

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

LIST A
No. 9299 of 2009

IN THE MATTER OF TIMBERCORP
SECURITIES LIMITED (IN LIQUIDATION) and
others (according to schedule attached)

Plaintiffs

<u>JUDGE:</u>	PAGONE J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	30 September 2009
<u>DATE OF JUDGMENT:</u>	30 September 2009
<u>CASE MAY BE CITED AS:</u>	In the matter of Timbercorp Securities Limited (In Liquidation) & Ors
<u>MEDIUM NEUTRAL CITATION:</u>	[2009] VSC 597

CORPORATIONS LAW – Liquidators – Application to court for directions – ss 477 and 511
Corporations Act 2001 (Cth).

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiffs		Mr L. Zwier of Arnold Bloch Leibler
For Michael Fernon	Mr G. Bigmore QC Mr M. Galvin	Clarendon Lawyers
For the Commonwealth Bank of Australia	Mr L. Glick SC Mr S. Cipriano	Commonwealth Bank of Australia

HIS HONOUR:

- 1 This application is brought under ss 477(2B) and 511 of the *Corporations Act 2001* (Cth) to have determined certain questions which have arisen in the context of the liquidation of Timbercorp Securities Limited, Timbercorp Limited and the Timbercorp group of companies.
- 2 The application was made by a company in liquidation together with its liquidators. At the commencement of the hearing of the application leave was sought to add a number of other plaintiffs. They each appear to be proper parties to the application, and I gave leave for them to be added as plaintiffs. Leave was also sought by Mr Michael Fernon to appear through his counsel pursuant to Order 2.13 of Chapter 5 of the *Supreme Court (Corporations) Rules 2003* (Vic) to be heard as an interested party in the proceeding but without being made a party to the proceedings. Mr Fernon is a grower in the forestry schemes in which Timbercorp Securities Limited is the responsible entity. I granted Mr Fernon leave to appear and have been assisted by his counsel's submissions in the proceeding.
- 3 The applications seek comfort for the liquidators before they enter into a contract. In *Re Ansett Australia Ltd v Korda*¹ Goldberg J explained the Court's jurisdiction in this task by saying:

When liquidators and administrators seek directions from the court in relation to any decision they have made, or propose to make, or in relation to any conduct they have undertaken, or propose to undertake, they are not seeking to determine rights and liabilities arising out of particular transactions, but are rather seeking protection against claims that they have acted unreasonably or inappropriately or in breach of their duty in making the decision or undertaking the conduct. They can obtain that protection if they make full and fair disclosure of all relevant facts and circumstances to the court.²

To that one may add the passages from *Re Pasmenco Ltd*³ and *Re J W Murphy & P C Allen*.⁴

¹ (2002) 40 ACSR 433.

² Ibid 444.

³ (2004) 49 ACSR 470, 473 (Finkelstein J).

⁴ (1996) 19 ACSR 569, 570 (McLelland CJ).

- 4 The liquidators and the company in liquidation find themselves with an enterprise which the liquidator has described as being hopelessly insolvent. They have undertaken a careful and robust process to sell the enterprise at the best price. They intend to enter into a contract today with a buyer, and have sought the court's guidance about the appropriateness of them doing so. An aspect of the deal involves repayment to the Commonwealth Bank of moneys owed to the bank. The Commonwealth Bank was represented by counsel at the hearing before me this morning, but not as a party, and it did not seek to be heard in the applications. A consequence of the contract being entered into is that the rights of others, in particular of the growers, will be lost.
- 5 The evidence relied upon for the applications are two affidavits of Mr Mark Korda, 14 exhibits, including some confidential exhibits, and some oral evidence given by Mr Korda on which he was cross-examined.
- 6 A number of matters are relied upon in support of the conclusion I am urged to reach that the proposed actions are reasonable and appropriate, or at least are not unreasonable and inappropriate. The legal ability of Timbercorp Securities to surrender rights of the growers was affirmed by a process involving orders made by Finkelstein J in Federal Court proceedings when his Honour sanctioned an amendment to the constitution of the forestry schemes under s 601GC(1)(b) of the *Corporations Act*. The liquidators have undertaken a robust process to secure the best possible sale in the interests of all. That process involved approaches to potential purchasers to elicit interest for a purchase, public advertisements, and the evaluations of competing offers. The assets offered for sale were described in information memoranda, and included trees, freehold land, leasehold land, business assets and other business rights. The process has been extensive, diligent, and has involved frequent communication and information with interested parties, including in particular the growers whose rights will be affected.
- 7 Mr Korda is an experienced liquidator. In 2002 he founded the firm of which he

continues to be a partner. Before then he had been with Arthur Andersen for 24 years, during which time he held several positions. He has practised in the area of corporate insolvency and financial reconstruction for some 20 years. He was appointed as one of the voluntary administrators of Timbercorp Limited and Timbercorp Securities Limited on 23 April this year. On 29 June 2009 the creditors of those companies resolved to wind them up, and since then he and Ms Leanne Chesser have been the liquidators for those companies. Mr Korda's opinion is that the present offer is much better than the next best offer capable of acceptance. Its terms involve a payment to third party farmers who are entitled to rent and are as yet unpaid. Acceptance of the offer will undoubtedly avoid greater and irrecoverable losses to growers and to other creditors. The process they propose to complete has in large part been made known to the growers over time as the current proposal has evolved. ASIC, the government regulator charged with such matters, has been kept informed of the developments, is aware of the application before me, and has not indicated that it wished to be heard in any way against the application as presently urged upon me. Various alternative avenues have been considered and explored to deal with the insolvent companies and their enterprises.

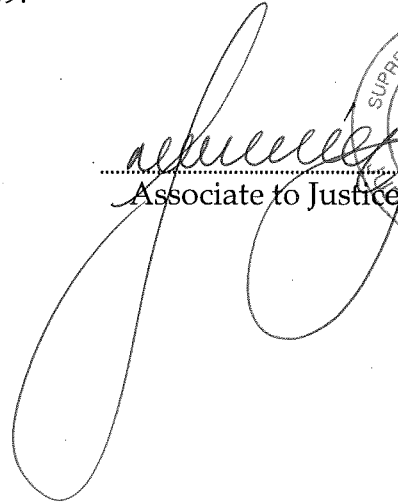
8 The position of the Commonwealth Bank is that it insists upon payment from the proceeds of sale of so much as is required to cause the bank either to release or to assign all of its securities to the Timbercorp group of companies. The information memorandum provided as a condition precedent that unless the Commonwealth Bank released the securities, the agreement with the buyer could not be completed. The bank's position is, as it appears entitled for it to take, that it requires repayment of approximately \$152m for it to discharge its securities.


9 In all of those circumstances, it seems to me that the plaintiffs are entitled to the orders in substantially the terms they seek, except that for the word "justified" in the two proposed orders I will substitute the words "acting reasonably and appropriately". I will otherwise make the orders for confidentiality sought in the third order.

CERTIFICATE

I certify that this and the three preceding pages are a true copy of the reasons for Ruling of Pagone J of the Supreme Court of Victoria delivered on 30 September 2009.

DATED this thirtieth day of September 2009.


Associate to Justice Pagone



SCHEDULE OF PARTIES

No. 9299 of 2009

TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION) (ACN 092 311 469) IN ITS CAPACITY AS RESPONSIBLE ENTITY OF EACH OF THE MANAGED INVESTMENTS SCHEMES LISTED IN SCHEDULE 1 AND IN ITS CAPACITY AS MANAGER OF THE UNREGISTERED MANAGED INVESTMENTS SCHEME LISTED IN SCHEDULE 2

First Plaintiff

MARK ANTHONY KORDA

Second Plaintiff

LEANNE KYLIE CHESSER

Third Plaintiff

MARK FRANCIS XAVIER MENTHA

Fourth Plaintiff

CLIFFORD ROCKE

Fifth Plaintiff

TIMBERCORP LIMITED (IN LIQUIDATION)

Sixth Plaintiff

TIMBERCORP PLANTATIONS 2002 IAB PTY LTD (IN LIQUIDATION)

Seventh Plaintiff

TIMBERCORP PLANTATIONS PTY LTD (IN LIQUIDATION)

Eighth Plaintiff

TIMBERCORP LANDS PTY LTD (IN LIQUIDATION)

Ninth Plaintiff

TIMBERCORP PROPERTIES LIMITED (IN LIQUIDATION)

Tenth Plaintiff

TIMBERCORP FORESTRY PTY LTD (IN LIQUIDATION)

Eleventh Plaintiff

TIMBERCORP LOT INVESTMENTS PTY LTD (IN LIQUIDATION)

Twelfth Plaintiff