

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMERCIAL & EQUITY DIVISION
COMMERCIAL COURT**

LIST E

**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 EACH OF THE
MANAGED INVESTMENT SCHEMES LISTED IN SCHEDULE 1
AND OTHERS ACCORDING TO THE SCHEDULE**
Plaintiffs

GROWERS' SUBMISSIONS

1. These submissions are made by counsel for John Angus Hordern, the applicant in an interlocutory process filed in this proceeding on 10 November 2009. John Angus Hordern is a participant in the Timbercorp Growers Group ('**TGG**'), a group formed to represent the interests of growers in Timbercorp managed investment schemes. It appears to be common ground that growers have significant rights to the olive assets, just as growers were recognised by Robson J as having significant rights to the almond assets (see MJF-10 or MAK-12).
2. Great Land Olives Ltd ('**GLO**') has made a bid for the olive assets ('**GLO bid**'). GLO is an entity associated with George Kalil.
3. These submissions are made for two reasons:
 - (a) in support of an application under s.1321 of the *Corporations Act 2001* to set aside the decision of the Liquidators to accept a bid by Boundary Bend Pty Ltd ('**BB**' and '**BB bid**') and enter into conditional sale and purchase deeds ('**SPDs**') with BB; and
 - (b) in opposition to an application made by the Liquidators in this proceeding seeking approval from the Court under ss 477(2B), 511 and 568(1A) of the *Corporations Act* of their entering into the SPDs (thus fulfilling a condition subsequent).
4. The grounds for making these submissions are:
 - (a) the GLO bid is superior to the BB bid;
 - (b) the Liquidators have a conflict of duties that should have been addressed by (as a minimum) the seeking of an order relevantly

expanding the role of the existing additional liquidator (Mr Carson) to include the exclusive capacity to discharge the duties of the Liquidators of TSL as Responsible Entity of the Olive Schemes ('TSL/RE').

GLO bid is superior to BB bid

5. The background to and details of the GLO bid are set out in paragraphs 17 to 26 of Kalil's affidavit. The revised GLO bid is set out in paragraphs 46 to 48 of Kalil's affidavit.
6. The background and details of the BB bid is set out in paragraphs 38 to 45 of Kalil's affidavit and 74 to 95 of Korda's affidavit.
7. The GLO bid is superior to the BB bid for the following reasons:-
 - (a) a sale to BB will not produce an immediate return to creditors or growers. Instead, it is proposed that the sale proceeds be placed into a trust account and that the interested parties litigate over the proceeds (see Korda at 121-2). This is likely to result in multiple complicated class actions by growers, possibly represented by separate lawyers (see Fernon at 14 to 21), causing delays in the distribution of funds and the dissipation of proceeds in legal fees;
 - (b) GLO is willing to enter an unconditional contract (see Kalil at 46(e)). Once funds are raised by GLO, the return to creditors will be immediate. Any delay caused by the raising of funds will be exceeded substantially by the subsequent litigation proposed by the Liquidators;
 - (c) the GLO bid is for around \$6.5M more than the BB bid (see Kalil at 48(a) and 38);
 - (d) the BB sale will produce virtually no return for growers who have contributed \$260M (see Kalil at 8-9). However, the GLO bid offers shares to growers to maintain their investment and the opportunity to acquire further shares (see Kalil at 46(k) to (o));
 - (e) the proposal will require a non-deductible contribution by GLO of \$60M, raised largely from capital contributed by growers. That contribution will then save the growers around \$30M (after tax deductibility is exploited) in annual contributions that would otherwise have been payable for the remainder of the project (see Kalil at 48(i));
 - (f) the GLO bid will will extinguish growers' claims over the sale proceeds (see Kalil at 46(l)), increasing the funds available to creditors. Those claims are currently valued at around \$260M (see Kalil at 8-9);

- (g) there may be no litigation between growers and secured or other creditors if the GLO bid is accepted (see Kalil at 46(c) and (d) and Fernon at 14-17);
- (h) there should be no litigation between forestry growers and olive growers if the GLO bid is accepted (see Fernon at 18); and
- (i) further advantages of the GLO bid are set out in paragraph 48 of Kalil's affidavit.

The Liquidators have conflicts of duties

8. The Liquidators (of TSL/RE) are also liquidators of a company which owns 19.4% of the shares in BB (see Korda at 69(f)). Consequently, they have a duty to act in the best interest of the creditors of that other company.
9. The Liquidators (of TSL/RE) have a duty to act in the best interest of the growers (see CA s.601FC(2) and *Miller Street Pty Ltd v Porter* [2007] FCA 1830 per Finkelstein J at [21] this point not being considered on appeal; see also unsettled summary of reasons of Robson J in *Great Southern Managers Australia* (unreported, 17 August 2009, proceeding 8169 of 2009) at 11 to 14 and the authorities there cited, but noting his Honour's reservation at paragraph 1).
10. The Liquidators also have a duty to act in the best interest of creditors and others interested in the winding up of all companies of which they are liquidators (see *Timbercorp Securities Ltd (in liq) v WA Chip and Pulp Co Pty Ltd* [2009] FCA 901 at [8] – [11]).
11. Although liquidators are experienced at dealing with conflicting duties, the law still applies to them; see *Lo v Nielsen & Moller Autoglass (NSW) Pty Ltd* (2008) 26 ACLC 497; [2008] NSWSC 407 (applied by Robson J in *Re Timbercorp Securities Ltd (in liq) (No 2)* [2009] VSC 411), and (as to the proposition that a fiduciary should not serve two masters without fully informed consent) *Clark v Barter* (1989) NSW Conv R 55-483 at 58,504.
12. In *Re Greight Pty Ltd* [2006] FCA 17 at [14], Finkelstein J said:

"If there are, or are likely to be, disputes between companies in liquidation that are under the control of one liquidator then as a general rule different persons should be appointed as liquidator to each company. That is not to say that it is inappropriate to appoint one person as liquidator of a group of companies or of companies that are closely connected. But once the likelihood of conflict becomes apparent it is necessary to take action."
13. The Liquidators appear not to have implemented the orders of Robson J made on 18 September 2009 (MAK-27; see also Korda at 122).

Accordingly, the Court can have no confidence that the SPDs reflect the opinion of the additional liquidator. In any event, because of the conflicting duties mentioned above, the Liquidators should have approached the Court to expand Mr Carson's role and remove or modify the qualifications stated in "other matters".

Comparison of Effects of Bids

14. If the Liquidators' proposal is accepted, the following benefits will flow to BB:-
 - (a) the bid is inferior to the GLO bid by (at least) \$6.5M for the reasons set out above, so BB obtains a windfall of \$6.5M;
 - (b) BB will acquire assets in which growers have invested \$260M for around \$3.5M (see Kalil at 43);
 - (c) it appears that BB has been levying fees from the olive groves at an un-commercial rate (see Kalil at 32 to 37);
 - (d) the sale will produce an immediate return for BB as the Boort groves are now productive (see Kalil at 7);
 - (e) the sale appears to have been conditional on capital raising (see Kalil at 29(c)). Korda's affidavit suggests at 16 it is not conditional on finance, but provides no supporting documents.
15. On the other hand, the BB proposal will have the following consequences for growers:-
 - (a) there will be no immediate return to growers;
 - (b) the growers will need to engage in protracted and expensive litigation with secured creditors over the proceeds of the sale;
 - (c) Paragraph 114 of Mark Korda's affidavit indicates that part of the sale proceeds are to be allocated to the 2000 private offer growers. They are being given certain rights out of a constructed arrangement between OLPL and OML. This indicates that moneys which should be paid to growers in the registered schemes are being diverted to growers in the private scheme. This disadvantages registered scheme growers and creditors and may advantage Timbercorp itself because the private growers are indebted to Timbercorp entities and the moneys will likely be set off against these debts (see Kalil at 45);
 - (d) the growers will not be able to participate in the ongoing scheme. The growers have voted overwhelmingly in favour of continuing the schemes (see Kalil at 12 - 13); and

- (e) the superior bid by GLO will have been rejected.
16. Further, the BB proposal will have the following consequences for creditors:-
- (a) there will be no immediate return for creditors;
 - (b) the Liquidators and creditors will need to engage in protracted and expensive litigation, reducing the pool of funds available;
 - (c) the growers will maintain their claim for the portion of the sale proceeds that represent their legal and equitable rights upon their investment of \$260M, reducing the pool of funds available to creditors; and
 - (d) they will not receive the benefit of the additional \$6.5M in value for the GLO bid.
17. For the above reasons, it is submitted that the Liquidators' decision to prefer BB's bid should be set aside and that the Court should not give its approval to the transaction.

Dated: 11 November 2009

Garry Bigmore

Sam Hopper