

**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 LTD
(UNDER ADMINISTRATION) (ACN 092 311 469):**

**IN THE MATTER OF TIMBERCORP SECURITIES LTD
(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

- and -

MARK ANTHONY KORDA and LEANNE KYLE CHESSER

Second and Third Plaintiffs

SUBMISSIONS OF ANDREW NIERE

Date of document: 16 June 2009
Filed on behalf of: Andrew Niere
Prepared by:

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1. Mr Andrew Niere seeks leave to file these submissions and the affidavit of John Vincent Sinisgalli sworn 16 June 2009 in relation to the application by the Second and Third Plaintiffs for directions concerning the possible winding up of certain managed investment schemes contained in Schedule 1 other than the 2007/2008 Timbercorp (Single Payment) Timberlot Project (ARSN 122 510 981) (the **2008 Timber Project**).

2.

2. Mr Niere concedes that he is not the best contradictor to the Second and Third Plaintiffs' application for directions but seeks to have these written submissions considered by the Court insofar as any directions the Court may make, and any winding up of those other managed investment schemes, may be detrimental to his interests as an investor in the 2008 Timber Project.
3. On about 30 June 2008, relying on a Product Disclosure Statement made by Timbercorp Securities Ltd dated 5 December 2006 (**the PDS**), Mr Niere invested the sum of \$308,000.00 in the 2008 Timber Project by way of 'Application Monies' (defined in the PDS) for 100 'Timberlots', having borrowed the full amount from Timbercorp Finance Pty Ltd: affidavit of John Vincent Sinisgalli, para. 2.
4. At pp. 56-57 of the PDS, a summary of a Custody Agreement stated:

"1 Appointment of Custodian

...

"Scheme Assets" is defined as Application Moneys, until they are expended, and Proceeds, until they are distributed, in accordance with the proper instructions of the Responsible Entity.

...

3 Duties of Custodian

...

To the extent required by the Corporations Act... the Custodian must ensure that the Scheme Assets are clearly identified as the property of the Project and held separately from the Custodian's own assets, the assets of any other scheme or any other assets held by the Custodian in any other capacity whatsoever...".

5. The Glossary at p. 67 of the PDS defined 'Application Moneys' as "the amount of \$3,080 per Timberlot (including \$280 GST)".

3.

6. The Custodian, Trust Company Ltd, was and remains the agent of Timbercorp Securities Ltd as the responsible entity of the 2008 Timber Project.
7. Section 601FC(2) of the *Corporations Act 2001* (Cth) (**the Act**) provides:

“The responsible entity holds scheme property on trust for its members”.
8. Section 601FC(1) of the Act provides:

“In exercising its powers and carrying out its duties, the responsible entity of a registered scheme must:

...

(b) exercise the degree of care and diligence that a reasonable person would exercise if they were in the responsible entity’s position;

...

(i) ensure that scheme property is:

(i) clearly identified as scheme property; and

(ii) held separately from property of the responsible entity and property of any other scheme; and

...

(k) ensure that all payments out of the scheme property are made in accordance with the scheme’s constitution”.
9. Mr Niere submits that, by reason of the above provisions and stipulation, his investment or ‘Application Monies’, to the extent that they have not been specifically expended on the 2008 Timber Project, was and remains held on trust by Timbercorp Securities Ltd and/or the Trust Company Ltd for his benefit.
10. Last Tuesday, 9 June 2009, the Second and Third Plaintiffs were put on notice in open Court by Counsel for Mr Niere that the ‘Application Monies’ invested in the

2008 Timber Project which remain unexpended on that project should be treated as trust funds held for the benefit of investors in that project.

11. At that hearing, and in response to Mr Niere's notice, Mr Leon Zwier, for the Second and Third Plaintiffs, informed that Court that:
 - (a) he was unaware of any trust in relation to the 2008 Timber Project Application Monies;
 - (b) monies invested in the various investment schemes were put into a form of "consolidated revenue" in accordance with the "Timbercorp model"; and
 - (c) whilst seed had been acquired for the 2008 Timber Project, there had been no plantings on the 2008 Timberlots.
12. The 2008 Timber Project is unique amongst the managed investment schemes of which Timbercorp Securities Ltd was the responsible entity in that planting has never occurred, with the consequence that:
 - (a) a comparatively larger proportion of the original investment funds, or Application Monies, should remain unexpended; and
 - (b) doubt exists over the deductibility of those investments on the part of individual "growers".
13. Any directions or other orders of the Court, or any dealings by the Second and Third Plaintiffs as administrators or liquidators of the other managed investment schemes, must preserve as trust funds the balance of the Application Monies invested in the 2008 Timber Project.
14. If the balance of the 2008 Timber Project Application Monies are currently maintained by the Trust Company Ltd as Custodian or by Timbercorp Securities Ltd, any direction given by the Court and any action by the Second and Third Plaintiffs (whether by way of winding up other managed investment schemes or otherwise) should provide for the preservation of that account as a trust account.

15. If, however, as was suggested by Mr. Zwier for the Second and Third Plaintiffs last week, the balance of the Application Monies for the 2008 Timber Project have, in contravention of s 601FC(1)(2) of the Act and contrary to the representations contained in the PDS referred to above, been mixed with funds belonging to other managed investment schemes or Timbercorp Securities Ltd, Timbercorp Securities Ltd and/or Trust Company Ltd on the one hand and the Second and Third Plaintiffs on the other should be treated by the Court as defalcating trustees and third parties in knowing receipt of trust funds respectively.
16. In that case, in addition to any directions or other orders the Court may make, an amount representing the balance of the 2008 Timber Project Application Monies should be deposited with the Court forthwith or otherwise placed in a separate trust account pending an application by Mr Niere and/or other investors in the 2008 Timber Project for an account and/or a winding up and distribution on a pro rata basis.
17. On Thursday, 11 June 2009, at the suggestion of Robson J last Tuesday, Mr Niere's solicitors wrote to the solicitors for the Second and Third Plaintiffs setting out the basis of the contended trust and requesting information about the balance of the 2008 Timber Project Application Monies and the status of that project: affidavit of John Vincent Sinisgalli, para. 4 and exhibit JVS-2 thereto. As at 2 pm on the date of these submissions, no response has been received.
18. Mr Niere further seeks the costs of last week's appearance, his application to appear, prepare and file these submissions, to be paid by the Second and Third Administrators in their capacity as administrators.

DATED: 16 June 2009

PAUL VOUT