

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-71**' now produced and shown to MARK ANTHONY
KORDA at the time of swearing this affidavit on 3 March 2010.

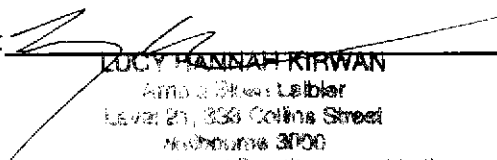
Before me: 
LUCY HANNAH KIRWAN
Arnold Bloch Leibler
Level 21, 333 Collins Street
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An Australian Legal Practitioner within the
meaning of the Legal Profession Act 2004

Exhibit 'MAK-71'

**Copy of Judgment of Justice Robson dated
14 September 2009**

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

Not Restricted

COMMERCIAL COURT

No 7114 of 2009

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

TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)
IN ITS CAPACITY AS RESPONSIBLE ENTITY OF EACH
OF THE MANAGED INVESTMENT SCHEMES LISTED IN
SCHEDULE 1 OF THE ORIGINATING PROCESS and
MARK ANTHONY KORDA and LEANNE CHESSER

Plaintiffs

<u>JUDGE:</u>	ROBSON J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	14 September 2009
<u>DATE OF JUDGMENT:</u>	14 September 2009
<u>CASE MAY BE CITED AS:</u>	Re Timbercorp Securities Limited (in liquidation) No 2
<u>MEDIUM NEUTRAL CITATION:</u>	[2009] VSC 411

CORPORATIONS – application by liquidators for directions – liquidators facing conflict in duties – liquidators of members of a group of companies – one of the companies in the group acts as a responsible entity for horticultural managed investment schemes growing almonds – another company owns the land on which the managed investment schemes are conducted – interest of scheme members different to owner of the land – whether liquidators justified in appointing another person to assess the reasonableness of division of sale proceeds between the land owning company and the managed investment schemes – whether direction sought appropriate for a court to give – whether an additional liquidator to represent the managed investment schemes should have been appointed – direction given as sought – s 511 of the *Corporations Act 2001*.

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Mr L Zwier

Arnold Bloch Leibler

For ASIC

Mr S J Hibble

ASIC

For the Timbercorp Growers' Group Mr G T Bigmore QC

Clarendon Lawyers

Cases referred to:

Lo v Nielsen [2008] NSWSC 407

Re Ansett Australia Ltd (No 3) (2002) 115 FCR 409

HIS HONOUR:

- 1 The liquidators of Timbercorp Securities Ltd (in liquidation) (TSL) seek directions pursuant to s 511 of the *Corporations Act 2001* that Mark Anthony Korda (one of the liquidators) is justified in entering into the agreement a copy of which is annexed to the application.
- 2 Before going to the agreement, it is convenient to say something about the liquidation of TSL. The Timbercorp Group of Companies carried on business promoting managed investment schemes whereby investors (known as growers) invested in and participated in the growing of trees, almonds, olives and other horticultural products. This application concerns several managed investment schemes that grew almonds.
- 3 The Timbercorp Group of Companies appointed administrators after they could not renegotiate large amounts of bank debt. The creditors then resolved to put each of the group companies into voluntary liquidation. TSL (a member of the group) acted, *inter alia*, as the responsible entity of the relevant almond schemes.
- 4 Andrew Malarkey is a partner of Mr Korda and Ms Chesser (the liquidators) and has sworn an affidavit explaining the circumstances giving rise to the application for the direction. Mr Korda was not available to swear the affidavit in support of the application.
- 5 Mr Malarkey deposes that in the 2002, 2005, 2006 and 2007 Almond Schemes, Almond Land Pty Ltd (in liquidation) (a member of the Timbercorp Group) (Almond Land) owns the land on which the Almond Schemes are operated. Almond Land leases the land to TSL.
- 6 In the 2005, 2006 and 2007 Almond Schemes, TSL subleases the land to the growers. In the 2002 scheme, TSL leases the land back to Almond Land and Almond Land then associates itself with the growers in a licence and joint venture agreement. The joint venture agreement grants the growers a licence to occupy the land.

- 7 A difficulty faced by the liquidators in the sale of the almond groves is as follows. The growers do not own the almond trees but rather have certain rights to crop the trees. The liquidators are of the view that to realise the maximum value for the land, equipment, and cropping rights (that is in effect the whole business) it may be necessary to offer the lot for sale or recapitalisation as a whole. To that end, the liquidators have amended the constitution of the relevant almond schemes to allow the responsible entity to surrender any interest the growers have in the almond groves. Such a power will enable the liquidators to offer the almond groves on an unencumbered basis to a buyer or a party willing to recapitalise the almond groves.
- 8 The relevant land is mortgaged to banks. If insufficient is realised to pay out the mortgagees, then any sale depends on the mortgagee banks agreeing to discharge their mortgages in exchange for a sum less than they are owed. Naturally, the banks will be seeking to have as much as necessary allocated to the land value to discharge the mortgages.
- 9 On the other hand, the growers represented by the responsible entity will be wishing to maximise the sum they can derive by surrendering such rights as they have in the almond groves to enable an unencumbered title to be available to the buyer or the party recapitalising the groves.
- 10 Mr Malarkey deposes that for TSL to exercise the power to surrender the sub-leases or joint venture agreements, TSL and Almond Land may need to reach agreement about the value of the growers' interests. Accordingly, they may need to agree on a dollar amount to be assigned to the surrender of these rights. Mr Malarkey says such an agreement between Almond Land and TSL would be exchanged contemporaneously or as a condition precedent with the agreement between Almond Land and the purchaser.
- 11 Mr Zwier, who appeared for the liquidators, went one step further in his submissions. He said that it was unlikely that an agreement could be reached with a buyer unless the Timbercorp Growers' Group, TSL, Almond Land and the banks all

agreed on the allocation of the sale proceeds as between the TSL as the responsible entity and Almond Land as the land owner. As mentioned above, the banks would be only able to look to the proceeds allocated to the land to satisfy their securities. I should add here that the Timbercorp Growers' Group is a group of growers and financial advisers to growers who have got together to protect their interests in the various schemes.

12 Mr Malarkey deposes that there are potential issues of conflict in the liquidators fulfilling the role of liquidators for multiple Timbercorp Group Companies. In this case, the liquidators of Almond Land and TSL are the same people. He says a potential for conflict arises if the liquidators had to negotiate with themselves to determine the price for the surrender of the sub-leases or the joint venture agreements.

13 He deposes that to assist the liquidators they have decided it would be useful to appoint an independent liquidator who will fulfil the role of a special purpose conflict liquidator. He deposes that they have retained Ian Carson of PPB for this purpose. He says Mr Carson has been a chartered accountant for over 20 years and is a managing partner of PPB. Mr Zwier added that Mr Carson has had experience with agricultural or horticultural managed investment schemes.

14 Mr Malarkey deposes that Mr Carson's precise role will be determined by how the sale process evolves and may for example be facilitative or to provide an opinion. He says his general role is outlined in the retainer letter of 9 September 2009. In fact, the letter annexed to the affidavit has been executed and is dated 3 September 2009.

15 This brings me back to the direction sought. As mentioned above, it is that Mr Korda is justified in entering into the agreement with Mr Carson of 3 September 2009.

16 Before going to the terms of the agreement, I should refer to a condition subsequent which provides that if the Court does not give a direction by 16 September 2009 then either party may terminate the retainer.

- 17 I expressed some dissatisfaction that the request for a direction was presented to me in this way. I was informed that the preferred bidder for the relevant almond groves had been chosen and the liquidators hoped to be able to close the deal in the next five working days. I was concerned that the court may have been placed in the position that its decision may have an impact on the prospects of the deal settling.
- 18 Mr Zwier said, however, that if the Court did not make the direction it was not the intention of the liquidators to terminate the agreement with Mr Carson.
- 19 The letter in substance provides that the liquidator and the company have engaged him to perform a review of the reasonableness of an anticipated offer from Almond Land to TSL in relation to the Almond Schemes. Under the agreement, if Almond Land makes an offer to TSL, Mr Carson is to provide an opinion as to whether or not this is an offer he would or would not accept as a reasonable compromise if he were the liquidator of TSL. He is to meet with representatives of the growers and secured creditors. I was informed he had met with the Timbercorp Growers' Group.
- 20 A matter of contention with the Timbercorp Growers' Group represented by Mr Bigmore QC was that it is a term of Mr Carson's retainer that for the purposes of Carson's opinion and report he is to assume that all legal advice and other documentation and materials provided to him by the liquidator, the company and Arnold Bloch Leibler, the solicitors for the liquidators, is correct. It is provided, however, that he may seek legal advice to assist him in determining the effect of those legal advices and other materials.
- 21 Mr Bigmore QC said that the Timbercorp Growers Group would prefer a special purpose liquidator to be appointed. It will be recalled, that Mr Malarkey said that that is what the liquidators have decided to do. It is apparent, however, that what the liquidators describe as a special purpose liquidator is different to what the TGG have in mind.
- 22 Mr Bigmore had in mind the appointment of an additional liquidator by the Court to undertake a limited task or as it is called for a specific purpose. Such a procedure is

discussed in *Lo v Nielsen*¹ where Barrett J canvases the jurisdictional basis for such an appointment and the many cases where it has been done in both a court ordered winding up and a voluntary winding up.

23 In that case, Barrett J refers to the problems and difficulties that might be faced such as the allocation of financial resources between the main liquidators and the special purpose liquidator.

24 I do not have an application before me for the appointment of a special purpose liquidator and I did not hear any considered submissions on whether or not it would be practical to make such an appointment in this case.

25 In my opinion, I should approach this application on the basis that either I give the direction sought or I do not. I do not consider I should make a decision on the basis that I am choosing one method of appointing a specific purpose liquidator over another.

26 In my opinion, the liquidators of TSL are placed in a difficult position. Conflicts of interest are common in liquidations. Nevertheless, in this case I consider it is prudent that the liquidators appoint Mr Carson as they have done. It is true there are limitations on his brief in respect of the legal advice he must rely on.

27 On the other hand, if he were to seek to obtain his own legal advice at this stage, it could be several weeks before he was able to properly assess whether or not an offer to TSL as responsible entity was reasonable or not.

28 The appointment does not shut out the Timbercorp Growers' Group from tendering advice to Mr Carson. In fact, Mr Zwier contended that the liquidators had encouraged the Timbercorp Growers' Group to tender such advice and submissions as they wished and I would infer that Mr Carson would be similarly assisted in this duties if similar submissions were made to him.

29 ASIC has appeared through Mr Hibble of counsel. The Court is grateful for ASIC's

¹ [2008] NSWSC 407

appearance. It is important to acknowledge that where there are large numbers of small unrepresented investors that ASIC plays an important role in representing the unrepresented investors and creditors in these types of hearings.

30 ASIC does not oppose the application by the liquidators. It does however, question whether it is necessary. In *Re Ansett Australia Ltd (No 3)*, Goldberg J of the Federal Court of Australia held that the Court will not make a direction under s 447D (as the relevant section was there) where the administrator merely “has a feeling of apprehension or unease about the business decision made and wants reassurance”, but s 447D may be attracted where there are “challenges to the decision made by the liquidator or administrator”.²

31 In this case there is a challenge to the decision of the liquidator to engage Mr Carson by the Timbercorp Growers’ Group. The liquidators do not face merely a commercial decision in appointing Mr Carson, but the matter raised for directions goes to how the liquidator should handle a potential conflict of interest where the liquidators have to represent interests that conflict.

32 In my view, the approach of the liquidators is sensible. The restriction on obtaining legal advice seems prudent in the circumstances.

33 Mr Zwier informed the Court that if a sale is achieved, it is intended to seek directions in any event as many growers will not have had a say in the agreement. He said that if agreement can not be reached with the Timbercorp Growers’ Group it is unlikely that a sale will be agreed on. Accordingly, the Timbercorp Growers’ Group does not appear to be greatly disadvantaged by the limited nature of Mr Carson’s retainer. It can make submissions to him as it wishes. Further, it appears that it will have a significant say in whether or not a deal is done and on what terms. In my view, it may well be assisted by the opinion of Mr Carson.

34 I propose to give the direction sought.

² *Re Ansett Australia Ltd (No 3)*, (2002) 115 FCR 409 at [66].