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

S CI 2011

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 THE 2004 TIMBERCORP CITRUS PROJECT (ARSN 108 887 538) AND THE 2005 TIMBERCORP CITRUS PROJECT (ARSN 114 091 299) AND ORS ACCORDING TO THE SCHEDULE
Plaintiffs

CERTIFICATE IDENTIFYING EXHIBIT

Date of document: 28 February 2011
Filed on behalf of: the Plaintiffs

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This is the exhibit marked "MAK-18" now produced and shown to **MARK ANTHONY KORDA** at the time of swearing his affidavit on 28 February 2011.

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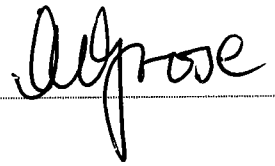
Before me: 

Exhibit "MAK-18"

Reasons for judgment dated 26 February 2010 in respect of *Re Timbercorp Securities Limited (in liq)* [2010] VSC 50

Filed on behalf of the Plaintiffs
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MAK-18

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

Not Restricted

LIST E
No. 398 of 2010

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 THE
2005 TIMBERCORP CITRUS PROJECT
(ARSN 114 091 299) — First Plaintiff

MARK ANTHONY KORDA — Second Plaintiff

LEANNE KYLIE CHESSER — Third Plaintiff

JUDGE:	DAVIES J
WHERE HELD:	Melbourne
DATE OF HEARING:	16 – 17, 22, 24 February 2010
DATE OF JUDGMENT:	26 February 2010
CASE MAY BE CITED AS:	Re Timbercorp Securities Limited (In liq) (ACN 092 311 469)
MEDIUM NEUTRAL CITATION:	[2010] VSC 050

CORPORATIONS – Application by liquidators for judicial advice and directions – Managed investment schemes – Responsible entity in liquidation – Sale of land on which citrus schemes conducted – Sale to be completed unencumbered by Growers' rights to use and enjoy the land – Scheme constitution amended to include the power in the responsible entity to terminate the Growers' licenses with respect to the use of the land – Whether liquidators justified in procuring the extinguishment of Growers' rights – Net proceeds to be held on trust pending determination of persons entitled to receive the proceeds – S 511 of the *Corporations Act 2001* (Cth).

STATUTORY INTERPRETATION – Power to amend a scheme constitution – Requirements for a responsible entity to amend a constitution unilaterally – S 601GC of the *Corporations Act 2001* (Cth).

CORPORATIONS – Unilateral action by responsible entity to amend scheme constitution –

Whether responsible authority considered whether the amendment "adversely affected members' rights" – Whether consideration reasonably based.

LIQUIDATORS – Duties as a liquidator of a company which is the responsible entity of a managed investment scheme – Whether conflict of interest – Whether breach of fiduciary duty.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr. L Zwier	Arnold Bloch Leibler
For the Timbercorp Growers Group	Mr. S G Hopper	Clarendon Lawyers
For the Receivers	Ms. W A Harris	Allens Arthur Robinson
For the Timbercorp Growers Group Citrus Inc	Mr. D Shavin QC with Mr. D C Gration	Herbert Geer

HER HONOUR:

1 This is an application for directions from the Court pursuant to s 511 of the *Corporations Act 2001* ("the Act") by the second and third named plaintiffs ("the liquidators") in their capacity as liquidators of the first named plaintiff ("TSL"). TSL is the responsible entity of the 2005 Timbercorp Citrus Project ("the Citrus Scheme"), a registered managed investment scheme under Part 5C of the *Corporations Act 2001* ("the Act") for the cultivation of citrus trees and the harvesting and processing of citrus. TSL cannot perform its obligations as the responsible entity of the Citrus Scheme because it is hopelessly insolvent and unable to continue to fund the operations of the scheme, which has placed the citrus orchards at risk of wasting. The liquidators seek a direction to the effect that they would be justified in procuring TSL to exercise its power under the Citrus Scheme Constitution ("the Constitution") to extinguish the rights that TSL granted to the members of the scheme ("the growers") under licence with respect to the use of a property ("the Solora property") on which the citrus operations are conducted. If the direction is made, the liquidators have proposed that TSL would use the power contained in cl 11(fa) of the Constitution:

to assign, terminate, surrender or otherwise deal with any Licence Agreement[1]

The liquidators have formed the view that it is appropriate for TSL to exercise that power.

2 The Court's power to give the direction sought was not disputed in the hearing before me and is undoubted[2] but the making of the direction was opposed by a grower entity, Siger Super Services Pty Ltd as trustee for the Kereg Trust and a growers' group, the TGG Citrus Committee Inc (collectively, "the grower parties") which applied for joinder as parties and for a declaration that the power contained in cl 11(fa) of the Constitution is invalid and ineffective. The joinder of the grower parties was not opposed and, in my opinion, is necessary to ensure that all questions are effectually and completely determined and adjudicated upon.[3]

3 For the grower parties, it was argued that there is no valid and effective power in the Constitution to terminate the licences because of the manner in which cl 11(fa) was inserted. It was not in the original constitution but inserted as an amendment effected by deed. It was argued that the nature of the amendment required a special resolution of the members of the Citrus Scheme. The argument raised for consideration the application of s 601GC(1) of the Act which provides that:

> (1) The constitution of the registered scheme may be modified, or repealed and replaced with a new constitution:
>
> (a) by special resolution of the members of the scheme; or
>
> (b) by the responsible entity if the responsible entity reasonably considers the change will not adversely affect members' rights.

Mr Shavin QC on behalf of the grower parties contended that the evidence showed that liquidators did not consider whether the amendment would affect members' rights but, rather, directed their consideration to whether the amendment would affect the members' commercial interests and, thus, failed to form the requisite state

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1 Further Amendment Deed for the 2005 Timbercorp Citrus Project ARSN 114 091 299, made 28 January 2010, cl. 2.

2 *Re Ansett Australia v Mentha* (2001) 39 ACSR 355; *Re Pasminco Ltd & Ors* [2004] FCA 656; *Dean-Willcocks v Soluble Solution Hydroponics Pty Ltd* (1997) 42 NSWLR 209.

3 *Supreme Court (General Civil Procedure) Rules 2005* r 9.06.

of mind. He further contended that the requisite state of mind, if held, was not one that was reasonable as, on any objective view, the amendment "adversely" affected members' rights because the security of tenure that the growers had under the terms of their licences was "degraded" to a licence terminable at will by reason of the amendment.

4 Mr Shavin QC also argued that the liquidators would be in breach of their fiduciary duties to the growers if they procured TSL to exercise the power contained in cl 11(fa). It was submitted that the liquidators have serious conflicts of interests, giving rise to the need for the liquidators to obtain the informed consent of the growers to the extinguishment of their rights before they can cause TSL to terminate their licence agreements.

5 I have formed the view that the directions sought should be given and that the relief sought by the grower parties should be refused. I now set out my reasons.

A. Constitutional amendment: s 601GC(1)(b)

6 I do not accept the submission on behalf of the grower parties that the constitutional amendment is invalid and of no effect. In my opinion, the evidence before the court showed that the liquidators addressed the question that s 601GC(1)(b) formulates and that they considered that the insertion of cl 11(fa) into the Constitution would not adversely affect members' rights. I also consider that there was a reasonable basis for that view.

7 The analysis first requires a consideration of the proper construction of the amendment power under s 601GC(1)(b). In *ING Funds Management Limited v ANZ Nominees Limited*[4] Barrett J, in obiter, observed that three requirements must be satisfied for a constitutional amendment effected under that provision to be valid. According to His Honour, the first component involves an assessment of how the responsible entity viewed "members' rights" before the modification and the impact that the modification would have on those rights. The second component requires

4 [2009] NSWSC 243.

that the responsible entity consider that, according to a comparison of "members' rights" before the modification with the changed rights that would exist after the event, there would be no "adverse" affectation of those rights. The third component requires that the opinion formed by the responsible entity as to the absence of adverse affectation be seen to be something that the responsible entity "reasonably considers".[5] His Honour concluded that the question is not a general question whether members will be "worse off" if the change is made, nor a general question of prejudice or disadvantage:

> It is a specific question that goes wholly and exclusively to the much narrower matter of members' rights. Their interests are...another thing altogether. So is the value of their rights.[6]

Barrett J had earlier observed that a distinction is drawn in the Act between "rights" and "interests" and expressed his view that the task of the responsible entity seeking to amend a Constitution in reliance on s 601GC(1)(b):

> ... is first to ascertain the rights of members created by the constitution, as they exist immediately before the modification.[7]

I generally agree with the views of Barrett J about the approach to s 601GC(1)(b).

8 Before the amendment to the Constitution, the events for termination of the licence agreements were provided for in the licence agreements that TSL was obliged to enter into with the growers upon accepting their applications to become a member of the Citrus Scheme.[8] Under those licence agreements, termination was the earlier of –

- the expiry or termination of the sublease of the Solara property granted to TSL by Timbercorp Limited ("TL"), a related company;
- the termination of the particular grower's interest in the Citrus Scheme;
- 29 June 2027; and

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5 Ibid [84] – [88].
6 Ibid [101].
7 Ibid [96].
8 2005 Citrus Project Constitution, cls 8.7, 9 and the definition of "licence agreement" in cl 1.

- the termination of the Citrus Scheme.[9]

The Constitution provided for the termination of the Citrus Scheme on completion of the scheme operations or on the winding up of the Citrus Scheme.[10] Relevantly, there was no provision for TSL to terminate the licence agreements at will. However, the circumstance that "the purpose of the [Citrus scheme] ... cannot be accomplished"[11] is a trigger under the Constitution for the formal winding up of the Citrus Scheme and an event of early termination provided for in the licence agreement. The question, therefore, is whether the liquidators considered whether the conferral of power on TSL under the Constitution to terminate, surrender, assign or otherwise deal with the licence agreements was a change to the Constitution that would "adversely affect" the growers' rights conferred under their licence agreements.

9 Mr Korda, the second-named plaintiff, frankly admitted in cross-examination that he and the third-named plaintiff had not undertaken an analysis of the Constitution and its constituent documents to identify the growers' rights and the impact on those rights of the proposed amendment. He also frankly stated that the context in which the decision was made was the insolvency of TSL, its lack of funds to enable it to continue to manage the scheme and the risk of the scheme assets wasting in the absence of proper maintenance. The liquidators regarded the amendment as a step in facilitating the sale process of the Citrus Scheme to be exercised, if appropriate, subject to the direction of the court.

10 Mr Shavin QC submitted that the liquidators had not attempted the task identified by Barrett J in *ING Funds Management Limited*[12] as the prerequisite to any determination under s 601GC(1)(b) of the Act. He argued that the liquidators addressed themselves to the wrong question because the evidence showed that they considered the commercial interests of the growers in favour of making the amendment, which is not the criterion for the exercise of the power under s

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9 See License Agreement, Solora Estate, 2005 Timbercorp Citrus Project cl 4.1.
10 2005 Citrus Project Constitution, cl 26.1 and cl 26.2.
11 2005 Citrus Project Constitution cl 26.2(b).
12 [2009] NSWSC 243.

601GC(1)(b) of the Act.

11 In *ING Funds Management Limited*[13] the distinction between "rights" and "interests" became material to His Honour's decision but the facts of that case are very different from those with which I am concerned. In that case, the responsible entity modified the constitution of two schemes to suspend the rights of members of those schemes to require redemption of their units. His Honour concluded that the modification changed members' rights by denying immediate efficacy to redemption requests. His Honour found on the evidence that the ING Funds Management Board, in deciding to create the suspension, was preoccupied "with preserving value for members"[14] and although the Board passed a resolution that the amendment would not adversely affect members' rights, His Honour found that the evidence was "entirely lacking" on the considerations that the Board undertook in the process of making that determination and the thinking that led to that conclusion.[15]

12 In contrast, the evidence before the Court here, in my view, plainly shows that the liquidators gave due consideration to the affect on "members' rights" of the proposed constitutional amendment, before they made it. The process followed by the liquidators was the same as the process that they had instigated on three other occasions in relation to the forestry, almond and olive schemes of which TSL is also the responsible entity, in contemplation of enabling assets to be sold unencumbered by the growers' sub-leases and licences. The very step that was taken on those occasions was amendment to the constitutions of the relevant managed investment schemes so that the liquidators could proceed with the informal winding up of those schemes, necessitated by the inability of TSL to fulfil its obligations as responsible entity. The evidence before me included the steps that the liquidators had taken, and critically, the explanation for the taking of those steps, to effect the informal winding up of the forestry, almond and olive schemes. There was no argument before me that the liquidators had not fairly set out in that evidence what they had done to secure

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13 Ibid.
14 Ibid [114].
15 Ibid [118].

that outcome. Significantly, their evidence was that they are employing the same strategy here because the original scheme arrangements have broken down due to the insolvency of TSL and other companies in the Timbercorp group and the inability of TSL to fund the continued operations of the Citrus Scheme.

13 It may be accepted that the purpose of developing that strategy has been to maximise the return to all stakeholders, including the growers and to circumvent significant loss from the wasting of the orchards which TSL has no funds to continue to manage, and thereby in consequence to seek to protect the commercial interests of the growers, but the strategy is to be effected through the informal winding up of the Citrus Scheme. The evidence, in my view, plainly showed that the considerations of the liquidators that led to the decision to insert into the Constitution the power to enable TSL to terminate the growers' licence agreements concerned the necessity to put TSL into the position to be able to terminate the growers' licence agreements so that the Citrus Scheme can be wound up, if that is the appropriate course to take.[16]

14 I am satisfied on the basis of the evidence before me that the liquidators turned their mind to the impact on members' rights, rather than their commercial interests as such. In so finding, I take into account the following exchange in cross-examination:

> At the time you made the decision did you sit down and undertake an analysis of the constitution of the 2005 scheme and the other constituent documents and identify what rights of the various parties were and the impact on those rights of the proposed amendment? ... No.

This exchange cannot be considered in isolation from the whole of the evidence before me and, as I have indicated, that evidence bears out that the liquidators were cognisant that the very rights of the growers that would be impacted by the

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16 Cf Justice Barrett, *"Insolvency of Registered Managed Investment Schemes"* (speech delivered at the Banking and Financial Services Law Association, Queenstown, New Zealand, July 2008). Barrett J wrote extra-curially:

> The only really feasible outcome in the situation of the independently impecunious responsible entity seems to be for the company in liquidation to remain the responsible entity. That raises the issue already noticed. A liquidator's duty is to wind up the affairs of the company. To the extent that the affairs include the holding of property on trust, with ongoing duties, the liquidator's first task, it seems to me, will be to find a way to bring the managed investment scheme to an end, either by the *Orchard Aginvest* means (if it is truly viable) or by resort to s 601NC.

amendment were their rights with respect to their tenure of the licence.

15 The next matter for consideration is whether the evidence supports a finding that the liquidators considered whether the amendment would "adversely affect" members' rights. In *ING Management Fund*, Barrett J in obiter observed as follows:

> The task of a responsible entity under s 601GC(1)(b), then, is to assess members' rights as they exist before the modification and members' rights as they will exist after the modification and, if the rights afterwards are different from the rights beforehand, to decide whether the difference in the rights will be, from a member's perspective, unfavourable. To put this another way, the responsible entity must decide whether the change will remove, curtail or impair existing rights in a way that is disadvantageous to the persons whose holdings of units cause them to possess and enjoy the rights. No particular degree of affectation is contemplated by the legislation. Any adverse affectation at all, however slight, is sufficient to deny the responsible entity the modification power.[17]

The exercise of power under s 601GC(1)(b) is not constrained merely because a proposed amendment affects a change in members' rights but the criterion *will not adversely affect members' rights*[18] requires the responsible entity to be satisfied of a negative.

16 I am of the opinion that the evidence showed that the liquidators formed the view that the constitutional amendment would not adversely affect members' rights. The decision was made in the context of the hopeless insolvency of TSL and the inability of the Citrus Scheme to continue under the original arrangements. The liquidators decided to make the constitutional amendment after they became aware that the Solora property was up for sale. Mr Korda's evidence was that the liquidators expected that the property, if sold, would be subject to the same conditions precedent as the conditions precedent to the sales of assets in relation to the other managed investment schemes. Those conditions precedent included the requirement that the growers' rights be extinguished so that the purchaser could acquire clear title. The strategy for informal winding up was the same as it had been with the other managed investment schemes and would not be acted on – that is to say, that

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17 [2009] NSWSC 243 [100].

18 See [2009] NSWSC 243 [87], [100].

the liquidators did not intend to cause TSL to terminate the growers' licences – without a direction from the Court. In the process undertaken with the forestry and almond schemes, the liquidators had sought directions from the Court that they would be justified in procuring TSL to amend the constitutions of those schemes to permit TSL to "assign, terminate, surrender or otherwise deal with any sub-lease/licence and joint venture agreement".[19] Although it appears that there was no contradictor to the making of the directions, the fact that those directions were given provided the liquidators with comfort that such an amendment was uncontroversial and indeed the evidence showed that the liquidators had the olive scheme constitution amended similarly and later the Citrus Scheme Constitution without obtaining the protection of a court direction because of their view that the amendment was "not controversial". Before doing so in the Citrus Scheme, the liquidators wrote to the Australian Securities and Investment Commission ("ASIC") and various lawyers who had appeared for representative grower groups notifying them of their intention to make the constitutional amendment and of the liquidators' view that the amendment was "not controversial" and, that unless an objection was made by ASIC or the grower representative groups, that the liquidators did not intend to seek a direction in relation to the making of the amendment, but:

> As has been the case with each other Timbercorp project, the liquidators would seek directions from the Court prior to exercising any such power.[20]

No objection was received, although it is fair to say that ASIC responded that it was not able to comment upon whether in the circumstances it was appropriate for the Constitution to be amended in the manner proposed "and more particularly, what the responsible entity may consider to be the effect of doing so on members' rights".[21] But as I have stated, the liquidators were doing no more than following the same strategy as they had in the other managed investment schemes to be able to facilitate the informal winding up the Citrus Scheme, if that was the appropriate

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19 Orders of Finklestein J in Federal Court proceeding VRD 595 of 2009, 18 August 2009; orders of Robson J in Supreme Court proceeding 9408 of 2009 made 21 August 2009, referred to in *Re Timbercorp Securities Limited (In Liquidation)* [2009] VSC 510, [19].

20 Exhibit MAK-5 of the affidavit of Mark Anthony Korda sworn 8 February 2010.

21 Exhibit MAK-6 of the affidavit of Mark Anthony Korda sworn 8 February 2010.

course to take in circumstances where the Court on two previous occasions had directed that TSL was justified in using the s 601GC(1)(b) power to amend the scheme constitutions to confer an explicit power of termination in TSL. The matters taken into consideration by the liquidators bear out that they did not consider that members' rights would be adversely affected.

17 The next issue is whether there was a reasonable basis for the view of the liquidators that the amendment would not adversely affect members' rights. An inquiry into the "reasonableness" of the state of mind is an objective inquiry and requires consideration of whether there were facts sufficient to induce that state of mind which, in turn, requires consideration of the matters that were taken into consideration. [22] Contrary to the submission put by Mr Shavin QC, in my view the factual context is part of the material which the Court not only may, but should, consider in determining whether the liquidators' view was reasonably based.

18 In the circumstances of this case, I am satisfied that it was reasonable for the liquidators to consider that the rights of the members would not be adversely affected by the amendment. Here the decision to effect the amendment was taken in the context of the insolvency of TSL and its inability to perform its task as responsible entity because of its insolvency. It was not a decision made in a vacuum or an isolated action on the part of the liquidators, unconnected with the incapacity of the Citrus Scheme to continue because of the insolvency of TSL and other companies in the Timbercorp group. It was quite the contrary. The original scheme arrangements could not continue; TSL could not continue to fund the operation of the scheme; the amendment was made in anticipation of enabling an informal winding up of the Citrus Scheme. Had the liquidators instead sought to have the scheme wound up by direction of the Court[23] or sought to take steps to wind up the scheme in accordance with s 601NC of the Act, the licence agreements would have terminated by operation of cl 4.2(b)(iv) of those agreements.

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22 *George v Rockett* (1990) 170 CLR 104, 112; *ING Funds Management Ltd v ANZ Nominees Ltd* [2009] NSWSC 243, [102].

23 *Corporations Act 2001* (Cth) s 601ND.

19 Accordingly, I have concluded that cl 11(fa) is valid and effective and the declaratory relief sought by the grower parties is refused.

B. Disclaimer of onerous property

20 The plaintiffs, as a fallback in the event that that the amendment was not valid, sought the leave of the Court to disclaim the licence agreements, if leave is required.[24] In view of the conclusion that I have reached concerning the validity of the exercise of power under s 601GC(1)(b) of the Act, it is unnecessary for me to consider whether the Court should give that leave. I should note that I did give consideration to whether I should form a view nonetheless given the extensive submissions, written and oral, put to me in the course of the hearing. Time has not permitted me to give proper consideration to the important factual and legal questions that I would need addressed to reach a concluded view, as there is the need to deliver judgment in this matter promptly because the making of the directions by 3 March 2010 is a condition precedent to the sale of the Solora property. Accordingly, I express no view on whether the licence agreements can or should be disclaimed by the liquidators.

C. Breach of fiduciary duty

21 In the course of cross-examination, Mr Shavin QC elicited from Mr Korda that the liquidators are also the liquidators of TL which has a 35% interest in the ultimate holding company ("Costa Holdings") of the purchaser ("Agriproperty") of the Solora property. Costa Holdings is also the holding company of CostaExchange Pty Ltd ("CostaExchange"), which provides management services under the Citrus Scheme to TSL and the growers. The shareholding interest of TL was not disclosed by the liquidators to the Court or to the growers for the purpose of obtaining the directions sought in this proceeding, although TL's shareholding interest in Costa Holdings is disclosed in publicly available records.

22 Mr Shavin QC submitted that the shareholding interest placed the liquidators in a

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24 *Corporations Act 2001* (Cth) ss 568(1A), 568(1)(f), 568D(1).

position of conflict and in breach of their fiduciary duty to the growers under the Citrus Scheme because they propose to cause TSL to terminate the growers' rights to benefit from the operation of the orchards, for the purpose of enabling the sale of the Solora property to a company in which TL has an interest. It was argued that TSL, and the liquidators by virtue of their office as liquidators of TSL, have obligations to the growers akin to those of a trustee. Mr Shavin QC relied on the equitable principle that a trustee cannot, without full disclosure to, and consent of, the beneficiaries participate in the sale for disposition of an interest held by the beneficiaries where the trustee derives, directly or indirectly, a benefit. It was submitted that the informed consent of the growers to the extinguishment of their rights is required before the liquidators could cause TSL to act on its power contained in cl 11(fa) of the constitution.

23 I reject the contention that the liquidators must obtain the informed consent of the growers before causing TSL to exercise that power.

24 In the first place, the liquidators' duties, as liquidators of TSL, are not solely to the growers under the scheme. Finkelstein J said in *Timbercorp Securities Limited (In Liquidation) v WA Chip and Pulp Co Pty Ltd*:[25]

> It is, I think, necessary to say something about the position of a liquidator of a responsible entity which is in the course of being wound up in insolvency. The liquidator is fiduciary. The principal beneficiaries of the duties owed by the liquidator in their capacity as a fiduciary are those who are interested in the liquidation, namely the creditors and members. Moreover, as a fiduciary the liquidator must act impartially between all those who are interested in the winding up.
>
> Is the position of a liquidator of a responsible entity any different? The Corporations Act requires a managed investment scheme to have a responsible entity operate the scheme: s 601FB. The responsible entity must be a public company that holds an Australian financial services licence authorising it to operate a managed investment scheme: s 601FA. Strict duties are imposed on a responsible entity under s 601FC. One duty is that the responsible entity must act in the best interests of members and, if there is conflict between the members' interests and the entity's own interests, it must give priority to the members' interests: s 601FC(1)(c). This duty overrides any conflicting duty an officer of the responsible entity has under Pt 2D.1: s 601FC(3). Part 2D.1 contains the general duties owed by directors

25 [2009] FCA 901.

> and other officers of a corporation. Included among them is the duty to act with reasonable care and diligence (s 180), the duty of good faith (s 181), and the obligation to not use their position to improperly gain an advantage (s 182).
>
> The Corporations Act also imposes duties upon an officer (which would include a liquidator) of a responsible entity: see s 601FD. The duties are similar to those owed by the responsible entity. Like the obligations of the responsible entity, the duties of an officer override any conflicting duty the officer has under Pt 2D.1: s 601FD(2).
>
> The liquidators seem to be of the opinion that by reason of ss 601FC and 601FD they are required to look after the interests of investors even if that be at the expense of other creditors. In my view that is wrong. There is nothing in ss 601FC or 601FD that overrides the liquidator's duty to those interested in the winding up. It would be quite extraordinary were that to be the case. I think the liquidators should readjust their priorities.[26]

The trustee analogy here is inapt to capture sufficiently the nature of the duties of the liquidators with respect to a company that is the responsible entity of a managed investment scheme.

25 Secondly, I do not accept that there is a conflict of interest. The conflicting duty was said by Mr Shavin QC to be the duty that the liquidators owe to the growers to consider how the benefits from the purchase of the property by Agriproperty that will accrue to TL from its shareholding in CostaHoldings should be allocated. It was submitted that the conflict is dealing with the excision of growers' rights on the basis that the growers get an interest in only one of two possible streams of benefits, and that there has been no consideration by the liquidators nor material placed before the Court as to whether that is an appropriate way to proceed. The two possible streams of benefits were identified as the benefit in sharing in receipt of the proceeds of the sale and the benefit which TL will have from the CostaGroup's operation of the orchards. However TL has no relevant relationship with the growers. Growers were never entitled to a share of the income stream derived by CostaExchange from its management of the orchards under the original scheme arrangements. I have concluded on the basis of the material before me that there is no conflict with respect to the liquidators procuring TSL to exercise the power so as to enable the Solora property to be sold free from the encumbrance of the growers' licences.

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26 Ibid [8] – [11].

26 Thirdly, the liquidators had no role in, and were completely independent of, the sale process for the Solora property. The sale process was undertaken by receivers and managers ("the receivers") appointed to the owner of that property. That sale process culminated in the receivers entering into a sale contract with Agriproperty. The sale process and bid offer accepted are described in detail in an affidavit of Mr McEvoy, one of the receivers. That evidence confirmed that the sale process was calculated to, and did, elicit a successful bid that was higher than the market valuation the receivers had for the property. Three bids were received for the purchase of the Solora property and associated assets. Each of those bids had as a condition of purchase that the property be sold unencumbered by the growers' licences. Agriproperty's bid was the highest and most acceptable bid.

27 The sale process was not challenged by the grower parties. They accept that a robust sale process was undertaken. As I said, the liquidators played no role or took any part in the bid that was made by Agriproperty. Although the liquidators have not conducted a review of the receivers' sale process, they did negotiate the terms of a deed with the receivers recording their agreement to obtain Court approval for the termination of the growers' rights with the receivers. The terms were recorded in a deed entitled the "Solora Grower Rights Deed" which was executed on 25 January 2010. The deed contains the receivers' confirmation to the liquidators that, in exercising their power of sale in respect of the property, they have complied with their obligations under s 420A of the Act.[27]

28 The enquiry for the Court here is not whether it is commercially prudent for the liquidators to facilitate the sale and through it a potential return to the growers. The liquidators have explained to the Court their reasons for considering that the extinguishment of the growers' rights will be in their best interests and I accept that

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27 Solora Grower Rights Deed cl 3.1.
Corporations Act 2001 (Cth) s 420A provides: (1) In exercising a power of sale in respect of property of a corporation, a controller must take all reasonable care to sell the property for: (a) if, when it is sold, it has a market value--not less than that market value; or (b) otherwise--the best price that is reasonably obtainable, having regard to the circumstances existing when the property is sold. (2) Nothing in subsection (1) limits the generality of anything in section 180, 181, 182, 183 or 184 (emphasis added).

they have formed their view in good faith.

D. Conclusion

29 Accordingly for the above reasons I have concluded that an order should be made with respect to the liquidators procuring TSL to exercise the power in cl 11(fa) of the Constitution. I note that TSL will not exercise the power to surrender the licence agreements until the sale contract is completed and the purchase price paid to ensure that sale proceeds are received and that the sale proceeds are to be held in trust pending the Court's determination of the apportionment of those sale proceeds amongst the relevant groups of stakeholders.

CERTIFICATE

I certify that this and the 15 preceding pages are a true copy of the reasons for Judgment of Davies J of the Supreme Court of Victoria delivered on 26 February 2010.

DATED this twenty sixth day of February 2010.

JUDGE'S ASSOCIATE SUPREME COURT OF VICTORIA

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Associate