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

List E

No 7114 of 2009

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

BETWEEN

TIMBERCORP SECURITIES LIMITED (ACN 092 311 469) (IN LIQUIDATION) IN ITS CAPACITY AS RESPONSIBLE ENTITY OF EACH OF THE MANAGED INVESTMENT SCHEMES LISTED IN SCHEDULE 1 TO THE ORIGINATING PROCESS

First Plaintiff

and

MARK ANTHONY KORDA and LEANNE KYLIE CHESSER

Second and Third Plaintiffs

PLAINTIFF'S OUTLINE OF SUBMISSIONS

Date of document: 10 July 2009
Filed on behalf of: The Plaintiffs

Prepared by:
ARNOLD BLOCH LEIBLER
Lawyers and Advisers
Level 21
333 Collins Street
MELBOURNE 3000

Solicitor's Code: 54
DX 38455 Melbourne
Tel: 9229 9999
Fax: 9229 9900
Ref: LZ: 01-1499489
(Leon Zwier)

Background

1 The First Plaintiff (**TSL**) is the responsible entity of relevantly 14 registered managed investment schemes for the growing of olives and almonds listed in Schedule 1 to the Originating Process (**Schemes**). TSL is part of the Timbercorp group of companies (**Timbercorp Group**), which comprise Timbercorp Limited and 39 of its wholly owned subsidiaries.

2 The Second and Third Plaintiffs were appointed as administrators to TSL and the other companies in the Timbercorp Group on 23 April 2009 under s 436A of the *Corporations Act 2001* (Cth) (**Act**). At the second creditors meeting on 29 June 2009 the creditors resolved to

wind up each of the companies, and on that date the Second and Third Plaintiffs were appointed as liquidators of TSL (**Liquidators**).

3 TSL (by the Liquidators) applies for an order under s 601ND(1) of the Act directing TSL, as the responsible entity of the Schemes, to wind up the Schemes. The Court may make a winding up order if the Court thinks it is just and equitable to make the order: s 601ND(1)(a). TSL, as the responsible entity, has standing to bring the application: s 601ND(2).

4 TSL and the Liquidators bring this application because, based on the material presently available to them, they consider that winding up the Schemes is in the best interests of the members of the Schemes (**Growers**), and as the responsible entity it has a duty to act in the best interests of the members: ss 601FC(1)(c) and 601FD(1)(c) of the Act.

Grounds for winding up

5 A registered managed investment scheme may be wound up in one of 4 ways: under its constitution, by direction of its members, if the responsible entity considers that its purpose has been accomplished or cannot be accomplished, or by the Court.

6 The grounds on which the Court can order that a registered scheme be wound up are set out in s 601ND(1). Insolvency of a scheme is not mentioned specifically. However there is authority that it is 'just and equitable' to make an order under s 601ND(1)(a) winding up a registered scheme that is insolvent: *Re Orchard Aginvest Ltd* [2008] QSC 2, p 3 (Fryberg J); *Re PWL; Ex parte PWL Ltd (No 2)* [2008] WASC 232, [43]–[44] (EM Heenan J); *Re Environinvest Ltd* (2009) 69 ACSR 530, [114] (Judd J). In *ASIC v Knightsbridge Managed Funds Ltd* [2001] WASC 339, [64] Pullin J concluded that where the original arrangement, as set out in the prospectus of a registered scheme, had broken down, and the responsible entity and affiliated companies were insolvent under external administration, it was just and equitable for the scheme to be wound up by the court, and further, intervention was justified on public interest grounds because the investors required protection.

7 Although the statutory 'cash flow test' of insolvency in s 95A of the Act applies to persons, it is a useful proxy for the insolvency of a managed investment scheme. In the corporate insolvency context, it is established that:

(a) insolvency is to be decided as a matter of commercial reality in all the circumstances: *Taylor v Australia and New Zealand Banking Group Limited* (1988) 6 ACLC 808; and

(b) in considering a company's ability to pay its debts as they become due, some consideration should be given to the immediate future, that is a degree of forward analysis to identify the debts that will become due and the resources that will be available at the time when each debt must be paid: *Bank of Australasia v Hall* (1907)

4 CLR 1514, 1527–8; *The Bell Group Limited (in liq) v Westpac Banking Corporation (No 9)* (2008) 225 FLR 1, [1123]–[1138].

8 It has been said that in assessing the solvency of a managed investment scheme it is necessary to consider whether the 'scheme assets are insufficient to meet liabilities, the venture is trading unprofitably and cash flow is negative': RI Barrett, 'Insolvency of Registered Managed Investment Schemes', (paper presented to BFSLA conference in July 2008), 10. Where the responsible entity is a company that is poor in its own right, the only really feasible outcome seems to be for that company to remain the responsible entity, and as the liquidator's duty is to wind up the affairs of the company, the liquidator ought to bring the scheme to an end: Barrett paper, 13, 15. It is in accordance with that general expectation that the Liquidators bring this application for the winding up of the Schemes.

9 Moreover, in analysing the solvency of a scheme, it is necessary to consider not only the 'scheme property' (as defined in s 9 of the Act, and which is held on trust for the members: s 601FC(2) of the Act), but also the surrounding contractual framework including the constitution, the scheme documents, the relationships thereby created and the scheme objectives, inputs and outcomes: *Re Environinvest*, [11].

Insolvency of the Schemes

10 The contractual framework which underlies each Scheme can be summarised as follows.[1] A landowner (which is often a subsidiary within the Timbercorp Group) leases land to TSL, and TSL sub-leases or licenses parcels of the land to the Growers. Each Grower appoints TSL to manage the crops grown on the land, and TSL in turn appoints a manager (another subsidiary within the Timbercorp Group) to manage all the Growers' crops. There are some additional downstream contracts, for example, for the processing and distribution of the crops. Each Scheme is governed by a constitution and the Scheme property is held by a custodian. The Growers fund the Scheme by paying an initial application fee, annual rent (described as a licence fee), and annual operating expenses (including management fees). The rent and some other operating expenses are due on 31 October each year.[2] In return the Growers are entitled to receive a proportionate share of the net proceeds of sale of the crops (after allowing for some deductions).

11 There is evidence that each of the Schemes is insolvent, on a cash flow test. The cash flow analysis of each Scheme is set out below.[3]

---

[1] Each of the relevant documents is found in Exhibit **MAK-1** to each of the Korda Scheme Affidavits.
[2] Clause 7.1 of each sub lease, and clause 10 of each management agreement.
[3] Each of the relevant cash flow analyses is found in Exhibit **MAK-12** to each of the Korda Scheme Affidavits (Supplementary & Reply).

12 Each cash flow analysis is based on a number of assumptions in relation to the 2010 crop variables.[4] These variables are largely irrelevant to the short-term cash flow of the Schemes. (In the short-term, they are relevant only to the Temp Water expense. Otherwise, they are relevant only to receipts and payments which are not scheduled to occur until June 2010: the proceeds of sales of crops, the TIM management fee and the administration fee). Given the lack of funding in the immediate future it is submitted that any debate about the accuracy of these variables is largely academic.

13 The main difficulty that each Scheme faces is that there will be debts which become due and payable in the short-term (in the next 3 months or so) but there will be no cash with which to pay the debts. There is a timing mismatch between receipts from Growers and the due dates for payment of expense. The cash is expected to start to flow in, in the form of receipts from Growers following invoices, only from around October 2009. (The Liquidators have not issued invoices yet because there is no right to demand payment until 31 October and they do not consider that it is in the interests of the Growers to do so.[5]) Unless and until the Grower contributions are received, there are no funds with which to pay the expenses that become due.

14 Receipts from previous harvests cannot be retained and applied, because there is a contractual obligation to distribute them to Growers.

15 TSL itself does not have the cash or realisable assets, as it is insolvent. There is no power in each constitution for the Scheme (or its responsible entity) to borrow in order to meet any shortfall (see s 601GA(3) of the Act), and in any event TSL is hopelessly insolvent.[6]

16 The other companies in the Timbercorp Group are insolvent too, and as a result these companies do not have the financial capacity to meet their ongoing obligations to contribute to scheme costs as joint venturers, they cannot bear (as they have done previously) a portion of the management costs of the Schemes pending receipt of harvest proceeds and/or payment by Growers, and Timbercorp Finance Pty Ltd is unable to finance Growers (as it has done previously).[7] All of the Almond and Olive Schemes, with the exception of the 2001 and 2008 Almond Schemes, have Growers that include Timbercorp Group Companies, which are now insolvent.

17 In addition it seems that if and when the Grower contributions are received, they will be insufficient to meet all the future expenses of the Schemes. Further it is likely that Growers will terminate their participation in the Schemes or default on their participation, given the

---

[4] Each of the relevant sets of variables is found in Exhibit **MAK-6** to each of the Korda Scheme Affidavits.
[5] Paragraph 39 of the Korda Directions Affidavit.
[6] Paragraphs 27 and 28 of the Korda Directions Affidavit.
[7] Paragraph 29 of the Korda Directions Affidavit.

current levels of unpaid project invoices, loans (used by Growers to fund their participation) in arrears and direct debit rejections.[8] In 2008 payments by Growers were slow and in some cases moneys were not paid at all. That is likely to be amplified given the placement of the Timbercorp Group companies in external administration in 2009.

Solvency analysis of each Scheme

2001 Timbercorp Olive Scheme

18 The Cashflow Analysis shows that:

(a) The total net sales proceeds to the Growers from the 2010 harvest are $7.264m, but these are expected to be received only after June 2010, and are based on assumptions in relation to yield crops which are likely to be optimistic; there is no power to retain any sales proceeds from previous harvests;

(b) The total operating expenditure during the 2009/10 financial year is expected to be $6.676m, with payments of $501,000 due in July 2009, $308,000 due in August 2009 and $280,000 due in September 2009;

(c) The expected receipts from Growers for the financial year total $5.620m, but these are not expected to be received until at least October or November 2009, when the invoices to growers are due for payment;

(d) There are no funds to pay the amounts that will fall due in July 2009, August 2009 and September 2009;

(e) This short-term cashflow shortage will be amplified if the capital expenditures (which are required in order to achieve the projected crop yield) are taken into account;

(f) The net operating cashflow over the financial year 2009/10 is a deficit of –$887,000.

2002 Timbercorp Olive Scheme

19 The Cashflow Analysis (taking the 2002 Olive Early and 2002 Olive Post June projects together) shows that:

(a) The total net sales proceeds to the Growers from the 2010 harvest are $5.336m, but these are expected to be received only after June 2010, and are based on assumptions in relation to yield crops which are likely to be optimistic; there is no power to retain any sales proceeds from previous harvests;

[8] Each of the relevant analyses of Grower defaults is found in Exhibit **MAK-7** to each of the Korda Scheme Affidavits.

(b) The total operating expenditure during the 2009/10 financial year is expected to be $4.226m, with payments of $331,000 due in July 2009, $203,000 due in August 2009 and $185,000 due in September 2009;

(c) The expected receipts from Growers for the financial year total $3.703m, but these are not expected to be received until at least October or November 2009, when the invoices to growers are due for payment;

(d) There are no funds to pay the amounts that will fall due in July 2009, August 2009 and September 2009;

(e) This short-term cashflow shortage will be amplified if the capital expenditures (which are required in order to achieve the projected crop yield) are taken into account;

(f) The net operating cashflow over the financial year 2009/10 is a deficit of –$533,000.

2003 Timbercorp Olive Scheme

20 The Cashflow Analysis (taking the 2003 Olive Early and 2003 Olive Post June projects together) shows that:

(a) The total net sales proceeds to the Growers from the 2010 harvest are $5.359m, but these are expected to be received only after June 2010, and are based on assumptions in relation to yield crops which are likely to be optimistic; there is no power to retain any sales proceeds from previous harvests;

(b) The total operating expenditure during the 2009/10 financial year is expected to be $7.037m, with payments of $345,000 due in July 2009, $231,000 due in August 2009 and $306,000 due in September 2009;

(c) The expected receipts from Growers for the financial year total $6.293m, but these are not expected to be received until at least October or November 2009, when the invoices to growers are due for payment;

(d) There are no funds to pay the amounts that will fall due in July 2009, August 2009 and September 2009;

(e) This short-term cashflow shortage will be amplified if the capital expenditures (which are required in order to achieve the projected crop yield) are taken into account;

(f) The net operating cashflow over the financial year 2009/10 is a deficit of –$76,000.

2004 Timbercorp Olive Scheme

21 The Cashflow Analysis shows that:

(a) The total net sales proceeds to the Growers from the 2010 harvest are $948,000, but these are expected to be received only after June 2010, and are based on assumptions in relation to yield crops which are likely to be optimistic; there is no power to retain any sales proceeds from previous harvests;

(b) The total operating expenditure during the 2009/10 financial year is expected to be $1.828m, with payments of $84,000 due in July 2009, $57,000 due in August 2009 and $75,000 due in September 2009;

(c) The expected receipts from Growers for the financial year total $1.632m, but these are not expected to be received until at least October or November 2009, when the invoices to growers are due for payment;

(d) There are no funds to pay the amounts that will fall due in July 2009, August 2009 and September 2009;

(e) This short-term cashflow shortage will be amplified if the capital expenditures (which are required in order to achieve the projected crop yield) are taken into account;

(f) The net operating cashflow over the financial year 2009/10 is a deficit of –$63,000.

2006 Timbercorp Olive Scheme

22 The Cashflow Analysis shows that:

(a) The total net sales proceeds to the Growers from the 2010 harvest are $4.914m, but these are expected to be received only after June 2010, and are based on assumptions in relation to yield crops which are likely to be optimistic; there is no power to retain any sales proceeds from previous harvests;

(b) The total operating expenditure during the 2009/10 financial year is expected to be $8.075m, with payments of $211,000 due in July 2009, $194,000 due in August 2009 and $389,000 due in September 2009;

(c) The expected receipts from Growers for the financial year total $7.225m, but these are not expected to be received until at least October or November 2009, when the invoices to growers are due for payment;

(d) There are no funds to pay the amounts that will fall due in July 2009, August 2009 and September 2009;

(e) This short-term cashflow shortage will be amplified if the capital expenditures (which are required in order to achieve the projected crop yield) are taken into account;

(f) The net operating cashflow over the financial year 2009/10 is a deficit of –$3.172m.

2007 Timbercorp Olive Scheme

23 The Cashflow Analysis (taking the 2007 Olive Early and 2007 Olive Post June projects together) shows that:

(a) The total net sales proceeds to the Growers from the 2010 harvest are $3.406m, but these are expected to be received only after June 2010, and are based on assumptions in relation to yield crops which are likely to be optimistic; there is no power to retain any sales proceeds from previous harvests;

(b) The total operating expenditure during the 2009/10 financial year is expected to be $6.657m, with payments of $150,000 due in July 2009, $140,000 due in August 2009 and $300,000 due in September 2009;

(c) The expected receipts from Growers for the financial year total $5.991m, but these are not expected to be received until at least October or November 2009, when the invoices to growers are due for payment;

(d) There are no funds to pay the amounts that will fall due in July 2009, August 2009 and September 2009;

(e) This short-term cashflow shortage will be amplified if the capital expenditures (which are required in order to achieve the projected crop yield) are taken into account;

(f) The net operating cashflow over the financial year 2009/10 is a deficit of –$3.479m.

2008 Timbercorp Olive Scheme

24 The Cashflow Analysis shows that:

(a) The total net sales proceeds to the Growers from the 2010 harvest are $7.844m, but these are expected to be received only after June 2010, and are based on assumptions in relation to yield crops which are likely to be optimistic; there is no power to retain any sales proceeds from previous harvests;

(b) The total operating expenditure during the 2009/10 financial year is expected to be $12.044m, with payments of $1.161m due in July 2009, $586,000 due in August 2009 and $586,000 due in September 2009;

(c) The expected receipts from Growers for the financial year total $10.829m, but these are not expected to be received until at least October or November 2009, when the invoices to growers are due for payment;

(d) There are no funds to pay the amounts that will fall due in July 2009, August 2009 and September 2009;

(e) This short-term cashflow shortage will be amplified if the capital expenditures (which are required in order to achieve the projected crop yield) are taken into account;

(f) The net operating cashflow over the financial year 2009/10 is a deficit of –$5.237m.

2001 Timbercorp Almond Scheme

25 The Cashflow Analysis shows that:

(a) The total net sales proceeds to the Growers from the 2010 harvest are $3.557m, but these are expected to be received only from June 2010, and are based on assumptions in relation to yield crops which are likely to be optimistic; there is no power to retain any sales proceeds from previous harvests;

(b) The total operating expenditure during the 2009/10 financial year is expected to be $3.843m, with payments of $368,000 due in July 2009, $536,000 due in August 2009 and $793,000 due in September 2009;

(c) The expected receipts from Growers for the financial year total $3.174m, but these are not expected to be received until at least September or October 2009, when the invoices to growers are due for payment;

(d) There are no funds to pay the amounts that will fall due in July 2009 and August 2009;

(e) This short-term cashflow shortage will be amplified if the capital expenditures (which are required in order to achieve the projected crop yield) are taken into account;

(f) The net operating cashflow over the financial year 2009/10 is a deficit of –$585,000.

2002 Timbercorp Almond Project

26 The Cashflow Analysis (taking the 2002 Almond Early and 2002 Almond Post June projects together) shows that:

(a) The total net sales proceeds to the Growers from the 2010 harvest are $11.786m, but these are expected to be received only from June 2010, and are based on assumptions in relation to yield crops which are likely to be optimistic; there is no power to retain any sales proceeds from previous harvests;

(b) The total operating expenditure during the 2009/10 financial year is expected to be $11.516m, with payments of $984,000 due in July 2009, $556,000 due in August 2009 and $706,000 due in September 2009;

(c) The expected receipts from Growers for the financial year total $10.570m, but these are not expected to be received until at least October or November 2009, when the invoices to growers are due for payment;

(d) There are no funds to pay the amounts that will fall due in July 2009, August 2009 and September 2009;

(e) This short-term cashflow shortage will be amplified if the capital expenditures (which are required in order to achieve the projected crop yield) are taken into account;

(f) The net operating cashflow over the financial year 2009/10 is a deficit of –$995,000.

2003 Timbercorp Almond Project

27 The Cashflow Analysis (taking the 2003 Almond Early and 2003 Almond Post June projects together) shows that:

(a) The total net sales proceeds to the Growers from the 2010 harvest are $15.310m, but these are expected to be received only from June 2010, and are based on assumptions in relation to yield crops which are likely to be optimistic; there is no power to retain any sales proceeds from previous harvests;

(b) The total operating expenditure during the 2009/10 financial year is expected to be $19.494m, with payments of $1.828m due in July 2009, $819,000 due in August 2009 and $1.354m due in September 2009;

(c) The expected receipts from Growers for the financial year total $16.469m, but these are not expected to be received until at least October or November 2009, when the invoices to growers are due for payment;

(d) There are no funds to pay the amounts that will fall due in July 2009, August 2009 and September 2009;

(e) This short-term cashflow shortage will be amplified if the capital expenditures (which are required in order to achieve the projected crop yield) are taken into account;

(f) The net operating cashflow over the financial year 2009/10 is a deficit of –$1.473m.

2004 Timbercorp Almond Project

28 The Cashflow Analysis shows that:

(a) The total net sales proceeds to the Growers from the 2010 harvest are $16.753m, but these are expected to be received only from June 2010, and are based on assumptions in relation to yield crops which are likely to be optimistic; there is no power to retain any sales proceeds from previous harvests;

(b) The total operating expenditure during the 2009/10 financial year is expected to be $22.378m, with payments of $2.003m due in July 2009, $1.135m due in August 2009 and $1.771m due in September 2009;

(c) The expected receipts from Growers for the financial year total $21.058m, but these are not expected to be received until at least October or November 2009, when the invoices to growers are due for payment;

(d) There are no funds to pay the amounts that will fall due in July 2009, August 2009 and September 2009;

(e) This short-term cashflow shortage will be amplified if the capital expenditures (which are required in order to achieve the projected crop yield) are taken into account;

(f) The net operating cashflow over the financial year 2009/10 is a surplus of $423,000.

2005 Timbercorp Almond Project

29 The Cashflow Analysis shows that:

(a) The total net sales proceeds to the Growers from the 2010 harvest are $15.24m, but these are expected to be received only from June 2010, and are based on assumptions in relation to yield crops which are likely to be optimistic; there is no power to retain any sales proceeds from previous harvests;

(b) The total operating expenditure during the 2009/10 financial year is expected to be $21.934m, with payments of $1.338m due in July 2009, $1.286m due in August 2009 and $1.886m due in September 2009;

(c) The expected receipts from Growers for the financial year total $18.326m, but these are not expected to be received until at least October or November 2009, when the invoices to growers are due for payment;

(d) There are no funds to pay the amounts that will fall due in July 2009, August 2009 and September 2009;

(e) This short-term cashflow shortage will be amplified if the capital expenditures (which are required in order to achieve the projected crop yield) are taken into account;

(f) The net operating cashflow over the financial year 2009/10 is a deficit of –$10.609m.

2006 Timbercorp Almond Project

30 The Cashflow Analysis shows that:

(a) The total net sales proceeds to the Growers from the 2010 harvest are $20.744m, but these are expected to be received only from June 2010, and are based on assumptions in relation to yield crops which are likely to be optimistic; there is no power to retain any sales proceeds from previous harvests;

(b) The total operating expenditure during the 2009/10 financial year is expected to be $37.538m, with payments of $1.261m due in July 2009, $2.243m due in August 2009 and $3.498m due in September 2009;

(c) The expected receipts from Growers for the financial year total $34.05m, but these are not expected to be received until at least October or November 2009, when the invoices to growers are due for payment;

(d) There are no funds to pay the amounts that will fall due in July 2009, August 2009 and September 2009;

(e) This short-term cashflow shortage will be amplified if the capital expenditures (which are required in order to achieve the projected crop yield) are taken into account;

(f) The net operating cashflow over the financial year 2009/10 is a deficit of –$26.904m.

2007 Timbercorp Almond Project

31 The Cashflow Analysis (taking the 2007 Almond Early, the 2007 Almond Post June and the 2008 FinYr Almond projects together) shows that:

(a) The total net sales proceeds to the Growers from the 2010 harvest are $13.483m, but these are expected to be received only from June 2010, and are based on assumptions in relation to yield crops which are likely to be optimistic; there is no power to retain any sales proceeds from previous harvests;

(b) The total operating expenditure during the 2009/10 financial year is expected to be $48.797m, with payments of $1.712m due in July 2009, $2.509m due in August 2009 and $3.856m due in September 2009;

(c) The expected receipts from Growers for the financial year total $44.781m, but these are not expected to be received until at least October or November 2009, when the invoices to growers are due for payment;

(d) There are no funds to pay the amounts that will fall due in July 2009, August 2009 and September 2009;

(e) This short-term cashflow shortage will be amplified if the capital expenditures (which are required in order to achieve the projected crop yield) are taken into account;

(f) The net operating cashflow over the financial year 2009/10 is a deficit of –$65.017m.

Winding up of the Schemes

32 In summary, each of the Schemes is insolvent as a matter of commercial reality. When considering the immediate future of, say, July to October 2009, each Scheme (and TSL on behalf of each Scheme) is unable to pay the debts which are or will become payable during that period.

33 In the circumstances and based on the material currently available to the Plaintiffs, it is submitted that it is just and equitable to make an order that the Schemes be wound up.

34 In *Re Environinvest*, [103]–[105], Judd J was satisfied that several managed investment schemes were insolvent, and decided to wind them up on the 'just and equitable ground'. Each scheme was insolvent in the sense that it was wholly dependent on its insolvent responsible entity for management and administration. The responsible entity did not have the funds to continue its functions in relation to the schemes. Substantial funds were required. There were defaults by growers in respect of amounts due for the funding of the

schemes. Each scheme had broken down because the responsible entity had no funds to continue the management and administration of the scheme and there was no reasonable prospect of getting in those funds.

Other matters

35 There are discussions in relation to the appointment of a replacement responsible entity to at least some of the Schemes. If appointed, any replacement responsible entity would assume the rights, obligations and liabilities of TSL: s 601FS(1) of the Act. It would take the new entity some time to become familiar with the Schemes, to renegotiate and amend agreements, and for the transition in management to take effect, but in the meantime there are pressing costs which would need to be met in order to ensure that the crops are produced and do not perish. Accordingly, any replacement responsible entity would require immediate access to working capital.[9] The Liquidators will update the Court as and when new relevant information comes to hand.

36 If a winding up order is made in respect of a Scheme, TSL, as the responsible entity, is under a statutory obligation to ensure that the Scheme is wound up in accordance with its constitution and any orders under s 601NF(2): s 601NE. It is TSL's liquidators, the Liquidators, who would ordinarily have the function of winding up the Schemes, by analogy with liquidators of corporate trustees: *Re Crest Realty Pty Ltd (in liq)* (1977) 1 NSWLR 664, 672. See also *ASIC v Knightsbridge Managed Funds Ltd* [2001] WASC 339, [71]–[83] and *Re Knightsbridge Managed Funds Ltd (in liq); Ex parte Carrello* [2007] WASC 306, [17].

37 The Liquidators seek consequential orders and directions (under s 601NF(2) of the Act and under the court's inherent jurisdiction) under which, relevantly, they are (i) authorised to cause TSL to conduct the winding up of the Schemes, and (ii) entitled to be indemnified out of the Scheme property for their costs. As TSL is in liquidation, its right to be indemnified from scheme property is exercisable only by the Liquidators: s 601FH(b) of the Act.

10 July 2009

P D CRUTCHFIELD
O BIGOS
Counsel for the Plaintiffs

Arnold Bloch Leibler
....
ARNOLD BLOCH LEIBLER
Solicitors for the Plaintiffs

[9] Paragraph 9 of the Korda Scheme Affidavits (Reply & Supplementary).