

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 INVESTMENTS SCHEMES LISTED IN SCHEDULE 1
First Plaintiff

MARK ANTHONY KORDA and LEANNE KYLIE CHESSER
Second and Third Plaintiffs

PLAINTIFFS' OUTLINE OF SUBMISSIONS

Date of document: 16 June 2009

Filed on behalf of: the Plaintiffs

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(Leon Zwier/Bridgette Toy-Cronin)

Summary

- 1 The Administrators (the Second and Third Plaintiffs) of Timbercorp Securities Limited (First Plaintiff) (**TSL**) apply for directions under s 447D of the *Corporations Act 2001 (Cth)* (**Act**) as to whether it is proper for TSL to apply to the Court for orders that TSL wind up 14 managed investment schemes. TSL is the Responsible Entity (**RE**) of those managed investment schemes, which are listed in the schedule (**the Schemes**).
- 2 The Administrators seek the direction under s 447D because:
 - (a) the decision to wind up the Schemes raises an issue about conflicting duties of administrators; and

- (b) some Growers (the investors in the Schemes) have attacked the propriety of TSL applying for directions to wind up the Schemes.

Background

- 3 The Administrators were appointed to TSL on 23 April 2009 pursuant to s 436A of the Act.¹ TSL is the responsible entity for the 14 Schemes that are the subject of this application. They are horticulture schemes for the cultivation of olives and almonds and are registered under Part 5C of the Act. TSL is the responsible entity for 8 other horticultural schemes and 11 active forestry schemes. TSL may also apply to wind up those schemes but they are not currently the subject of this application.
- 4 The directors of Timbercorp Limited and 40 of its wholly owned subsidiaries also appointed the Administrators, along with three other KordaMentha partners, administrators of those companies (**Timbercorp Companies**).²
- 5 Mark Korda, an administrator and the second plaintiff, has deposed to his belief that both TSL and the Schemes are insolvent.³ TSL as RE is currently unable to operate the Schemes. Mr Korda has deposed that:
- Having regard to the current financial position of TSL, the cash requirements to complete the management and harvest of the 2010 olive and almond crops, the likelihood of Grower defaults and the insolvency of Timbercorp Group of Companies, I do not believe it is in the best interests of the growers for KordaMentha to raise invoices requesting them to pay the estimated [operating expenses] for the 2010 financial year, on an accelerated basis, or at all.⁴
- 6 Mr Bland, a solicitor for Christopher Garnaut who is an investor in the 2001 Almond scheme, has submitted to the Court and notified the Plaintiffs by letter to their solicitors, that the answer lies in finding a new responsible entity.⁵ Mr Korda deposes that “the TSL administrators will consider all bona fide alternative proposals to replace TSL as responsible entity for any one or more of the Schemes if that proposal is in the best interests of the Growers”.⁶ To date no replacement responsible entity has been found.
- 7 The Administrators therefore propose that TSL will apply for an order pursuant to s 601ND of the Act to wind up the Schemes on the basis that it is “just and equitable” to do so. Justice Heenan held in *Re PWL (No 2)* that it a registered management investment

¹ First Affidavit of Mark Anthony Korda, sworn 4 June 2009, para 5.

² First Affidavit of Mark Anthony Korda, sworn 4 June 2009, para 7.

³ First Affidavit of Mark Anthony Korda, sworn 4 June 2009, paras 27-38.

⁴ First Affidavit, of Mark Anthony Korda, sworn 4 June 2009, para 38.

⁵ Affidavit of Mark Albert Bland, exhibit MAB-1.

⁶ First Affidavit, of Mark Anthony Korda, sworn 4 June 2009, para 52.

scheme may be wound up pursuant to section 601ND(1)(a) of the Act if it is insolvent.⁷ In that case the administrators sought winding up of the schemes on the basis that the schemes were insolvent, could not achieve their purpose because of the financial conditions of the schemes, and the RE was insolvent and it was highly unlikely a replacement RE could be found. Justice Hennan said that the phrase “just and equitable” is “broad and designed to accommodate a multiplicity of situations” and that “[i]t is not possible to define the phrase in exhaustive terms”, “in each case it will be a question of fact for determination upon the evidence relating to the scheme or corporation put before the court”.⁸ The Administrators therefore consider this course of action is open to them.

- 8 The application now before the Court does not concern whether it is in fact just and equitable to wind up the schemes. It is solely concerned with whether or not the Administrators should be given protection against claims that they have acted unreasonably, inappropriately or in breach of their duties in applying to wind up the Schemes.

Direction under s 447D

- 9 The Court can provide that protection by giving directions under s 447D “about a matter arising in connection with the performance or exercise of any of the administrator’s functions and powers”. The Court can give directions under s 447D where there are “issues of propriety, power, reasonableness of conduct, contested issues of legal principle or procedure or challenges to the decision made by the liquidator or administrator”.⁹ The Court will not however give directions where the matter is purely one where the Court is being asked to give its imprimatur to a commercial decision.¹⁰
- 10 Justice McLelland held in *Re G B Nathan & Co Pty Ltd (in liq)*¹¹ that if a liquidator:
- ... has made full and fair disclosure to the court of the material facts, [the liquidator] will be protected from liability for any alleged breach of duty as liquidator to a creditor or contributory or to the company in respect of anything done by him in accordance with the direction.
- 11 The same protection applies to administrators who obtain a direction after giving full and fair disclosure of all relevant facts and circumstances.¹²

⁷ *Re PWI - ACN 084 252 488 Ltd; Ex Parte Pwl Ltd (Formerly Palandri Wines Ltd) (Administrators Appointed) (No 2)* [2008] WASC 232.

⁸ *Ibid*, para 43.

⁹ *Re Ansett Australia Ltd (No 3)* (2002) 115 FCR 409, para 66, Goldberg J.

¹⁰ *Ibid*.

¹¹ *Re G B Nathan & Co Pty Ltd (in liq)* (1991) 24 NSWLR 674, 678, McLelland J.

¹² *Re Ansett Australia Ltd (No 3)*, above n 9, para 44.

- 12 The purpose of the section, as Finkelstein J observed in *Re Pasminco*, is “to facilitate [their work] by giving them direct access to the Court ... and should be interpreted as widely as possible to give effect to that intention”.¹³ The application for directions is however “an administrative, non-adversary proceeding”.¹⁴ The origins of the s 447D can be traced back to the power of the courts to give “private advice” to trustees and as in trustee cases, contradictors are to assist the Court but do not have parity with the Administrators and are not adversaries.¹⁵

Conflicting Duties of the Administrators

- 13 The Administrators do not seek the Court’s guidance over a commercial matter but ask for a direction because the Act imposes on them seemingly conflicting duties. The conflicting duties are the requirements to act in the best interests of the Growers, stated as a primary duty, and their duties as administrators to TSL and the Timbercorp Companies.
- 14 Section 601FC(1)(c) sets out the duties to the Growers:
- ... in exercising its powers and carrying out its duties, the responsible entity of a registered scheme must ... act in the best interest of the members and, if there is a conflict between the members’ interest and its own interests, give priority to the members’ interests.
- 15 This duty to the Growers is stated as overriding any conflicting duty of an officer of a RE has under Part 2D.1 of the Act which include to act with care and diligence, in good faith and for a proper purpose (s 601FC(3)).
- 16 However, as officers of the Timbercorp Companies, the Administrators owe Part 2D.1 duties and fiduciary duties to TSL and the Timbercorp Companies.¹⁶ What is in the best interests of one or more of those companies may not be in the best interests of the Growers. The Administrators must however exercise the discretionary powers under s 437A “to decide whether or not to carry on the company’s business and the form in which it should be carried on during the administration” and in making those decisions:

¹³ *Re Pasminco Ltd [No 2]* (2004) 22 ACLC 774, para 7.

¹⁴ *Re J W Murphy & P C Allen; Re BPTC Ltd (in liq)* (1996) 19 ACSR 569.

¹⁵ *Re Pasminco Ltd [No 2]*, above n 13, para 2 Finkelstein traces the origin of s 447D. *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 249 ALR 250, para 64- 66, Gummow ACJ, Kirby, Hayne, Heydon and Kiefel JJ.

¹⁶ Section 9 of the Act defines administrators as “officers”. See *Re NC RE Capital Ltd (vol admin apptd)* (1999) 32 ACSR 418 regarding fiduciary duties of administrators.

must act impartially as among all parties having or claiming to have an interest in the present or future assets of the company and must make those decisions which, in the light of contemporary circumstances, best serve those interests.¹⁷

- 17 The Administrators' duties stated in the Act to the Growers, TSL and Timbercorp Companies create a tension. The Administrators believe the only option open to them is winding up the Schemes as they are insolvent and are not viable.¹⁸ While the Administrators consider that in the circumstances applying to wind up the Schemes is reasonable and is pursuant to their duties, the Administrators seek a direction from the Court because some Growers have questioned whether the Administrators should be applying to wind up the Schemes.

Growers Challenging the Decision of Administrators

- 18 Justice Goldberg held in *Re Ansett Australia Ltd (No 3)* that the Court will not make a direction under s 447D where the administrator merely "has a feeling of apprehension or unease about the business decision made and wants reassurance" but s 447D may be attracted where there are "challenges to the decision made by the liquidator or administrator".¹⁹ He refused to give the direction in that case, emphasising the fact that "no-one has suggested or complained that the administrators should not have formed the views they have formed and should not have made the decisions they have made".²⁰ In contrast to *Re Ansett Australia Ltd (No 3)* the Growers are directly challenging the propriety of applying to wind up the Schemes.

- 19 Mr Bland, acting for his Grower client, has written to the Administrators' solicitors questioning the decision to apply to wind up the Schemes. Exhibited to his affidavit sworn 9 June 2009 is a letter to Leon Zwier in which Mr Bland states:

Our clients consider that your clients should not be making application for directions whether to apply to wind up the almond and olive schemes. Instead your clients should vigorously pursue other alternatives.

- 20 In an affidavit dated 9 June 2009, David Sydney Butterfield states that he "cannot understand how [the 2002 almond scheme] could suddenly become unviable when it has been almost cash flow positive" and questioning the Administrators decision not to invoice the Growers, a step necessary to continue the scheme.²¹

- 21 There is therefore evidence before the Court of the Administrators' legitimate apprehension that if they proceed to a winding up application, they will subsequently be

¹⁷ *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia (No 3)* (1998) 195 CLR 1, para 52 Bennan CJ, McHugh, Gummow, Kirby and Hayne JJ.

¹⁸ First Affidavit of Mark Anthony Korda, sworn 4 June 2009.

¹⁹ *Re Ansett Australia Ltd (No 3)*, above n 9, paras 65-66.

²⁰ *Ibid*, para 32.

²¹ Affidavit of David Sydney Butterfield, 9 June 2009, para 7.

accused of acting unreasonably or in breach of their duties. This challenge necessitates a direction under s 447D to protect the Administrators.

22 The Administrators therefore seek an order that:

Pursuant to s 447D, the Court directs that the Second and Third Plaintiffs (in their capacity as administrators of the First Plaintiff acting in its personal capacity) may apply to the Court under section 601ND for orders that the First Plaintiff (in its capacity as a responsible entity) be directed to wind up each of the managed investment schemes listed in the Schedule in accordance with their respective constitutions and any orders of the Court made under section 601NF(2) of the Act.

Dated: 16 June 2009

Arnold Bloch Leibler

Schedule

1. 2001 Timbercorp Olive Project (ARSN 094 382 082)
2. 2002 Timbercorp Olive Project (ARSN 098 233 455)
3. 2003 Timbercorp Olive Project (ARSN 104 648 473)
4. 2004 Timbercorp Olive Project (ARSN 108 744 378)
5. 2006 Timbercorp Olive Project (ARSN 119 182 179)
6. 2007 Timbercorp Olive Project (ARSN 123 155 715)
7. 2008 Timbercorp Olive Project (ARSN 129 307 722)
8. 2001 Timbercorp Almond Project (ARSN 095 649 746)
9. 2002 Timbercorp Almond Project (ARSN 099 611 935)
10. 2003 Timbercorp Almond Project (ARSN 103 197 299)
11. 2004 Timbercorp Almond Project (ARSN 108 336 670)
12. 2005 Timbercorp Almond Project (ARSN 112 935 092)
13. 2006 Timbercorp Almond Project (ARSN 118 387 974)
14. 2007 Timbercorp Almond Project (ARSN 122 511 040)