

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

LIST E

No of 2009

IN THE MATTER OF TIMBERCORP SECURITIES LIMITED
(IN LIQUIDATION)
ACN 092 311 469

TIMBERCORP SECURITIES LIMITED
(IN LIQUIDATION) ACN 092 311 469
IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE
MANAGED INVESTMENTS SCHEMES LISTED IN SCHEDULE 1
AND ORS ACCORDING TO THE SCHEDULE
Plaintiffs

CERTIFICATE OF EXHIBIT

Date of document: 10 November 2009
Filed on behalf of: the Plaintiffs

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This is the exhibit marked "**MAK-26**" now produced and shown to **MARK ANTHONY KORDA** at the time of swearing his affidavit on 10 November 2009.

Before me:
BRIDGET ELLEN SLOCUM
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An Australian Legal Practitioner within the
meaning of the Legal Practitioners Act

Exhibit "**MAK-26**"

Transcript of Hearing for Appointment of Special Purpose Liquidator

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 HIS HONOUR: Call the matter for hearing.

2 MR ZWIER: Your Honour I appear on behalf of the plaintiffs in
3 the application.

4 HIS HONOUR: Mr Zwier.

5 MR HIBBLE: Your Honour I appear on behalf of ASIC.

6 HIS HONOUR: Yes Mr Hibble.

7 MS CIPRIANO: Your Honour I appear on behalf of the
8 Commonwealth Bank.

9 HIS HONOUR: Ms Cipriano.

10 MR BLAND: Your Honour I appear on behalf of (indistinct) in
11 place of Mr Bigmore.

12 HIS HONOUR: Mr Bland, thank you.

13 MR ZWIER: Your Honour this is an application concerning the
14 olive schemes. Your Honour might recall that earlier in
15 the week we came to Your Honour in relation to problems
16 in relation to almond schemes and the conflict in - for
17 Ms Acorda being the liquidator for almond owning
18 properties as well as being the liquidator of the
19 responsible entity Timbercorp Securities Limited, Your
20 Honour just a little background in relation to the olive
21 schemes. The olive schemes conducted had bought through
22 a Timbercorp company known as Olivecorp Land Pty Ltd, as
23 well as at boundary bend for another company in the
24 Timbercorp Group called Boundary Bend Pty Ltd.

25 The liquidators of Olivecorp are Mark Mentha and
26 Mark Korda. The liquidators of TSL are Mark Korda and
27 Leanne Chesser, so there's a commonalty of liquidators
28 between the Olivecorp company and TSL. The projects
29 which are conducted at Boort concern the earlier schemes,
30 the earlier olive schemes 2001 and 2002, and the
31 liquidators of Olivecorp have embarked upon a sale

1 process calling for interested parties to either purchase
2 again the land, the plant and equipment, the olive
3 groves, cropping rights, the water rights, and potential
4 purchasers of those assets wish to do so free of all
5 encumbrances. And again the same issue arises of
6 conflict because TSL will be required to surrender the
7 subleases, and sublicenses for valuable consideration,
8 and therefore issues may arise as to whether and how they
9 go about doing their job.

10 Your Honour might recall that when I came to you
11 earlier in the week I indicated to Your Honour that the
12 liquidators were minded to appoint Ian Carson of the firm
13 PPB to act as a special purpose liquidator to assist in
14 facilitating any negotiations or by providing the court
15 with a report or an affidavit, and I said that one
16 creditor in relation to the olive schemes, the
17 Commonwealth Bank had wanted the application to be made
18 by the appointment of a special purpose liquidator as
19 opposed to an arrangement by private treaty. So Your
20 Honour the background to it is the Commonwealth Bank have
21 made that request of the liquidators and liquidators have
22 formed the view that it's appropriate for them to bring
23 this application in seeking the appointment of a special
24 purpose liquidator for a limited purpose. I'll come to
25 the purpose in a minute.

26 I think Your Honour in Your Honours judgment earlier
27 in the week observed that the court has jurisdiction to
28 appoint a special purpose liquidator under s.511 of the
29 act, and in Your Honours earlier judgment Your Honour
30 referred to *Lowe and Neilson v. Moller Autoglass New*
31 *South Wales Pty Ltd* reported [2008] N.S.W.S.C.R. 407.

1 HIS HONOUR: I wanted to ask you about that Mr Zwier because I
2 don't know whether I said they've got jurisdiction to do
3 it under 511, the court - the decisions appear that the
4 court is a jurisdiction, but 511 is the provisions are
5 not where the court can give directions.

6 MR ZWIER: My reading of the authority on it is that the
7 directions power was held to be a power which enabled the
8 court to make the appointment of the special purpose
9 liquidator.

10 HIS HONOUR: Well we'll come to that in a moment, but if the
11 appointment of a special purpose liquidator is akin to
12 the appointment of a liquidator then I would've thought
13 that we'd have to look at the powers to appoint a
14 liquidator. If we're appointing a liquidator normally
15 you need a consent from the liquidator and I presume
16 there's evidence that Mr Carson is a registered
17 liquidator.

18 MR ZWIER: Your Honour I have to see whether there's a consent.
19 I note that Mr Carson is- - -

20 HIS HONOUR: I mean - you could - I presume you'd get one very
21 quickly.

22 MR ZWIER: Yes, Your Honour.

23 HIS HONOUR: No, I think the main point is, Mr Zwier, I just
24 want to turn - you can address me on it obviously - but
25 when I read the papers I thought that I had a query
26 whether Sections 511 would give power to a court to
27 appoint a liquidator under the Corporations Act. I would
28 have to look at the decision again in those decisions you
29 took me to but I thought that what was happening was an
30 additional liquidator was being appointed with limited
31 powers and they were therefore appointing the liquidator

1 under - I can't remember what the case said. Perhaps it
2 does say 511 but I thought it may have been under some
3 provisions or agent of appointment of liquidators.

4 MR ZWIER: Your Honour the case of Lowe v. Neilson and
5 Moller- - -

6 HIS HONOUR: Yes.

7 MR ZWIER: - - -refer to the decision of Re Cobar Mines, a
8 decision of Justice Santo.

9 HIS HONOUR: Yes.

10 MR ZWIER: Where Justice Santo states it's clearly established
11 in the winding up by the court the court has power to
12 appoint an additional liquidator.

13 HIS HONOUR: Yes.

14 MR ZWIER: Under Section 511 of the then Corporations Law on an
15 application by the liquidator amongst others
16 contributories and others can make the application. "In
17 a voluntary winding up the court may exercise any of the
18 powers it has where the company has been wound up by the
19 court if it is satisfied that such exercise will be just
20 and beneficial."

21 And Your Honour I can hand up a copy of that
22 decision. I think the relevant passage has been marked
23 up. And I can also hand up to Your Honour a copy of
24 Justice Santo's decision in the matter of Cobar Mines
25 Proprietary Limited which is referred to in that case.
26 It's an unreported decision, Your Honour. If I could
27 just hand up - - -

28 HIS HONOUR: So the first one you want me to go to is what -
29 Justice Santo, is it?

30 MR ZWIER: Yes. Justice Santo at p.4 under the heading, "Legal
31 Questions" at the bottom of the page. In the last

1 sentence, "It is clearly established that in the winding
2 by the court the court has power to appoint an additional
3 liquidator under s.511 of the law on an application by
4 the liquidator amongst others." And the test is whether
5 it would be just and beneficial to do so.

6 HIS HONOUR: So this is under 511 1(b), presumably. It's not
7 to determine the question. This is to exercise all or
8 any of the powers that the court might exercise if the
9 company were being wound up by the court.

10 MR ZWIER: Yes, your Honour.

11 HIS HONOUR: Now he also refers to s.472(1) which is - have you
12 got your Corporations Act there?

13 MR ZWIER: I do, Your Honour.

14 HIS HONOUR: Well, 472(1) is on an order being made for the
15 winding up of a company the court may appoint an official
16 liquidator to be the liquidator of the company. He also
17 refers to 473(8)(viii). "If more than one liquidator is
18 appointed by the court the court must declare whether
19 anything that is required or authorised by this Act to be
20 done by the liquidators to be done all or any one or more
21 of the persons appointed." So I suppose it's that power
22 which enables you to sort of carve out some powers. I
23 hear what you say about 4511 - he does say that - but in
24 the sentence before he does refer to those earlier
25 sections. I suppose that's where the court actually has
26 the power to. It's really 511 1(a) - 1(b) is bringing
27 into play those earlier sections.

28 MR ZWIER: Yes.

29 HIS HONOUR: I think that's probably the better way of
30 analysing it.

31 MR ZWIER: I think that's so, Your Honour.

1 HIS HONOUR: Yes.

2 MR ZWIER: So that the matter is brought before the court under
3 the direction of power of- - -

4 HIS HONOUR: You're asking the court to exercise a power that
5 it might exercise and then you have to say what power is
6 that? It's the power in 472(i) and the power in
7 473(viii). I think that's a better way of analysing it.

8 MR ZWIER: Yes, Your Honour, and if I could - - -

9 HIS HONOUR: I'm happy about that jurisdictional point. I
10 hadn't read the second part of 511(1) to be frank with
11 you. I just had a quick look. I didn't even look at it
12 actually. I just read your application. But then the
13 matter about the consent I mean you can attend to that
14 but I think - normally to appoint a liquidator you do
15 need a written consent, don't you? So I don't see why it
16 wouldn't apply in this case.

17 MR ZWIER: I think Your Honour is correct and I will probably
18 have to agree to file such a consent from Mr Carson.

19 HIS HONOUR: Now what was that?

20 MR ZWIER: I can tell Your Honour that the form of the order
21 which Your Honour has had emailed to Your Honour's
22 Chambers.

23 HIS HONOUR: Yes.

24 MR ZWIER: Has been run by Mr Carson and he and his lawyers are
25 happy with the form of the proposed orders. Your Honour
26 might notice that there are two issues dealt with in
27 other matters in that order.

28 HIS HONOUR: Excuse me, yes. There's a general form of order
29 left on my desk here with the tag "amended" on it. Is
30 that the one?

31 MR ZWIER: Does it have on the top of p.2 - does it begin with,

1 "For the purposes of"?

2 HIS HONOUR: Yes. "For the purposes of", yes.

3 MR ZWIER: That's the same - that's the amended version. That
4 second paragraph was a paragraph that Mr Carson and his
5 lawyers sought to be inserted although I explain to Your
6 Honour that the two matters that the parties seek to have
7 noted. First, Your Honour has correctly identified
8 s.473(viii) as necessary to set out what powers the
9 current liquidators have and in other matters it's
10 proposed to note that the special purpose liquidator will
11 not limit the role or powers of the current liquidators
12 of TSL other than is provided for in the orders
13 specifically and that's in there for the avoidance of any
14 doubt.

15 The second matters which the parties have sought to
16 have noted in the order concerns legal advice, and Your
17 Honour will see at the top of p.2: "For the purpose of
18 performing the appointment described in Paragraph 2 of
19 the order, the special purpose liquidator ... (reads) ...
20 to assist them in determining the effect of legal advices
21 and other materials."

22 If I could just explain again to Your Honour the
23 background to that matter. As Your Honour knows, these
24 MIS schemes are incredibly complicated, complex, with a
25 massive number of documents, Your Honour has seen a small
26 sample of them.

27 HIS HONOUR: You can explain it for the benefit of the other
28 parties, but I heard this the other day in this very
29 matter.

30 MR ZWIER: So Your Honour is familiar with it.

31 HIS HONOUR: You are seeking directions, it's not a separate

1 proceeding so I think I can accept the submissions you
2 made the other day on that.

3 MR ZWIER: Thank you, Your Honour. Apart from that the scope
4 of the special purpose liquidator is set out in
5 Paragraph 2. The costs of the special purpose liquidator
6 are to be paid on the same basis as the liquidator's
7 costs, and candidly, Your Honour, we're not sure what
8 that means but in whatever way Korda and Chesser are to
9 be paid is the same way that Carson is to be paid.

10 HIS HONOUR: Is this order - can I ask you this, Mr Zwier, is
11 this taken from a previous court order, the expression:
12 "Be appointed as a special purpose liquidator." I would
13 have thought, without the benefit of reading authorities,
14 he would be appointed a liquidator and - - -

15 MR HIBBLE: Your Honour, I hesitate to interrupt you and
16 Mr Zwier but I do have a decision here which I think
17 would help the court.

18 HIS HONOUR: Well, I'm struggling a bit here so I would be
19 grateful, Mr Hibble.

20 MR HIBBLE: This is a decision of Justice Barrett also, the
21 Supreme Court of New South Wales. I'm afraid I only have
22 the one copy which I will hand up. It's McGrath v. HRH
23 Insurance (2006) BC 2006 02910, and in this case a
24 special purpose liquidator was appointed, but under the
25 rubric Your Honour has already proposed, namely that
26 while s.511 gives the court the power the actual
27 appointment is under 47(2).

28 HIS HONOUR: I've actually written that in pursuant to - yes.

29 MR HIBBLE: Yes, and if Your Honour looks at Paragraph 13 there
30 is a form of orders there that I think will suit this
31 case.

1 HIS HONOUR: I will be assisted to have a look at that, yes. I
2 think someone reading this might think there is such a
3 thing as a special purpose liquidator defined in the Act,
4 but yes, the wording there is what I have had in mind
5 myself, that is he be appointed as an additional
6 liquidator, solely for the purposes specified. Yes, I am
7 more comfortable with that, I think.

8 MR ZWIER: Well, I'm grateful.

9 HIS HONOUR: I will tell you the changes, they be appointed as
10 an additional liquidator, after the word "liquidator",
11 solely for the purposes set out in Paragraph 2 below, and
12 then this order says at the beginning of the equivalent
13 of Paragraph 2 it says: "Pursuant to s.4738 which is the
14 one we identified before, Mr Zwier, as being the relevant
15 one." He makes a declaration but I don't know if that's
16 - I'll just have a look.

17 He says: "For the purposes - ", "Pursuant to s.4738
18 of the Act a declaration of the following matters may be
19 done only by Stephen James Parbery as an additional
20 liquidator of the company on behalf of the company." Now
21 I will just check 4738 whether a declaration is
22 appropriate rather than an order. Yes, 4738 says: "If
23 more than one liquidator is appointed by the court, the
24 court must declare whether anything that is required
25 authorised by this Act to be done by the liquidator is to
26 be done by all or any or more of the persons appointed."

27 So His Honour is precisely right, it's a
28 declaration. So it is therefore pursuant to s.4738 of
29 the Act a declaration that the following matters be done
30 only by Ian Menzies Carson, as an additional liquidator
31 of the company, on behalf of the company, then colon, and

1 then you set out the matters and you have an A, B, C and
2 D which we will look at in a moment, but that seems to be
3 what Justice Barrett has done and it seems to comply with
4 the wording in the section.
5 MR ZWIER: It does, Your Honour.
6 HIS HONOUR: Then he has also gone on and given him some
7 powers. We might actually get my tipstaff to copy pp.2-3
8 so everyone at the Bar table can have a copy of that form
9 of order. We will leave the form of order to one side
10 now, we will just look at A, B, C and D to see whether
11 they are appropriate.
12 MR ZWIER: Yes, Your Honour.
13 HIS HONOUR: Bearing in mind those objectives, just take me
14 through A, B, C and D then.
15 MR ZWIER: A is to play the role in the negotiation with the
16 liquidators concerning the extinguishment or surrender of
17 the leases and sub-leases.
18 HIS HONOUR: Yes, I understand that.
19 MR ZWIER: B is to negotiate in relation to entitlements for
20 the extinguishment. C is to engage with - - -
21 HIS HONOUR: What about also, would B cover the terms upon
22 which they would be extinguished, is that what you mean
23 to do?
24 MR ZWIER: It's really the negotiation about the amount of
25 money.
26 HIS HONOUR: Well, that's the terms.
27 MR ZWIER: Yes, Your Honour.
28 HIS HONOUR: I think we should have after "licence", "To
29 negotiate the (indistinct) and the terms thereof," isn't
30 it? Something like that?
31 MR ZWIER: Yes.

1 HIS HONOUR: And the terms thereof. Then you go on: "Between
2 TSL and the third parties, including but not limited to
3 the grower investors claiming an interest in or in
4 respect of the land leased by Olivecorp."

5 MR ZWIER: C is to retain experts if they deem it necessary and
6 Your Honour will appreciate that - - -

7 HIS HONOUR: To assist the additional liquidator, yes, that's
8 fine, and D to - - -

9 MR ZWIER: That's with the additional liquidator.

10 HIS HONOUR: Yes, I am content with those.

11 MR ZWIER: It's with the limited purposes (indistinct).

12 HIS HONOUR: No, well, we're going to get back to the draft
13 order and I think you will need some powers, we will have
14 a look when the draft comes back which I think you then
15 incorporate from other areas. Mr Zwier, are you looking
16 at the powers?

17 MR ZWIER: I am, Your Honour, I'm looking at the powers which -
18 the normal powers within 477(1) and (2), Your Honour, and
19 Your Honour might recall very often in this court
20 provisional liquidators powers are expressly taken from
21 the general powers and then the specific powers. It
22 seems to me, Your Honour, that the power that Mr Carson
23 would need would be 477(2)(b), appoint a solicitor to
24 assist him in relation to his duties; and then (m) do all
25 such other things as are necessary to give effect to the
26 declaration in Paragraph 2.

27 HIS HONOUR: Well, he is negotiating, does he need the power
28 then to execute deeds and things. He is negotiating,
29 does he actually make the agreement.

30 MR ZWIER: No, Your Honour, the intention would be that the
31 extant liquidators will execute documents and enter into

1 the agreement with their lawyers.

2 HIS HONOUR: So he will determine the terms and then it's up to
3 the other liquidator, what, is he bound to accept them or
4 what?

5 MR ZWIER: They will negotiate and work as a team, Your Honour,
6 and to the extent that they might not reach agreement and
7 there's something controversial they will have to come
8 back to the court, Your Honour. But the expectation is
9 that they will work and come out with some consensual
10 result.

11 HIS HONOUR: He's got to negotiate. So he is not there to
12 agree. Is that deliberate? You have only got him
13 negotiating.

14 MR ZWIER: Because it's not intended that - someone is going to
15 have to make a decision. The intention is that he will
16 help facilitate the decision of the current liquidators
17 by assisting in the negotiation.

18 HIS HONOUR: With those additional words he is negotiating the
19 terms of the surrender, it doesn't say he's agreeing, it
20 says: "He'll negotiate either a loan or with the
21 liquidators the extinguishment or surrender of the lease,
22 sub-lease or licence and the terms thereof," so he will
23 be negotiating the terms as opposed to agreeing on the
24 terms.

25 MR ZWIER: Yes.

26 HIS HONOUR: Is that what you want?

27 MR ZWIER: Exactly, so that the parties will - they will
28 continue the kind of negotiations we've already had.

29 HIS HONOUR: So you don't think he needs then D: "To do all
30 acts and execute the " - - -

31 MR ZWIER: No.

1 HIS HONOUR: He won't be actually entering into the agreement,
2 is that what you propose?

3 MR ZWIER: That's right, that's why I went to only really B and
4 M with a modification - - -

5 HIS HONOUR: So it's B and you said - - -

6 MR ZWIER: M with a modification.

7 HIS HONOUR: What is the modification?

8 MR ZWIER: Do all such other things as are necessary not for
9 the winding up of the affairs of the company but to give
10 effect to the declaration made in Paragraph 2.

11 HIS HONOUR: There may be incidental expenses, you have to get
12 things photocopied, hire a room or whatever, so anything
13 which is done for that purpose yes.

14 MR ZWIER: That's right; he'll get his costs - his legal costs
15 for whatever he does.

16 HIS HONOUR: So we'd have another clause then after two along
17 the lines Justice Barrett's decision which would be
18 pursuant to s.4738 of the act. I presume Mr Carson is
19 authorised to be appointed a liquidator is he?

20 MR ZWIER: Yes Your Honour he is. He's also Mr Parbery's
21 partner.

22 HIS HONOUR: This chap here in this case.

23 MR ZWIER: Yes, his PPB is Parbery something or other and
24 Barilla wasn't it, Parbery Prentice Barilla?

25 HIS HONOUR: I see, well under the act the liquidator
26 automatically gets these powers in 4771 and 4772 is that
27 correct?

28 MR ZWIER: I understand that the liquidator does.

29 HIS HONOUR: So you really want to take them away before you
30 grant them? "Subject to this section the liquidator
31 may", - well you'll have to help me out here, but I

1 would've thought that they - there's presumably a
2 provision for the court to take them away, is that
3 correct?

4 MR ZWIER: Well that's how Justice Barrett's done it in his
5 order.

6 HIS HONOUR: No he says in A he's entitled to exercise -
7 subject to Paragraph B all of the powers.

8 MR ZWIER: Other than 4771(a), and then he takes some away from
9 him.

10 HIS HONOUR: Other than, I see, yes.

11 MR ZWIER: So he's done it by giving all the powers and
12 excluding them.

13 HIS HONOUR: Yes so you would say the powers conferred on a
14 liquidator by s.4772(b) is it?

15 MR ZWIER: Yes, and in fact the way that order is expressed its
16 five, solely for the purposes specified, it's picked up
17 already in the introductory words.

18 HIS HONOUR: How would you express M? It's already in the
19 introductory - - -

20 MR ZWIER: It's already in the introductory words because the
21 introductory words be entitled to exercise solely for the
22 purpose specified in order - the preceding order in that
23 case, this case the order to above. Maybe it would be
24 safer to say - a second one rather than 4772(m) to do all
25 such other things as are necessary, and we don't need to
26 say anything more than necessary Your Honour because he's
27 already qualified for the purposes specified in the
28 order.

29 HIS HONOUR: What words do you want for otherwise - other than
30 - so he's entitled to - how would you express the fact
31 we've taken away all the rest?

1 MR ZWIER: Be entitled to exercise only the following powers -
2 (indistinct) exercise only the following powers for the
3 purposes specified in Order 2.

4 HIS HONOUR: So it'd just read: "Pursuant to s.4738 of the Act
5 a declaration that Anne Menzies Carson be entitled to
6 exercise for the purpose specified in Order 2 above only
7 the powers conferred on a liquidator by a s.4772B and
8 otherwise to do all such other things as are necessary."

9 MR ZWIER: Yes.

10 HIS HONOUR: Have you got that Mr Hibble?

11 MR HIBBLE: Yes, Your Honour.

12 HIS HONOUR: Now, then you see in Mr Justice Barrett's order,
13 Mr Zwier, there is an order there about the existing
14 liquidators. So that acknowledges there is a carve out
15 from what they can do, the powers given to the additional
16 liquidator are taken away from the other liquidators.

17 MR ZWIER: Well, this is slightly different this case because
18 it's intended that they will operate together really, and
19 so it's not intended to limit the power of the current
20 liquidators, it is intended to provide an additional
21 liquidator to assist them meeting their obligations. So
22 I wouldn't be pressing for a like order to that
23 Paragraph 7. Your Honour, I would be content for an
24 order for leave to modify or extend the powers generally,
25 leave to apply to do so, but I would assume that leave
26 would in any event be available under limited directions
27 powers.

28 HIS HONOUR: Right, I hear what you say.

29 MR ZWIER: If Your Honour pleases.

30 HIS HONOUR: Who is next? Mr Bland, are you opposed to this?

31 MR BLAND: Your Honour, we are not opposed to the application.

1 HIS HONOUR: I only ask that just trying to work out what order
2 people should go in, that's all.

3 MR BLAND: Conceptually, we're just opposed to some of the
4 terms of - - -

5 HIS HONOUR: Well, you go next and - is the bank opposing this
6 or agreeing to it?

7 MS CIPRIANO: No, the bank agrees.

8 HIS HONOUR: Well, it's best if Mr Hibble goes last I think.

9 MR HIBBLE: Yes.

10 HIS HONOUR: So yes, Mr Bland?

11 MR BLAND: Your Honour, as I said, our submissions relate to
12 the terms of the appointment, rather than the appointment
13 itself, we agree with that. The first issue, I guess it
14 would be beneficial to explain to you the background that
15 we are not as progressed on the olives as we are in the
16 almonds in that bids closed last Friday, and as Your
17 Honour may be aware the application for a temporary RE
18 has been re-listed for 6 October and that is because the
19 TGG decided to try to go through the sale and re-
20 capitalisation process in order to resolve that and the
21 TGG supported a bid in the early scheme, so the schemes
22 on the bought properties, the schemes 2001-2004 which
23 this order relates to which involves the continuation of
24 the schemes and the replacement of the responsible
25 entity. Accordingly we have had discussions with the
26 liquidator about this being couched in terms of there
27 being a sale going ahead and trying to ascertain whether
28 there has been a preferred bidder selected that involves
29 a sale. We understand, and correct me if I'm wrong, that
30 hasn't progressed to that point so the bid is still in
31 negotiation and one of the bids, and the bids that we

1 would be hoping are successful, is the bid that involved
2 the continuation of the schemes. Now, the scope of this
3 application only relates to the sale process. So we have
4 instructions to seek that the appointment in fact be
5 expanded also to the consideration of the various bids
6 because while there is obvious conflict in relation to a
7 sale price, essentially in which Olivecorp land would be
8 negotiated with TSL, there is also a considerable
9 conflict between Olivecorp land and TSL, a conflict for
10 the liquidator in relation to whether to prefer and
11 select a bid that involves a sale as opposed to re-
12 capitalisation which is a euphemism for continuing on the
13 schemes.

14 Under the head leases in these schemes the rent that
15 is payable to Olivecorp land is the rent that is received
16 by the growers - a certain amount or a lesser amount, to
17 the extent that it is received by the growers. There is
18 a perception from the liquidator that there will be a
19 considerable non-continuation by growers, so if the
20 schemes continue and Olivecorp land may be receiving
21 considerably less rent that it may have anticipated by
22 these schemes prior to the voluntary administrators.

23 HIS HONOUR: This order is premised on the assumption that the
24 leases are going to be surrendered, that is that the
25 schemes disappear.

26 MR BLAND: Yes.

27 HIS HONOUR: So you are putting something on the basis that
28 they don't, is that it?

29 MR BLAND: One of the bids, at least one of the bids, as far as
30 we know, involves the continuation of the schemes and for
31 reasons we have been arguing all along we think there is

1 a considerable conflict for the liquidator in that what I
2 was explaining to Your Honour was it may be far
3 preferable to Olivecorp that the sale process does occur
4 instead of a continuation of the schemes.

5 So we see the CBA has requested a liquidator make
6 this application and we would request a liquidator to
7 extend this application to cover the consideration of the
8 bids because we see a serious conflict in that process as
9 well. In further application to the order, Paragraph B,
10 it's not clear in Paragraph B in what capacity TSL is -
11 well, in what capacity the additional liquidator is to
12 negotiate with Olivecorp on behalf of TSL. TSL has two
13 hats in relation to the sub-leases.

14 Now, Mr Zwier has indicated that A relates to the
15 head leases and sub-leases, and B relates to the
16 entitlements for extinguishment. It seems to me that B
17 relates to the sub-leases - only relates to the head
18 leases and B relates to the sub-leases and entitlements
19 for extinguishment. The point I wish to make is that in
20 relation to the sub-leases TSL has two hats as
21 responsible entity and agent for the purpose of
22 exercising the power to surrender the sub-leases but also
23 as a party to the sub-leases in its own right.

24 It's not clear in B in which capacity its
25 negotiating and we would like to see it negotiating as
26 representative or responsible entity and agent of the
27 grower with Olivecorp. If the purpose of this is to
28 avoid the conflicts we think that achieves that better.

29 HIS HONOUR: How would you propose amending the order?

30 MR BLAND: Well, we have prepared a draft order which although

31 the changes are a bit clean in description it makes it a

1 bit messy in drafting, but to begin with in Paragraph B
2 clarifying which capacity TSL is negotiating in it may
3 have in brackets after the word "TSL" where it first
4 appears in Paragraph B in open bracket: "As
5 representative and agent of" - - -

6 HIS HONOUR: So you would say it ought to be where it says that
7 the additional liquidator is to negotiate with Olivecorp
8 on behalf of the 1st plaintiff, it should say: "On
9 behalf of the 1st plaintiff as responsible entity." Is
10 that correct?

11 MR BLAND: Yes, Your Honour, I think specifically the action it
12 will be doing to surrender the sub-leases is in the
13 constitution expressed as: "As representative and agent
14 of the grower," it's expressed slightly different. That
15 may be the contemplation of the liquidators on the
16 application, I'm not sure, but we would submit it would
17 be improved by inserting those words.

18 HIS HONOUR: The heading to the proceeding makes it clear that
19 the application has been made by TSL in its capacity as
20 responsible entity. So perhaps you would want to clarify
21 whether the reference to the 1st plaintiff is the
22 reference which it has in the heading, that's your point
23 isn't it? The document?

24 MR BLAND: Yes. Well, is that correct then in Paragraph A
25 where it's - - -

26 HIS HONOUR: I understood that it was negotiating on behalf of
27 the 1st plaintiff in the 1st plaintiff's position as the
28 responsible entity of the schemes, it's not negotiating
29 for the 1st plaintiff's own interests.

30 MR BLAND: That may not be the capacity in Paragraph A because
31 it's - - -

1 HIS HONOUR: That's what I understood, I would be surprised if
2 it's otherwise. It can be clarified but I took it to
3 be - - -

4 MR BLAND: Well, perhaps (indistinct) otherwise if that's - in
5 Paragraph A - - -

6 MR ZWIER: Your Honour, if it would assist, we don't doubt for
7 one moment it's as a responsible entity of the schemes as
8 the 1st plaintiff. The use of the definition of the 1st
9 plaintiff in Paragraph 1A picks it up, the use of the TSL
10 is just for clarity but it could be 1st plaintiff - - -

11 HIS HONOUR: No, I think the word "1st plaintiff" picks up,
12 Mr Bland, the defined term back in the heading which is
13 Timbercorp in its capacity as responsible entity, so I
14 think the fact that we spoke of on behalf of the 1st
15 plaintiff, I think on its construction it has the meaning
16 you say it should have.

17 MR BLAND: As Your Honour pleases.

18 HIS HONOUR: I think Mr Zwier has said on the transcript that
19 is correct. Is that so, Mr Zwier?

20 MR ZWIER: Of course it is, Your Honour.

21 HIS HONOUR: Yes. Now, you had a second point, did you not?

22 You said that you've wanted the additional liquidator to
23 in some way be involved in - - -

24 MR BLAND: The consideration of the offers.

25 HIS HONOUR: The consideration of the offers, is that correct?

26 MR BLAND: Yes. In the selection of the preferred bidder.

27 Now, without suggesting you drafting. I mean that's just
28 the mechanical plus the drafting but that's not worth
29 doing that until Your Honour indicates it.

30 HIS HONOUR: So your point is you accept that he would only -
31 similar to this - he would only - the actual choice of

1 the preferred bidder will be that of the liquidators but
2 he would be consulted in the selection of the preferred
3 bidder is that your - - -

4 MR BLAND: Or invite a - not necessarily a report for the court
5 but a recommendation.

6 HIS HONOUR: No, but your point is that if it came to an issue
7 in court he would then be in a position to say, "I looked
8 at the bidders. I talked about it with the liquidators
9 and in my view the liquidators chose the best one from
10 the point of view of the growers."

11 MR BLAND: That's right, Your Honour.

12 HIS HONOUR: Well, we'll hear what Mr Zwier's got to say about
13 that at the moment. It does seem to me to be a sensible
14 suggestion. It doesn't tie the hands of the liquidators.
15 It's again - it's consultative. I'll hear what ASIC's
16 got to say about it in a moment too but it seems to me at
17 first blush to be sensible.

18 MR BLAND: The other aspect, Your Honour, I note that the
19 application is limited to the schemes 2001 to 2004 and
20 that - - -

21 HIS HONOUR: Well, that's probably the ones which this company
22 is involved in and there's another property company in
23 the other one is there?

24 MR BLAND: Yes, and one of the companies involved - if I can
25 take you to Mr Malarky's affidavit.

26 HIS HONOUR: This draft order doesn't have schedule one but
27 it's probably somewhere - schedule one - and it's not in
28 the back of the application either. Mr Zwier we might be
29 without a schedule one. I think it would be prudent to
30 have one annexed to the application.

31 MR ZWIER: If Your Honour pleases. It's on the original motion

1 that was brought before the court. This is just an
2 application within an existing - - -

3 HIS HONOUR: Back in the original motion is it?

4 MR ZWIER: Yes. It goes back a while but we'll attach to
5 the - - -

6 HIS HONOUR: I was just looking at the application. Now,
7 what's your point, Mr Bland?

8 MR BLAND: The application relates to 2001 to 2005 schemes
9 only. I understand from the liquidators that they intend
10 to appoint Mr Carson by private treaty for the 2006 to
11 2008 schemes and that may be because the Commonwealth
12 Bank's request only limited to these schemes. But
13 there's a - in that paragraph 11 of Mr Malarky's
14 affidavit talks about the conflict with Olivecorp. If
15 you substitute the name of the company, BB Olives
16 Proprietary Limited which is also a company in
17 liquidation within the Timbercorp group. The same
18 paragraph, in our submission, would be correct. So
19 there's a landowner in the 2006-8 schemes with exactly
20 the same conflict and exactly the same scenario and more
21 likely to go through the sale process because there isn't
22 a currently formed bid that involves the continuation of
23 the schemes.

24 HIS HONOUR: So your point is that this order should be
25 extended to - well, this is only dealing with the
26 Olivecorp land though isn't it? You want a sort of
27 separate order for someone else's land?

28 MR BLAND: Well, it's - it would - - -

29 HIS HONOUR: I think Mr Zwier said it was called Boundary Bend
30 Proprietary Limited.

31 MR BLAND: No, BB Olive is a Timbercorp owned company.

1 HIS HONOUR: I'm sorry. BB Olives.

2 MR BLAND: So the same conflict exists in negotiating with BB
3 Olives as exists with Olivecorp land. The complication
4 with the Boundary Bend schemes is that there is - - -

5 HIS HONOUR: Well - - -

6 MR BLAND: - - - some non-Timbercorp land owners.

7 HIS HONOUR: I hear what you say. The liquidator hasn't asked
8 for directions about that. I'm not sure where I can
9 gratuitously say you should be asking for directions
10 about that.

11 MR BLAND: It's not our application.

12 HIS HONOUR: I think that this came up the other day, Mr Bland,
13 where Mr Bigmore suggested that the private treaty
14 shouldn't be pursued but there should be a special
15 purpose liquidator appointed but at that stage there was
16 no application to appoint one. I really had nothing
17 before me that anybody was consenting or what the terms
18 of it would be. I think if it came up again no doubt in
19 this case you'd have - this is a precedent - and say this
20 should be performed and followed.

21 MR BLAND: Our final point, Your Honour, you've heard
22 submissions on it before about the acceptance of the
23 legal advice of the liquidator and the charges.

24 HIS HONOUR: Is there some evidence? I said some things in my
25 judgment and if they aren't true you could put something
26 into an affidavit or tell me that they're not but I'm
27 working on the assumption that if someone got these cold
28 it could take a couple of weeks to get on top of the
29 documents.

30 MR BLAND: I think that still remains and - - -

31 HIS HONOUR: If that's the case I don't want to - that could

1 upset the sale.

2 MR BLAND: Your Honour will find in due course that we think

3 the submission is with - - -

4 HIS HONOUR: But you can put your constructions. I've said

5 that in the judgment and I think that it - I said that.

6 It wasn't a direction but if that wasn't observed you

7 could draw it to my attention and I could perhaps do

8 something.

9 MR BLAND: No, Your Honour - - -

10 HIS HONOUR: But it seems to me that Mr Carson would feel a lot

11 more comfortable if he knew there was a competing view.

12 MR BLAND: And we would seek to do the same here as long as

13 that's not excluded by the terms of it being an order

14 rather than just being an appointment.

15 HIS HONOUR: No, they're not. He can consider. If you've got

16 a view about what the proprietary rights the growers

17 extend to he'd be virtually duty bound to listen to you.

18 MR BLAND: The basis to it - we have - can confirm that has

19 been followed, and he has sought our advice. We are

20 coming to the impression that we - there'll be some

21 disagreement in the advice between our view and the

22 liquidators view, and that's why we raise it again. We

23 also - - -

24 HIS HONOUR: Well I suppose Mr Carson's been instructed to

25 assume that the advice he is given is correct, but if

26 he's given other advice which is inconsistent I would

27 imagine he would say in his advice that on this basis

28 this is a reasonable value. If the other interpretation

29 is correct which I don't have a view about, but if its

30 correct then that wouldn't effect the value or it would

31 effect the value and he may even say something. I mean

1 at the end of the day it's all - its going to be for the
2 assistance of the court because directions are going to
3 be sought as to whether these sales are to be approved.
4 So I would hope that Mr Carson would in his report point
5 out any differences, and make some helpful observations.

6 MR BLAND: Well we'd hope that he would Your Honour, it's just
7 it is a critical matter to the outcome, and I would
8 assume his lawyers may be telling him there's a cost risk
9 if he does that because the order would say that
10 he's - - -

11 HIS HONOUR: Well as a liquidator he can come to court for
12 direction himself if need be, if he's in any doubt. He's
13 got power to the act - he's got power under s.5 and 11 to
14 seek directions. I don't need to give him that power;
15 the act gives him that power.

16 MR BLAND: So - well look we'd be satisfied Your Honour if
17 that's the closest that - - -

18 HIS HONOUR: You can show him the transcript where I - you can
19 show him the transcript where I've said that, but he'll
20 know he's got those sort of powers. Even though he's
21 limited in what he can do he's still an independent
22 liquidator, and he's still duty bound to do the things
23 the act requires of him, and he's entitled to seek
24 directions. And as a liquidator if someone along to him
25 and says this is - we've got a different view of what the
26 proprietary interest is he's got to listen.

27 MR BLAND: If Your Honour pleases they are my submissions.

28 HIS HONOUR: Ms Cipriano do you want to make a submission?

29 MS CIPRIANO: Well all I want to say Your Honour is that we
30 agree with the order that the liquidator has proposed
31 today, and there's nothing that I wish to add.

1 HIS HONOUR: You support the application.

2 MS CIPRIANO: Yes.

3 HIS HONOUR: Thank you very much, Mr Hibble?

4 MR HIBBLE: Your Honour we don't oppose the application that

5 the liquidator has made. I've just received instructions

6 that we do oppose the broadening of the order as proposed

7 by Mr Bland, and we do that on the basis that - - -

8 HIS HONOUR: This is to - - -

9 MR HIBBLE: Consider the bids.

10 HIS HONOUR: To consider the bids, yes.

11 MR HIBBLE: Our concern there is we would like to see and

12 consider that proposed order, we've only just been made

13 aware of it, and we say that because the case is in

14 relation to a special purpose liquidator, all identify a

15 clear conflict facing the liquidator qua the liquidator,

16 and in this case the liquidator has identified the

17 conflict between Timbercorp Securities Limited and Olive

18 Land, and Mr Bland has acknowledged that. In moving on

19 to say that the additional liquidator should consider the

20 bids as it presently stands we haven't seen any material

21 that indicates what the conflict is that would require

22 the additional liquidator to take on that role. Put

23 conversely there's no reason before the court at the

24 moment why KordaMentha can't make that decision about the

25 appropriate bidder.

26 Now I'm jumping ahead a little bit here it may be

27 because if I'm understanding Mr Bland correctly, he's

28 alluding to the conflict, or theoretical conflict that's

29 been in this matter since the beginning, namely the

30 conflict between the duties of a liquidator and

31 responsible entity. But merely appointing an additional

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:

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J U D G M E N T

HIS HONOUR: I have before me an application by the liquidators of Timbercorp Securities Limited in liquidation in its capacity as responsible entity of each of the managed investment schemes, this is in Schedule 1 of the originating process, and the liquidators themselves, Mark Anthony Korda and Leanne Kylie Chesser for an order under s.511 of the Corporations Act 2001 that Ian Menzies Carson of PBB Chartered Accountants be appointed as special purpose liquidator to perform the role described in the affidavit of Andrew Malarky sworn 18 September 2009.

Andrew Malarky deposes in his affidavit he is a chartered accountant and partner in the firm of KordaMentha. He says his partners Mark Korda and Leanne Chesser are the 2nd and 3rd plaintiffs and are liquidators of TSL. He says also that Mark Korda along with their partner, Mark Francis Xavier Mentha, is also the liquidator of Olivecorp Land Pty Ltd in liquidation. He says that TSL is the responsible entity of the olive schemes, those numbered 8-14 in the Schedule 1 of the originating process.

He said in the 2001, 2002, 2003 and 2004 olive schemes Olivecorp owns land on which the olive schemes are operated. Olivecorp leases the land to TSL. He says that in the 2003/2004 olive schemes, TSL sub-leased the land to the growers. In the 2001/2002 olive schemes TSL leases the land back to Olivecorp and Olivecorp then associates itself with the growers in a licence and joint

1 venture agreement. The joint venture agreement grants
2 the growers a licence to occupy the land.

3 He says that on 13 August 2009 the liquidators
4 initiated a sale or recapitalisation process for the
5 olive schemes. He says final bids for the olive at it's
6 closing 11 September and the liquidators are now
7 negotiating with the bidders. He says that if a sale
8 proceeds, a purchaser may require Olivecorp to sell the
9 land free from all encumbrances. He says that in order
10 for Olivecorp to sell the land unencumbered, Olivecorp's
11 leases to TSL and TSL's sub-leases to the growers or
12 Olivecorp's joint venture agreements in respect of the
13 2001 and 2002 olive schemes may need to be surrendered.

14 He says TSL has amended the olive scheme
15 constitutions granting TSL the power to surrender the
16 sub-leases and joint venture agreements on behalf of each
17 grower. Mr Malarky says that in order for TSL to
18 exercise the power to surrender the sub-leases or the
19 joint venture agreements, TSL and Olivecorp may need to
20 reach agreement about the value of the sub-lease or joint
21 venture agreement, that is they may between Olivecorp and
22 the purchaser.

23 Mr Malarky says as has previously been explained to
24 the court in this proceeding there are potential issues
25 of conflict in the liquidators fulfilling the role of
26 liquidator for multiple Timbercorp Group companies. In
27 this case one of the liquidators of Olivecorp and TSL is
28 the same person. The potential for conflict arises if a
29 liquidator has to negotiate with himself to determine the
30 price for the surrender of the sub-leases or the joint
31 venture agreements.

1 He says that the same issue arose in relation to the
2 almond schemes, although in the almond schemes the
3 liquidators are both the liquidators of TSL and the land
4 owning company in relation to the almond schemes. In
5 relation to the almond schemes the liquidators retained
6 Ian Carson by private treaty to fulfil the role of
7 special purpose liquidator to assist them. Mr Carson has
8 been a chartered accountant for over 20 years and is a
9 managing partner of PPB.

10 He says in relation to the olive schemes the
11 applications for a court appointed special purpose
12 liquidator rather than by private treaty. He says the
13 scope of Mr Carson's appointment in relation to the olive
14 schemes is to be limited to the following matters:

15 1) to negotiate with Olivecorp on behalf of TSL,
16 either alone or with the liquidators, the extinguishment
17 or surrender of any lease between Olivecorp and TSL;

18 2) to negotiate with Olivecorp on behalf of TSL,
19 either alone or with the liquidators, the extinguishment
20 or surrender of any lease, sub-lease or licence between
21 TSL and third parties, including but not limited to the
22 grower investors claiming an interest in or in respect of
23 land leased by Olivecorp to TSL;

24 3) to engage jointly with the liquidators' one or
25 more experts as deemed necessary to assist the special
26 purpose liquidator in relation to the matters set out in
27 the previous two orders;

28 4) to provide if necessary or appropriate to the
29 court a report which identifies the activities undertaken
30 by the special purpose liquidator in discharging the
31 above functions.

1 Can someone lend me a Corporations Act? Mr Zwier
2 has appeared to make the application on behalf of the
3 liquidators. Mr Bland appeared on behalf of the
4 Timbercorp Growers Group which I've described in previous
5 proceedings. Mr Hibble appeared as counsel for ASIC, and
6 Ms Cipriano appeared for the Commonwealth Bank of
7 Australia, who I assume is a secured creditor of the land
8 owning company.

9 There is abundant authority for the appointment of a
10 special purpose for additional liquidator to carry out a
11 limited task in situations where the existing liquidators
12 are faced with a conflict and otherwise, and I refer to
13 Spedley Securities Limited [1991] 4 ACSR 555 and Advanced
14 Housing Pty Ltd v. Newcastle Classic Developments Pty Ltd
15 [1994] 14 ACSR 230. Another example is One Fone
16 Australia Pty Limited v. One. Tel [2003] 48 ACSR 562.

17 So far as the act is concerned the application has
18 been made under s.511 which provides that the liquidator
19 may apply to the court a) to determine any question
20 arising winding up of a company or relevantly in this
21 case b) to exercise all or any of the powers of the court
22 might exercise that the court were being wound up by the
23 court. One of those powers is under s.472 which provides
24 that the court - that on an order being made for the
25 winding up of a company the court may appoint an official
26 liquidator to be liquidator of the company, and that has
27 been construed as allowing the appointment of more than
28 one liquidator, and the appointment of liquidators at
29 different points of time.

30 Under s.473(8) the court has power to - if more than
31 one liquidator is appointed by the court, it is provided

1 the court must declare whether anything that is required
2 or authorised by this act to be done - by the liquidators
3 be done by all or any more of the persons appointed, that
4 power has also been construed, as it appears on its face,
5 to provide in the event that an additional liquidator can
6 be given limited powers of a - both limited as to power
7 as to time in the winding up of the company. ASIC - I
8 can not remember, did you agree or not oppose what was
9 it?

10 MR HIBBLE: We did not oppose Your Honour.

11 HIS HONOUR: Sorry, ASIC did not oppose the application.

12 Mr Bland had two - for the Timbercorp Growers Group had
13 two concerns. First he was concerned that the reference
14 to TSL in the proposed powers did not make clear whether
15 TSL - which hat TSL was wearing. TSL has two hats, it
16 has the - one hat is acting as the responsible entity for
17 the management investment schemes. Its other hat is it
18 has its own economic interest which include as I know
19 from other cases interest in the Timbercorp Group assets.
20 I think that Mr Bland's concern is misplaced in that the
21 term 1st plaintiff in the orders picks up the description
22 of the 1st plaintiff in the proceedings, which is in its
23 first - wearing its first hat, that is at responsible
24 entity for the schemes. His second point was that the
25 additional liquidator should also be empowered, or have a
26 duty in fact, to consider the offers and be in a position
27 to be heard by the liquidators on which one should be
28 selected.

29 Mr Hibble for ASIC opposed that application at this
30 stage primarily on the grounds that there wasn't
31 sufficient material to assess it properly but Mr Hibble

1 also appeared to have some objections in principle. I
2 hope he does not believe I do him a disservice by saying
3 that in my view, admittedly without having affidavit
4 evidence on it, it seemed appropriate that if Mr Menzies
5 is to be the champion of the growers the growers may feel
6 more comfortable within this otherwise distressing
7 position that they're in if their representative was
8 given the opportunity to discuss with the liquidators the
9 preferable bid to accept. My own view at the moment and
10 it is not a direction by the court is that that does
11 appear to me to be a sensible course for the liquidators
12 to permit in view of the conflict position they find
13 themselves in.

14 At this stage I am not prepared to vary the orders
15 on the basis of those submissions by Mr Bland alone but
16 to accommodate them I am going to clarify that both the
17 liquidators and the additional liquidator will have
18 liberty to apply to the court to vary this order. I will
19 give them liberty to apply generally to both and I will
20 also put on the transcript and in my reasons my view
21 which I believe is correct that the additional liquidator
22 will have the powers - any liquidator does - under s.511
23 to come to the court to seek directions.

24 If Mr Carson is of the view that he would be
25 assisted by being able to assess the tenders and if - and
26 it is a big if - if the liquidators resisted his requests
27 to do so he is perfectly free then to come to court if he
28 wishes to seek to have this order varied or seek
29 directions about it.

30 Apart from those observations I am content to make
31 the orders that have been sought but in a form varied

1 with the assistance of the precedent orders which are set
2 out by Justice Barrett in his decision of Re HIH
3 Insurance Limited [2006] NSW Supreme Court 385.

4 Therefore I am prepared to order on the assumption that
5 Mr Carson's files with the court the appropriate consent
6 to act as a liquidator. I am prepared to order as
7 follows:

8 (i) That pursuant to s.511 and s.472(1) of the
9 Corporations Act 2001, Ian Menzies Carson, of PPB
10 Chartered Accountants, Level 10, 90 Collins
11 Street, Melbourne, Victoria, be appointed as an
12 additional liquidator solely for the purposes set
13 out in paragraph 2 below.

14 (ii) Pursuant to s.473(viii) of the Act the court
15 declares that the following matters be done only
16 by Ian Menzies Carson, as an additional liquidator
17 of the company, on behalf of that company:

18 a. Negotiate with Olivecorp Land Proprietary Limited
19 ACNO 090141512 in liquidation - Olivecorp - on
20 behalf of the first plaintiff TSL either a loan or
21 with the liquidators the extinguishment or
22 surrender of any lease between Olivecorp and TSL
23 the head lease;

24 b. To negotiate with Olivecorp on behalf of TSL
25 either a loan or with the liquidators the
26 extinguishment or surrender of any lease,
27 sublease or license and the terms thereof between
28 TSL and third parties including but not limited to
29 the grower, investors claiming an interest in or
30 respect of land leased by Olivecorp to TSL
31 subleases.

1 c. To engage jointly with the liquidators one or more
2 experts as deemed necessary to assist the
3 additional liquidator in relation to the matters
4 set out in orders 2A and B; and

5 d. To provide if deemed necessary or appropriate to
6 the court a report which identifies the activities
7 undertaken by the additional liquidator in
8 discharging the above functions.

9 (iii) Pursuant to s.473(viii) of the Act the court
10 declares that Ian Menzies Carson be entitled to
11 exercise for the purposes specified in order 2
12 above only the powers conferred on a liquidator by
13 s.477(2)(b) of the Act and otherwise to do all
14 such things as are necessary therefore.

15 (iv) The additional liquidators costs are to be paid on
16 the same basis as the liquidators costs.

17 (v) The liquidators and the additional liquidator each
18 have liberty to apply to the court to vary this
19 order.

20 6) liberty to apply generally is reserved to the
21 liquidators and the additional liquidator;

22 7) the costs of this application of costs in
23 liquidation of Olivecorp and TSL in equal amounts.

24 - - -

1 HIS HONOUR: Is there anything else, Mr Zwier?

2 MR ZWIER: Your Honour, I think you referred to Mr Carson once

3 as Mr Menzies and you might want to just - - -

4 HIS HONOUR: His name is - what is it?

5 MR ZWIER: It's Ian Menzies Carson.

6 HIS HONOUR: Ian Menzies Carson is the person I am referring

7 to, yes.

8 MR ZWIER: Yes, I understood that, Your Honour. Secondly, Your

9 Honour will appreciate that the liquidators decisions can

10 also be appealed under s.13(21) of the Act so that in

11 addition to the other powers to seek directions, every

12 decision of Mr Carson or indeed my clients are capable of

13 appeal before the court. So that there are additional

14 protections from the way Your Honour has structured the

15 orders. If Your Honour pleases.

16 HIS HONOUR: All right, I am pleased to hear that. Very well,

17 gentlemen. Mr Zwier, I will be away for two weeks so I

18 spoke to Justice Pagone who is in charge of the

19 commercial court and told him that you might be seeking

20 some assistance while I am away, so he is aware that you

21 might be calling upon him.

22 MR ZWIER: Your Honour is very prescient because the PLL lease

23 dispute has taken a turn for the worse.

24 HIS HONOUR: Well, he's expecting your call.

25 MR ZWIER: Yes, thank you, Your Honour. Have a good vacation,

26 Your Honour.

27 HIS HONOUR: Thank you. We will adjourn sine die.

28 - - -