

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

LIST E

No 7114 of 2009

**IN THE MATTER OF TIMBERCORP SECURITIES LIMITED
(UNDER ADMINISTRATION)
ACN 092 311 469**

**TIMBERCORP SECURITIES LIMITED
(UNDER ADMINISTRATION) ACN 092 311 469
IN ITS CAPACITY AS RESPONSIBLE ENTITY OF EACH OF THE
MANAGED INVESTMENT SCHEMES LISTED IN SCHEDULE 1
First Plaintiff**

MARK ANTHONY KORDA and LEANNE KYLE CHESSE
Second and Third Plaintiffs

GROWERS' OUTLINE OF SUBMISSIONS

Date of document:	14 July 2009
Filed on behalf of:	Growers
Prepared by:	
Clarendon Lawyers	Tel: 03 8681 4400
Level 17, Rialto North Tower	Fax: 03 8681 4499
525 Collins Street	Solicitors Code: 101294
MELBOURNE VIC 3000	Ref: MAB:0900205

The proceedings

1. The proceedings concern the following registered managed investment schemes:
 - (a) The 2001 Timbercorp Olive Project ASRN 094 382 082;
 - (b) The 2002 Timbercorp Olive Project ASRN 098 233 455;
 - (c) The 2003 Timbercorp Olive Project ASRN 104 648 473;
 - (d) The 2004 Timbercorp Olive Project ASRN 108 744 378;
 - (e) The 2006 Timbercorp Olive Project ASRN 119 182 179;

- (f) The 2007 Timbercorp Olive Project ASRN 123 155 715;
 - (g) The 2008 Timbercorp Olive Project ASRN 129 307 722;
 - (h) The 2001 Timbercorp Almond Project ASRN 095 649 746;
 - (i) The 2002 Timbercorp Almond Project ASRN 099 611 935;
 - (j) The 2003 Timbercorp Almond Project ASRN 103 197 299;
 - (k) The 2004 Timbercorp Almond Project ASRN 108 336 670;
 - (l) The 2005 Timbercorp Almond Project ASRN 112 935 092;
 - (m) The 2006 Timbercorp Almond Project ASRN 118 387 974;
 - (n) The 2007 Timbercorp Almond Project ASRN 122 511 040;
2. In each case, the liquidators of the current responsible entity, Timbercorp Securities Limited (“TSL”) seek a winding up of the scheme on the “just and equitable ground” (*Corporations Act 2001* s 601ND(1)(a)).
 3. Clarendon Lawyers are instructed by the Timbercorp Growers Group which comprises individuals who were on the Investor Representatives of the Creditors Committee that was established at the First Creditors’ Meeting of Timbercorp Securities Limited. The Timbercorp Growers Group was formed following the dissolution of the Creditors Committee at the Second Creditors’ Meeting. Many are financial advisers and/or accountants who are advisers to grower investors and grower investors themselves. They represent approximately one half of the 18,000 investors in the schemes (“The Growers Group”). Those investors oppose the orders sought by the liquidators of TSL for a winding up of the schemes.

4. Growers in each of the schemes have applied, by separate interlocutory processes filed in the proceeding, for the appointment of a temporary responsible entity under regulation 5C.2.02 of the *Corporations Regulations 2001* on the ground that they believe that such appointment is necessary to protect scheme property or the interests of members of the scheme. The applicants are as follows:

Applicant	Scheme
Pauline Hammer	2001 Timbercorp Olive Project ARSN 094 382 082
David Sydney Butterfield	2002 Timbercorp Olive Project ASRN 098 233 455
Graham Goldenberg	2003 Timbercorp Olive Project ARSN 104 648 473
Kerree Anne Bezencon	2004 Timbercorp Olive Project ASRN 108 744 378
Michael Charles Vicary	2006 Timbercorp Olive Project ASRN 119 182 179
Pamela Jan Dry	2007 Timbercorp Olive Project ASRN 123 155 715
David Sydney Butterfield	2008 Timbercorp Olive Project ASRN 129 307 722
Peter Holt	2001 Timbercorp Almond Project ASRN 095 649 746
Graham Goldenberg	2002 Timbercorp Almond Project ASRN 099 611 935
Malcolm Arthur Weaver	2003 Timbercorp Almond Project ASRN 103 197 299

Kerree Anne Bezencon	2004 Timbercorp Almond Project ARSN 108 336 670
Christopher Mark Littlely	2005 Timbercorp Almond Project ARSN 112 935 092
Constantine Moshopoulos	2006 Timbercorp Almond Project ARSN 118 387 974
David Sydney Butterfield	2007 Timbercorp Almond Project ARSN 122 511 040

5. Each of the applicants has sworn an affidavit in support of his or her application.

Applicants in respect of olive projects further rely on affidavits sworn by:

- (a) Robert Garton Smith on 8 July 2009;
- (b) Paul Miller on 3 July 2009;
- (c) Paul Challis on 3 July 2009;
- (d) Paul Charles Riordan on 3 July 2009;
- (e) Christopher Mark Littlely on 3 July 2009;
- (f) Pauline Emma Hammer on 6 July 2009; and
- (g) Paul Charles Riordan on 14 July 2009.

Applicants in respect of almond projects further rely on affidavits sworn by:

- (h) John Knox on 14 July 2009;
- (i) Stephen Lynch on 3 July 2009;
- (j) Owen Stuart Lennie on 8 July 2009;
- (k) Christopher Mark Littlely on 3 July 2009;

(l) Pauline Emma Hammer on 6 July 2009; and

(m) David John Dunn on 14 July 2009.

The applications for the appointment of a temporary responsible entity are supported generally by the Growers Group.

Insolvency of TSL and viability of the schemes

Current position

6. Notwithstanding their claim that the schemes are “hopelessly insolvent”¹, the liquidators’ evidence does not identify outstanding liabilities by reason of which TSL, or the schemes, could be said to be presently insolvent. Rather, the liquidators’ case seems to be based exclusively on forecast insolvency. Furthermore, the forecast liabilities do not appear to arise “by reason of an obligation already existing”².

7. That TSL has:

- (a) no funds (not having sought them from growers);
- (b) no significant assets in its own right;
- (c) no employees; and
- (d) no infrastructure³

is typical of a responsible entity of a registered managed investment scheme.

Usually, the responsible entity relies on financial contributions from scheme members to fund arrangements which it enters with other entities for the

¹ See affidavit of Korda, 4 June 2009, para 27.

² See *Bell Resources v Westpac* (2008) 225 FLR 1 at p. 129 [1124].

³ Korda, 4 June 2009, para 28.

provision of goods and services necessary to the operation of the scheme. It is not usual for a responsible entitle to provide funds, or such goods and services, itself.

Forecast position

8. The liquidators have sought to apply prospective cash flow tests to demonstrate the insolvency of the schemes and to justify their being wound up on the just and equitable ground.⁴ In his various affidavits, Mr Korda has calculated anticipated gross receipts from the sale of produce, and deducted anticipated expenses, to reach a projected negative cash-flow forecast. On a proper analysis, the expenses are expenses which would be incurred by TSL were it to continue as responsible entity of the scheme pursuant to the existing agreements and arrangements.
9. Significantly, the liquidators' forecasts do not make any allowance for contributions by growers. The liquidators have said that they regard it as being in the growers interests not to seek payment from them because of:
 - (a) TSL's financial position;
 - (b) the cash requirements to complete the 2010 harvest of olives and almonds; and
 - (c) the likelihood that growers will not make the payments.⁵

But TSL's precise financial position is unclear. More particularly, it has already been noted that its present outstanding liabilities, if any, do not appear from the evidence. (Accordingly, there is apparently little or no reason for a replacement

⁴ MAK-2 ; Plaintiffs' submissions, paragraphs 10 – 17.

⁵ Korda, 4 June 2009, para 39.

responsible entity to be concerned about assuming TSL's liabilities pursuant to s 601FS). Further, whilst it may well be that some growers would be reluctant (were they asked) to make payments to a responsible entity under administration or in liquidation, it is not at all apparent that they would fail or refuse to make payments to a new responsible entity.

10. In a letter to Primary Securities dated 1 July 2009 (RGS-6), the liquidators stated the basis for their application as follows:

*“The fundamental reason for our application to have the Olive and Almond schemes wound up on the just and equitable ground under section 601ND(1) of the Corporations Act is that **TSL** is hopelessly insolvent and incapable of performing its obligations to growers under the Schemes and its other creditors. The short-term or long-term **viability of the Schemes** themselves is a secondary matter – the more pressing issue is that TSL does not currently have the funds to perform its obligations under the Scheme documents and to meet the significant operational shortfalls necessary [to] ensure the proper operation of the projects.”* (emphasis added).

The letter rightly acknowledged the distinction between the responsible entity's solvency, on the one hand, and the schemes' viability on the other.

11. Contrary to the plaintiffs' submissions (at para 7), the importing of a cashflow test to assess the solvency of a scheme confuses and conflates a responsible entity's solvency and a scheme's viability. For reasons given by Barrett J in a paper presented to the New Zealand Banking and Financial Services Law

Association in July last year,⁶ principles of corporate insolvency law are not readily applied to managed investment schemes. The absence in Part 5C of provisions for the winding up of schemes corresponding to those of Part 5.6 with respect to the winding up of corporations is noteworthy. After noting the “unavoidable overlay of trust law” in Part 5C, Barrett J questioned how meaningful it is to speak of the insolvency of a registered managed investment scheme:

It is not a person. It cannot sue or be sued. It does not own property.

It is the trustee (or responsible entity, in registered scheme terminology) that owns property and owes money. Debts are incurred by the responsible entity and it is to that entity that creditors must look for payment. The responsible entity, as trustee, in turn, looks to rights of indemnity and reimbursement once the creditors demand is made.⁷

12. Whilst in *Re Environinvest* (2009) 69 ACSR 530, Judd J concluded (at [103]) that the schemes before him were “insolvent”, his Honour did so on the basis of findings that the incumbent responsible entity had no means of funding the continuance of the schemes and no alternative for the future management of the schemes was proposed.⁸
13. It is not disputed that it is undesirable, if not impermissible, that a registered management investment scheme should continue to be conducted by a

⁶ Insolvency of Registered Managed Investment Schemes, R.I. Barrett, Banking and Financial Services Law Association, Queenstown, New Zealand, July 2008.

⁷ See also *Re Stacks Managed Investments Ltd* (2005) 219 ALR 532 at [44].

⁸ His Honour accepted (at [104]) that the condition of insolvency might not easily attach to a scheme, insofar as comprises a trust fund, but he took the view that a scheme is more than trust assets or scheme property.

responsible entity which is insolvent or in liquidation. Assuming the viability of the schemes, the concern is removed by the appointment of a replacement responsible entity. This was not an option in *Re Environinvest*. Nor, as Barrett J observed in the paper referred to above, will it ordinarily be an option where the incoming responsible entity will incur substantial liabilities, already incurred by the outgoing responsible entity, by reason of the operation of s 601FS. But it is not apparent in the present case what liabilities, if any, would be transmitted to a new responsible entity under s 601FS.

14. Even if TSL is insolvent, it does not follow that the schemes are not viable, or have “broken down”. The cases do not compel either conclusion. In *ASIC v Knightsbridge Managed Funds Ltd* [2001] WASC 339, *PWL; Ex parte PWL Ltd (No.2)* [2009] WASC 232 and *Environinvest*, no alternatives for the future management of the schemes were proposed or considered. The insolvency of the incumbent responsible entities left the Court in these cases with no practical alternative but to direct a winding up of the schemes. In *Re Orchard Aginvest Ltd* [2008] QSC 2, Fryberg J observed that there was no direct authority to establish that a mere insolvency was sufficient to warrant an order for a winding up of a scheme, but it is not apparent that any consideration was given to the distinction between the solvency of the responsible entity and the viability of the scheme. Moreover, the application was apparently unopposed and no alternatives were proposed. In *Cumulus Wines Pty Ltd v Huntley Management Ltd* (2004) 50 ACSR 58, the schemes were unregistered, and therefore were being conducted in breach of s 601ED(5) and no-one was prepared to take on the role of responsible entity (see paragraph [12]).

Interests of the Growers

15. The provisions of Part 5C.9 are aimed at protecting the interests of investors in managed investment schemes. It may be that, in the present case, in the event of a winding up of the schemes, growers' rights in leases, crops, product and sale proceeds will most likely be caught by the statutory definition of "scheme property" and will terminate. It is not expected that they would receive anything out of a winding up.
16. On the other hand, there is material before the Court which supports the appointment of a temporary responsible entity with a view to the restructuring and continuance of the schemes. Providing for the development and possible implementation of these proposals by the appointment of a temporary responsible entity is in the growers' interests. The willingness of entities experienced in acting as responsible entities with respect to agricultural managed investment schemes to be appointed as temporary responsible entities with respect to Timbercorp Olive and Almond schemes distinguishes the present schemes from the cases referred to above.

The Olive Schemes

17. Primary Securities Ltd has consented to its appointment as temporary responsible entity for all of the olive schemes and ASIC has agreed to vary its Australian Financial Services Licence so as to permit this (see the affidavit of Robert Garton Smith sworn 8 July 2009). Primary Securities is in the business of acting as a responsible entity for agricultural schemes and employs staff with competence and experience in the area, including one employee with specific expertise in

olive cultivation. It has experience in taking over schemes from responsible entities in administration. It has prepared a detailed three month plan in anticipation of its appointment as responsible entity to the olive schemes (RGS-4).

18. Boundary Bend Ltd has been the farm manager of the olive groves since 2004. It has considered continuing in this role and supports the application for the appointment of a new responsible entity (see affidavit of Paul Charles Riordan sworn 3 July 2009).
19. A proposal for managing the olive groves is also being developed by a neighbouring grower, Redisland Australia Ltd (see the affidavit of Paul Challis sworn 3 July 2009).
20. Paul Miller, a professional horticulturist with 30 years experience, including in the olive industry, has prepared a report in relation to the olive schemes (PM-2), concluding that the schemes have been established to a high standard and are likely to produce increasing yields as the orchards mature. In his opinion, it is the costs inherent in the current arrangements which affect their prospects. The implication is that, with appropriate adjustments to those arrangements, the schemes are likely to be viable and profitable.

The Almond Schemes

21. Huntley Management Limited has consented to acting as responsible entity for the Almond Schemes. and ASIC has offered to vary its Australian Financial Services Licence so as to permit this. Huntley is in the business of acting as a responsible entity for agricultural schemes and employs staff with competence

and experience in the area. It has experience in taking over schemes from responsible entities in administration. It will facilitate the proposal for the Almond Schemes (excluding 2007) referred to in the paragraph below. In relation to the 2007 Scheme, it will conduct an assessment and develop proposals on appointment.

22. There is evidence that Align Funds Management Ltd, the responsible entity in respect of the Timbercorp Primary Infrastructure Fund, which owns much of the land on which the almonds are cultivated, is developing proposals for the recapitalisation and continuance of the Almond Schemes (excluding 2007) (see affidavit of Owen Stuart Lennie sworn 8 July 2009).
23. Stephen Lynch, an agricultural scientist with expertise in managed almond investment schemes, has prepared a report (SL-2) concluding that all of the Timbercorp almond orchards are established to a high standard such that long term viability is expected. Their short term viability depends on a variety of variables addressed in his report.

Dated 14 July 2009

G.T. BIGMORE

M.J. GALVIN