOUR: Yes, sure, but – now, if the vendor – if the purchaser can't apportion it that might affect purchase price though.

MR BIGMORE: Yes.

5

HIS HONOUR: It will, so I'm not sure how you can both keep the best – get the best possible price, which is to make as much tax deductibility in the hands of the purchaser, and keep your own apportionment.

10 MR BIGMORE: So long as that apportionment is not binding on the growers – that's between the growers and the responsible entity, at the end of the day – then we don't have a problem.

15 HIS HONOUR: It might not be binding, but it might be a yard stick against which you work out what is fair and reasonable.

MR BIGMORE: Well, exactly, and, as your Honour said, it may be that the price was X per cent higher because of the apportionment as between vendor and purchaser. We would have to take all that into account, but that is not the same as saying we're bound by the actual percentage.

20

HIS HONOUR: Yes, okay. Well - - -

MR BIGMORE: That's a debate we can have.

25

HIS HONOUR: All right. Well, what debate do we have now?

MR BIGMORE: Only the debate about the form, because we're concerned about recital B. This is MAK19.

30

HIS HONOUR: Yes, probably buried somewhere. I got too many papers. Do you want to give me a copy of the exhibit. Mr Crutchfield has got hundreds of them.

MR BIGMORE: Have you got a spare of MAK19?

35

MR CRUTCHFIELD: MAK19?

MR BIGMORE: Yes.

40 MR CRUTCHFIELD: Is it attached to the order?

MR BIGMORE: Yes.

45 MR CRUTCHFIELD: We'll do better than that, your Honour. We will give you an order.

MR BIGMORE: Good.

SUPREME COURT OF VICTORIA

COMMERCIAL COURT

TIMBERCORP SECURITIES LTD

Plaintiff

v.

GARNAUT GROUP & ORS

Defendants

JUDGE: Robson J
WHERE HELD: Melbourne
DATE OF HEARING: 18 August 2009

APPEARANCES

MR P. CRUTCHFIELD appeared with MR O. BIGOS on behalf of the Plaintiff

MR G. BIGMORE QC appeared on behalf of The Grower Group.

MR I. WALLER appeared with MR M. GALVIN on behalf of ASIC

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1 but I've got to balance it up. Put yourself in my place,
2 you've got an experienced liquidator that's saying
3 things, which makes sense to me, but then you've got this
4 terrible resistance from the growers. This is what I've
5 got to sort of reconcile. I've been told that they're
6 main concern is that they worry that their sub-leases
7 will go if the companies are wound up. Do you perceive
8 - you've had lots of negotiations with them, do you
9 perceive any other major issues they've got?---I think
10 - and I think we're in - I hope we're in viable agreement
11 on this. If I contrast it a little bit to forestry at
12 the moment and - it was a long negotiation on forestry et
13 cetera and we've got an agreed process to sell the
14 forestry, which got signed off this morning by
15 Justice Finkelstein, that's basically said you've got the
16 power to terminate the sub-lease. That's really what you
17 need to deliver title. We know there will be ten's if
18 not hundreds of millions of dollars attributable to the
19 trees, although Justice Finkelstein did say well, I'm not
20 sure that's correct, but that's our view as liquidators.
21 I contrast that to the almonds and olives, where the land
22 owning companies own the land, the trees and the water
23 rights and the growers own the future crop. My
24 understanding is if they don't pay for the crop now then
25 they can't end up with the future crop, so it's possible
26 they may get very - other than the 2009 proceeds, they
27 might get - and other than not having to put any more
28 money in, they may not get very much out of the sale or
29 recapitalisation process. But we've always said that's
30 an argument to be had at a later date, i.e. the
31 allocation of a proceeds at a later date. But it's that

1 - - -
2 Sorry, can I interrupt, what do you mean by that's an argument
3 to be had at a later date, just explain to His Honour how
4 envisage that working?---So I assume if we discharge the
5 secured creditors - I'll make that - and there's a pot of
6 money left over, or even before that, if there's a pot of
7 money there'll be claims on whether it should go to the
8 growers, or whether it should go to the unsecured
9 creditors of TSL or the other unsecured creditors within
10 Timbercorp group or - - -

11 HIS HONOUR: There'll be a claim by the secured creditors?---Or
12 claimed by the secured creditors.

13 Because they'll be saying it's land money?---Correct, so I
14 think that's - I think that's the commercial economic
15 difference between forestry and where the almonds and
16 olives are, they don't actually own the trees, and the
17 trees are in Almond Land's books, so what you've got
18 is - - -

19 But on the other hand the land and the water's not worth much
20 if you can't have the crops. I mean you can say they
21 both need each other?---So you need the land, the water,
22 and the trees, and then there is - well the proceeds from
23 the crop, and this is the thing, the proceeds from the
24 crop - sorry, the costs of the crop, \$140m need to be
25 funded by the grower so they can get next year the
26 proceeds of the crop, which is a hundred million. Now
27 eventually over time it should turn around. So part of
28 the problem we are is well the growers don't want to put
29 their money in to get the crop. So what do you do? The
30 growers say I don't want to put my money in - some say
31 they don't want to put their money in. Some can't, and

1 hypothetical?

2 On the lock, stock and barrel?

3 HIS HONOUR: On the almond? Do you mean on the almond?

4 MR BIGMORE: On the almond schemes, the assets with respect of

5 which the almond schemes are involved, including the

6 land?---I'm just trying - cause we've got so many

7 schemes, so many properties. Let me say this, it be

8 \$170m. But what happens is the banks have cross

9 collateralised in some cases, back over olives, and

10 they're also cross collateralised more importantly

11 against the Timbercorp Finance loan book. So depending

12 on subrogation and marshalling issues, it's not that

13 clear, it's complex.

14 Is there a likelihood of any change after all these secured

15 creditors are paid?---I think I said before I thought

16 that was unlikely, but ultimately it will depend on the

17 marshalling and subrogation that relates to the

18 Timbercorp Finance loan book.

19 HIS HONOUR: If the bidder allocated a certain amount to the

20 crop, to cropping rights, the banks couldn't take that,

21 could they?---No.

22 It depends how the tendering was structured?---So, say if I

23 took my theoretical Land's \$200m and let's say the bank

24 debt is - I'll pick 150 for example. Well, what do we do

25 with the \$50m? Does that go to the growers, or does that

26 go to the unsecured creditors? So, there's this

27 allocation problem that's still to be determined.

28 MR BIGMORE: These would be the unsecured creditors, not just

29 the ones you mentioned earlier as having been incurred at

30 a relatively recent time in respect of the scheme, but

31 the unsecured creditors of other companies in the group,

1 would they?---For example, the unsecured creditors of the
2 Land company maybe.

3 Again, it boils down to an apportionment between the amount
4 that represents the present day value of the cropping of
5 the properties over a period of time, as against the
6 other interests?---Well, yeah, the practical reality is
7 the assets are spread over a number of entities and a
8 number of schemes. That's part of this - the whole
9 complexity of managing control as liquidators, I guess
10 determining who should be getting what.

11 Do you accept, do you that one of your duties is to maximise
12 for the growers the return they might get for giving up
13 their cropping rights?---I understand that.

14 How are you going to go about doing that, achieving the
15 maximisation of the growers interest in those cropping
16 rights?---Well that's, of course, as the liquidator of
17 TSL, we've also got the other creditors of TSL to deal
18 with and also we are liquidators of other companies. So,
19 we've always had a view that there are competing
20 interests, we'll manage that and where their
21 controversial, we'll have to come back to court. So, I
22 think there was a discussion Your Honour with Justice
23 Finkelstein this morning that well there'll be this sum
24 of money and he sort of pointed out that maybe the trees
25 aren't scheme property and - which leads to the
26 conclusion that maybe the money doesn't go to the scheme
27 members for the trees. But, I'm sure there'll be a
28 negotiation or a way to sort that out.

29 HIS HONOUR: It seems to me - don't mean to interrupt

30 Mr Bigmore, if the person tendered a separate price for
31 the cropping then the only liabilities which would be

1 deducted from that sum would be the ones you pointed out,
2 that have been incurred, the rent and the fees. The
3 secured creditors wouldn't be able to attach it?
4 ---Correct. So I think there'd be - just to help Your
5 Honour out, I think there'd be the 2009 proceeds which
6 are sitting in a bank account, what do we do with those.
7 Yes?---There's the 2010 crop that we would have spent say \$20m
8 on by 31 October, that's got to come back and that would
9 pay for the bees and so I could pay my liabilities. Then
10 there was - OK, there was the crop for 2011, 2012, 2013,
11 2014 and that's the big question mark at the moment.

12 Well it's up to the market.

13 MR BIGMORE: Yes. Do you know of any reason why a purchaser
14 would skew the values that he would place on the cropping
15 rights up or down as a result of perhaps for example tax
16 considerations?---I haven't turned my mind to it, but
17 that's an issue.

18 But that is something you would have to turn your mind to in
19 negotiating the proper figure for the cropping rights,
20 isn't it?---Yes.

21 For example, just hypothetically if a purchaser said I'd really
22 like very small value for cropping rights because I might
23 have to pay a different type of tax on that, you would
24 have to get some advice and expert opinion perhaps as to
25 what the appropriate figure should be?---And of course
26 banks sit there and go well they'll probably rather have
27 it in - - -

28 HIS HONOUR: In the land - - -?---Assets that are tax
29 deductible rather than the land, so yeah - - -
30 It's called transfer pricing.

31 MR BIGMORE: I have tax offices occasionally Your Honour - - -

1 HIS HONOUR: Tax office is fully on top of transfer pricing.
2 MR BIGMORE: So you regard yourself as able to discharge your
3 duties to the growers, as well as your duties as
4 liquidator to the companies in the group that have
5 liabilities to unsecured creditors, as well as whatever
6 duties you might have as liquidator of borrower companies
7 to the banks?---Yes, a lot of competing interests, and I
8 think, you know, we've taken the view if it's
9 controversial well we'll have to come back to court.
10 One of the difficulties might be, just to take you to a
11 hypothetical example, if there's \$150m owed to the banks
12 but you're only able to get \$150 for the sale of
13 everything, including the cropping rights, what fund is
14 there going to be to argue about?---Well what happens if
15 it's 120 million, they might - the banks might not even
16 discharge their mortgages.
17 Well you're in a position then where you have to negotiate with
18 the banks and say well the cropping rights are something
19 over which you don't have security?---I think that's
20 correct, yes.
21 Yes, and you would have to have that negotiation as well, yes,
22 nothing further if Your Honour pleases.
23 HIS HONOUR: Mr Crutchfield do you want to - - -
24 MR CRUTCHFIELD: No thank you Your Honour.
25 HIS HONOUR: Mr Korda you're - you can stand down?---Thank you
26 Your Honour.
27 <(THE WITNESS WITHDREW)
28 MR BIGMORE: (Indistinct) assurance that my learned friend has
29 closed his case Your Honour.
30 HIS HONOUR: Well I'm a little bit confused. Before you
31 continue, and I haven't excused Mr Korda, I'll let him

SUPREME COURT OF VICTORIA
COMMERCIAL COURT

TIMBERCORP SECURITIES LTD

Plaintiff

v.

GARNAUT GROUP & ORS

Defendants

JUDGE: Robson J
WHERE HELD: Melbourne
DATE OF HEARING: 19 August 2009

APPEARANCES

MR P. CRUTCHFIELD appeared with MR O. BIGOS on behalf of the Plaintiff

MR G. BIGMORE QC appeared on behalf of The Growers Group.

MR I. WALLER appeared with MR M. GALVIN on behalf of ASIC

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1 point of view. So it's very important to the growers to
2 understand what prices are being offered or what
3 apportionment is being offered within the prices. So
4 that's our concern, Your Honour.

5 HIS HONOUR: Thanks, Mr Galvin. Mr Hibble?

6 MR HIBBLE: ASIC doesn't take a position on this issue at the
7 moment, Your Honour.

8 HIS HONOUR: I wish you did.

9 MR BIGOS: Your Honour, can I just make a couple of points. As
10 to the alignment between TGG and Align, during the
11 meetings of the almond schemes, the position of Align was
12 put forward as a position of the Timbercorp Growers
13 Group. Align didn't actually make a proposal then, but
14 it was for all intents and purposes, and it would have
15 been apparent to people who attended the meeting, that
16 it's really a proposal by the Growers Group, which was
17 spearheaded by Timbercorp Growers Group, and the person
18 they were putting forward is Align. The persons who are
19 also thinking of making bids are very well aware of the
20 relationship there, and there is a concern that if they -
21 if this information is disclosed to the members of this
22 executive committee, even if those members will not
23 provide information at all to Align, there's the
24 perception that they might, and that might itself turn
25 away bidders from making bids. It's the perception of
26 some relationship.

27 HIS HONOUR: Well, we'll just analyse it. This information is
28 not to be provided until after the bids are in. That's
29 correct, is it not? It's before entering into any
30 contract, so the bids were - couldn't enter into a
31 contract unless the bids were in, so this is after the

1 bids are in. It's after the liquidator has assessed the
2 bids; it's after the liquidator's formed a view which
3 ones he would suggest be accepted.

4 MR BIGOS: Yes.

5 HIS HONOUR: Then he goes to the committee and says, "These are
6 the bids I've got. I'm going to accept this one," and
7 the committee then has the opportunity to come to court
8 to say, "Well, there's one which doesn't allocate." Now,
9 I can see this is why I'm talking to you. But that's
10 what I had in mind - was that sort of thing. I don't
11 want to in any way undermine this sale. I don't want in
12 any way to raise obstructions for the liquidator.

13 MR BIGOS: Yes.

14 HIS HONOUR: What I wanted to do was, because we have this very
15 delicate situation of how much should be allocated of a
16 bid price to the - what was the word I used? I forgot; I
17 had a different book yesterday - to the crop. Yes, the
18 cropping rights. The cropping rights. What concerns me
19 is this, that in the witness box Mr Korda explained how
20 they're going to do the Timbercorp tree sales, and I
21 asked him would he be prepared to have the - ask the bids
22 to allocate a portion of their purchase price to the
23 cropping rights, and he said yes, he thought that would
24 be sensible. But there's nothing in here with direction
25 to do that, and I know he's a man of his word but, as I
26 said before, I think the owners, the growers, are
27 entitled to know, just to satisfy themselves, that that
28 in fact has been done. I'm not making any adverse
29 reflection on Mr Korda at all. It's just the difference
30 between believing and knowing.

31 MR BIGOS: Yes.

1 HIS HONOUR: Also, it's more than that. It gives the growers
2 the opportunity to come to court to say to Mr Korda,
3 "Don't sign the contract; we think you're doing the wrong
4 thing. We're going up to see the judge," and so forth.
5 It can be dealt with in matters of hours.
6 That's what I've got in mind, so are you really
7 suggesting that if that was the process, after the bids
8 were in, after Mr Korda's assessed them, formed a view as
9 to which is the best one, the best interest to growers.
10 He then goes to this executive and says, "Here's the
11 range of bids we've got. I'm going to accept this one",
12 then they will either say to him, "Well, yes, that looks
13 good", or they'll say, "We don't agree. We can't stop
14 you", or "We think you're doing the wrong thing".

15 MR BIGOS: The difficulty from another bidder's point of view
16 would be, well, in a sense, one of the persons associated
17 with a bidder has a right of veto.

18 HIS HONOUR: Well, it's not a right of veto. All they can do
19 with the information is come to court and try and stop
20 the sale.

21 MR BIGOS: Yes. Another way of dealing with it, but it would
22 be after the event, is to provide all this
23 information - - -

24 HIS HONOUR: Do you understand what the point - the whole point
25 of it was just so that the owners or their
26 representatives can be reassured for their own knowledge
27 that the one which maximises their return is being
28 accepted.

29 MR BIGOS: Yes.

30 HIS HONOUR: I don't want to put a direction in here to the
31 liquidator, "You must accept this price and that price

1 and so forth".

2 MR BIGOS: And that's a commercial judgment.

3 HIS HONOUR: Yes, and he might say, "Look, this one's got a

4 lesser dollar amount but you get the money sooner", or

5 "This one's got" - I mean, there's all sorts of

6 commercial - - -

7 MR BIGOS: Yes.

8 HIS HONOUR: Or "This one is dependent upon - there's a

9 condition here that the crop has to yield a certain

10 amount". That's why I'm not going to put any directions

11 in to tie Mr Korda's hands, but on the other hand I hope

12 he does what he says in the witness box and has this

13 allocated price for the growing rights and to - I thought

14 the best people to check up on that would be the owners.

15 MR BIGOS: Yes. I mean, Mr Korda is under those obligations

16 anyway, at law, statutory duties - - -

17 HIS HONOUR: I understand that.

18 MR BIGOS: - - - equitable duties, et cetera. One other

19 solution would be if the grower - - -

20 HIS HONOUR: We've all got statutory duties. I've got a

21 statutory duty but people can disagree with what I do.

22 MR BIGOS: Yes, but there's a right to apply to the court to

23 have the decisions reviewed and in a sense, what the

24 growers could do after the event is they could ask

25 Mr Korda for all the bids after a sale process has gone

26 through. Mr Korda would provide those and then they

27 could actually judge for themselves whether he's made the

28 right choice or not and if not, they could take action.

29 HIS HONOUR: Are your instructions that the scenario I've put

30 would be prejudicial to sale process? That is, that the

31 committee is only consulted after the bids are in, after

1 Mr Korda's assessed them, after Mr Korda's formed a view
2 as to which one he thinks should be accepted. You still
3 think - is that your instructions?
4 MR BIGOS: Could I have a moment to confer with my - - -
5 HIS HONOUR: Yes, because we can clarify that in the
6 undertaking and that's what - but that's what it says.
7 What about we put in, "After the bids have closed". Does
8 that - and after the word Timber Group, can we put in
9 something like after - is it the bids have - "After the
10 tendering process is complete". Is that what - - -
11 MR BIGOS: Or "After the receipt of all bids under the" - - -
12 HIS HONOUR: Yes, "After the receipt of all bids" - I'll get
13 Mr - - -
14 MR BIGOS: "Under the sale process".
15 HIS HONOUR: Yes, "Under the sale process and before entering
16 into". Mr Galvin, that's what you want, isn't it?
17 MR BIGOS: There should, though, be a confidentiality
18 undertaking in relation to that.
19 HIS HONOUR: There is a - it says, doesn't it? They have to
20 give a confidentiality undertaking. "On the provision of
21 confidentiality undertaken from members of the
22 committee".
23 MR BIGOS: Yes, and as long as it's clear that that is caught
24 within it, yes.
25 HIS HONOUR: That's good, so it now reads, "Consult with the
26 executive of the Timber Growers Group after the receipt
27 of all bids under the sale process and before entering
28 into any contract for the sale of these assets on the
29 provision of confidentiality undertakings". Can you get
30 some instructions for that.
31 MR BIGOS: Yes. Your Honour, my instructions are that after

SUPREME COURT OF VICTORIA

COMMERCIAL COURT

TIMBERCORP SECURITIES LTD

Plaintiff

v.

GARNAUT GROUP & ORS

Defendants

JUDGE:

Robson J

WHERE HELD:

Melbourne

DATE OF HEARING/JUDGMENT: 18 September 2009

APPEARANCES

MR L. ZWIER appeared on behalf of the Plaintiff

MR S. HIBBLE appeared on behalf of ASIC.

MR M. BLAND appeared on behalf of Garnaut Group.

1 liquidator would not absolve that additional liquidator
2 from that conflict. So we would need to see in more
3 detail what exactly it is that they would be proposing,
4 and what conflict it is that they would see that as
5 addressing. And we say that not to bedevil any interests
6 of the growers, but to assist the court in the proper
7 interpretation of an additional liquidators powers.

8 HIS HONOUR: I thought that the offers were being solicited on
9 the basis that the tenderer was going to allocate so much
10 of the value to the land, and so much to the equipment,
11 and so much to the trees. In fact my recollection is
12 that's what they were doing, so wouldn't it therefore be
13 of interest to TSL as the responsible entity to make sure
14 - or to be aware of the break up of the value being a
15 sign by the bidder?

16 MR HIBBLE: Your Honour I'm not aware that they wouldn't be
17 made aware of that.

18 HIS HONOUR: Well it would be in the bids I would imagine.

19 MR HIBBLE: Exactly, so from where ASIC stands at the moment
20 we're not sure what task the additional liquidator would
21 perform in relation to those bids.

22 HIS HONOUR: I see.

23 MR HIBBLE: Without additional incurring of costs and delay.
24 Those are my submissions.

25 HIS HONOUR: Thank you very much.

26 MR ZWIER: Your Honour if I could just make a few brief
27 additional submissions. First Your Honour the issue of
28 extending the role of Mr Carson is one upon which we
29 should probably all take instructions, it's not been
30 discussed with Mr Carson, so I can't inform Your Honour
31 that he even consents to play that role - - -

1 HIS HONOUR: Now what I do propose to do, as I'm going to give
2 the additional liquidator leave to apply to vary the
3 order.
4 MR ZWIER: Yes.
5 HIS HONOUR: So that - at the moment you've got whip hand, but
6 once he's appointed he might come back and say well this
7 orders not as wide as - you know, I can't properly carry
8 out my function without something or whatever. So I am
9 giving that power.
10 MR ZWIER: Yes, Your Honour.
11 HIS HONOUR: And it doesn't need to be the three days notice,
12 you can just do it, and we have already noted in the
13 transcript that obviously he has got power to seek
14 directions as a liquidator. So I think that might cover
15 the position today and obviously - I think actually the
16 liquidator and the additional liquidator should have
17 liberty to come back and vary the order.
18 MR ZWIER: Yes, Your Honour.
19 HIS HONOUR: So that if Mr Bland comes up with something in
20 writing because I am not so - I see more merit in the
21 idea than ASIC does at this moment because I understood
22 that the offers were being solicited on the basis of an
23 allocation of value between the land and the growing
24 rights and therefore it may very well be relevant to TSL
25 to say well, this is the best one for us and it may well
26 be the liquidator will have to make a decision at the end
27 of the day, but what we will be doing, speaking in the
28 terms I used the other day, you are picking a champion,
29 the champion this time can negotiate, who can address,
30 you have got someone who can sit down with his brother
31 liquidator and say I think this one would be best.

1 MR ZWIER: Your Honour is aware there is no greater champion
2 for growers than Mr Bland and his team.
3 HIS HONOUR: I know, but I'm just saying that the
4 liquidator - - -
5 MR ZWIER: I understand that.
6 HIS HONOUR: So it's the liquidators - and the liquidator and
7 the additional liquidator each have liberty to apply to
8 the court to vary this order. So they can easily do it
9 on their own volition or Mr Bland can talk to them and
10 try and convince them or they can talk to you and
11 convince you, whatever.
12 MR ZWIER: Your Honour, can I just make some other
13 observations, I want to clarify some issues that have
14 been discussed today.
15 HIS HONOUR: Yes.
16 MR ZWIER: First, in relation to bidders and the structure of
17 the bid. As much as the liquidators might seek to impose
18 conditions on how a bid will be made - - -
19 HIS HONOUR: No, no.
20 MR ZWIER: - - - the bidders will come up with it. Your Honour
21 has got to appreciate that on one view there might be a
22 negative net present value of the trees, and so you might
23 find there is no value.
24 HIS HONOUR: The values they extend might be all to do with tax
25 reasons which have nothing to do with the distribution
26 the other day between the land and the growers.
27 MR ZWIER: Yes, and Your Honour I want to just share with Your
28 Honour some background in relation to the role of
29 Mr Carson in almonds because it will be the same in
30 olives. He has retained Mallesons, a partner of that
31 firm, and an insolvency practitioner. They have

1 independently looked at our advice to satisfy themselves.
2 That advice has been taken to Mr Scerri, it's been taken
3 to Mr Crutchfield who have signed a memorandum as well,
4 and to the extent that they have got differences of views
5 on it, they are reviewing it and share that with us. One
6 of the difficulties we have encountered of course is the
7 champions of the growers are not prepared to give the
8 current incumbent liquidators of TSL their extended views
9 of the legal advice, and again Your Honour I think has
10 encouraged them to do so.

11 It would only assist all of us, and if it were
12 provided to us it would also be made available to
13 Mr Scerri so Mr Scerri could express views about that as
14 well. Unfortunately it appears that not all the legal
15 practitioners have a common view, I think it's fair to
16 say that there are not big differences between the
17 parties, we understand the differences. Insofar as
18 extending the role of Mr Carson, the grower
19 representatives on the one hand seek to extend his role
20 or on the other hand come and complain about the
21 additional cost of having three members of Mr Carson's
22 office attending meetings and Mallesons and - - -

23 HIS HONOUR: No, they haven't complained about that, have they?

24 MR ZWIER: They have to us.

25 HIS HONOUR: Not to me so (indistinct).

26 MR ZWIER: No, but I want that on the record so that Your
27 Honour will appreciate that whilst on the one hand they
28 are seeking to extend his powers, on the other hand they
29 complain about the money that is spent in fulfilling his
30 role. Your Honour, I don't know that I can assist Your
31 Honour further in relation to the matter, but Your Honour

1 I think as a matter of practical reality I think
2 Mr Carson would probably play some role from today going
3 forward in relation to the process because all
4 liquidators, Mr Carson and the current liquidators, share
5 a common view that we need to find a consensual solution
6 to these problems.

7 HIS HONOUR: We will just have a brief adjournment and then you
8 make a phone call to see whether Mr Carson can send up
9 his consent. I'm sure he's got consent forms on hand.

10 MR ZWIER: Yes, Your Honour.

11 HIS HONOUR: Otherwise we will have to put something in the
12 order about it. Just adjourn pro tem.
13 (Short Adjournment.

14 JUDGMENT FOLLOWS:

WOODSIDE ENERGY LTD

ABN 63 005 482 986

BHP PETROLEUM (NORTH WEST SHELF) PTY LTD

ABN 41 004 514 489

BP DEVELOPMENTS AUSTRALIA PTY LTD

ABN 54 081 102 856

CHEVRON AUSTRALIA PTY LTD

ABN 29 086 197 757

JAPAN AUSTRALIA LNG (MIMI) PTY LTD

ABN 18 006 303 180

SHELL DEVELOPMENT (AUSTRALIA) PROPRIETARY LIMITED

ABN 14 009 663 576

- AND -

MOBIL AUSTRALIA RESOURCES COMPANY PTY LIMITED

ABN 38 000 113 217

PHILLIPS AUSTRALIA GAS HOLDINGS PTY LTD

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AGREEMENT**
