

1 COMMERCIAL & EQUITY DIVISION  
2 COMMERCIAL LIST - DIRECTIONS HEARING  
3 IN THE SUPREME COURT OF VICTORIA  
4 COURT 1 OLD HIGH COURT  
5 BEFORE THE HONOURABLE JUSTICE PAGONE  
6 FRIDAY 25 SEPTEMBER 2009  
7 TIMBERCORP LIMITED (IN LIQUIDATION) (ACN 055 185 067) & ORS  
8 V.  
9 PLANTATION LAND LIMITED (ACN 090 443 333)

10 - - -

11 MR ENIER: Your Honour, I appear on behalf of the plaintiffs.

12 HIS HONOUR: Mr Enier.

13 MR RUBENSTEIN: Your Honour, if it pleases, I appear on behalf  
14 to the defendant.

15 HIS HONOUR: Mr Rubenstein. This is a matter that is in Judd  
16 J's list, and is only before me because he is not  
17 physically in the jurisdiction. What do you want me to do  
18 today?

19 MR ENIER: Your Honour, the parties have agreed some directions  
20 which I can hand up to you.

21 HIS HONOUR: Thank you.

22 MR ENIER: Your Honour, before I take you to that I should say  
23 that in many of the other Timbercorp proceedings the  
24 Australian Securities and Investments Commission has  
25 appeared.

26 HIS HONOUR: Yes.

27 MR ENIER: They sent me an email, I think yesterday, in which  
28 they have asked that I bring it to the attention of the  
29 court explaining why they have no intention of appearing  
30 today. If I could just hand that to Your Honour, so I can  
31 fulfil that obligation.

1 HIS HONOUR: Thank you.

2 MR ENIER: Your Honour, there is one other party that regularly  
3 appears on the Timbercorp matters and that is the  
4 Timbercorp Growers Group, they are represented by  
5 Clarendon Lawyers, who have also sent a letter which  
6 I said I would bring to the attention of the court in  
7 relation to their position.

8 HIS HONOUR: Thank you. I see that the ASIC letter refers to  
9 Robson J, indeed, the blue form that you both filled out  
10 has List F on it, which is Robson J's list, although the  
11 actual writ has List B on it?

12 MR ENIER: It should be B, Your Honour, the registry allocated  
13 it to List B, which is Judd J, as I understand it.

14 HIS HONOUR: Yes.

15 MR ENIER: We brought to His Honour Robson J's attention,  
16 because he has dealt with the other projects that this  
17 proceeding had issued.

18 HIS HONOUR: Yes.

19 MR ENIER: I think His Honour was content to leave it in the  
20 list it had been allocated.

21 HIS HONOUR: List F or B?

22 MR ENIER: List B. Your Honour, before I get to the actual  
23 directions of the parties, if I could just give Your  
24 Honour a little background, so Your Honour will understand  
25 why we are seeking an urgent trial date, then the  
26 directions we seek might come off the back of the urgent  
27 trial date. As Your Honour may be aware the Timbercorp  
28 Group was in the business of promoting, selling and  
29 financing managed investment schemes. Those schemes by  
30 and large were divided between horticultural schemes, like  
31 olives, almonds, avocados, and forestry projects which

1 are, obviously, trees. The Timbercorp Group was placed  
2 into voluntary administration on 23 April 2009 and the  
3 responsible entity, which is Timbercorp Securities Limited  
4 was also one of the group placed into voluntary  
5 administration.

6 At the second creditors meeting the creditors voted  
7 to wind up all the Timbercorp Group companies, and the  
8 winding up resolution was passed on 29 June 2009. Your  
9 Honour, the background to this particular application is  
10 something like this; the defendant, Plantation Land  
11 Limited, leased to the Timbercorp - responsible entity in  
12 Timbercorp, in some instances, about 8,000 hectares of  
13 land upon which forestry schemes are being conducted. In  
14 total there are about 2,650 grower/investors in relation  
15 to that parcel of land owned by Plantation Land.

16 The rent for all forestry land fell due for payment  
17 on 30 June 2009, because Timbercorp was unable to pay the  
18 rent the rent has not been paid and a further quarter of  
19 rent on one view becomes due and payable on 30 September  
20 again.

21 On 21 July 2009, the defendant served a default  
22 notice for non-payment of rent, and on 31 July 2009, what  
23 the liquidators did, was they advertised all of the  
24 forestry assets for sale. So what they have undertaken is  
25 an extensive campaign to assign the various leases and to  
26 sell the trees which are situate on the land, the subject  
27 of the leases. That process has been, as I said, underway  
28 since 31 July.

29 The liquidators have kept landlords of the various  
30 parcels of land informed of what is going on, and just to  
31 give Your Honour an idea of the scale of that transaction,

1 it concerns about 98,000 hectares of land, 10,000 growers  
2 have invested in it, and a hundred million trees are  
3 situate on that land, although as I said, only eight per  
4 cent is subject to this particular proceeding.

5 When it became apparent that the liquidators were  
6 likely to consummate a transaction with a respectable,  
7 solvent, reliable purchaser the liquidators tendered  
8 payment for the unpaid rent and that was on 11 September  
9 and that was rejected. In the meantime, the sale process  
10 has continued and bids closed on Friday 18 September 2009,  
11 and again, a number of bids were received from parties and  
12 it is the liquidator's intention to sign up a sale and  
13 purchase agreement, which obviously will have certain  
14 conditions to it, next week.

15 So what they are intending to do is try and complete  
16 the transaction with a preferred bidder, sometime during  
17 the course of next week. So this proceeding takes on some  
18 significance, this proceeding commenced on 11 September in  
19 this court. There are South Australian proceedings which  
20 were filed a few days later, on 14 September, seeking also  
21 relief from forfeiture and there is an application to be  
22 heard I think in the South Australian Supreme Court this  
23 afternoon, to cross-vest the South Australian proceeding  
24 back into this proceeding and the parties have consented  
25 for that to occur. So that all of the relief from  
26 forfeiture proceedings can be dealt with by one court at  
27 the one time.

28 Your Honour, what the parties had intended to do was  
29 to seek an urgent hearing date and the minutes of the  
30 proposed orders, which I have handed up, propose that a  
31 trial be set down on the first available date after

1 12 October 2009. The parties are obviously in the hands  
2 of the court, we have talked about how long we think the  
3 trial might take and I think my proposal - I am not sure  
4 whether my opponent agrees - my opponent says one to two  
5 days, but because of the urgency, for our part we would  
6 content if it were set down for one day and the court made  
7 some directions about how long each party could make their  
8 submissions, to try and dispose of it, because it is very  
9 important to have it disposed quickly.

10 HIS HONOUR: How did this get into List B?

11 MR ENIER: I think when the papers were sent up to the  
12 registry, the registry has allocated it into List B.

13 HIS HONOUR: Are there no other court proceedings already in  
14 this court?

15 MR ENIER: In the List B court?

16 HIS HONOUR: Or indeed, any court? Any other list in this  
17 court, the Supreme Court?

18 MR ENIER: Yes, there are, there are extant proceedings for  
19 Robson J, concerning a number of the horticultural  
20 schemes, olives and almonds. There is an application set  
21 down before Robson J on 6 October, concerning olives and  
22 an application to appoint a replacement RE.

23 HIS HONOUR: Nothing before Judd J?

24 MR ENIER: Nothing before Judd J.

25 HIS HONOUR: I see.

26 MR ENIER: Whilst Your Honour has asked me that question about  
27 other proceedings, there will be further proceedings the  
28 parties will seek to bring urgently before the court  
29 concerning forestry, almonds and olives, and I will  
30 explain what they are.

31 HIS HONOUR: The reason I ask the question is, I know that Judd

1 J had a job lot of cases, if I can refer to it that way,  
2 but I wasn't sure whether it was a Timbercorp job lot or  
3 some other proceeding. If the parties are looking for a  
4 hearing date, as - in the timeframe that you are looking  
5 for and there is no other Timbercorp proceeding before  
6 Judd J, I could assume the case in this day, and you've  
7 heard discussion earlier on about hearing dates, which  
8 would mean that you could come on to be heard before me  
9 some time in November. But I don't want to do any of that  
10 if Judd J has some other proceedings that would cause a  
11 fragmentation of disputes.

12 MR ENIER: Your Honour, if I could just explain some of the  
13 other matters that will come on, so Your Honour will  
14 understand the ambit of the problem. In addition to  
15 selling the forestry assets the liquidators have had the  
16 same type of campaign in relation to olives and almonds.  
17 The almonds sale has been signed and it has a sunset  
18 clause for the fulfilment of a condition precedence, or  
19 conditions precedent, of 6 October - 9 October, I am  
20 sorry. One of the conditions precedent to that  
21 transaction is the court make a direction that the  
22 liquidators are justified in entering into the sale  
23 agreement and I will explain why; the sale agreement sells  
24 land, plant and equipment, irrigation and also cropping  
25 rights to the almond groves, and contemplates the  
26 extinguishment of the grower's rights.

27 That would occur as part of the one transaction.  
28 The extinguishment of the grower's rights in relation to  
29 almonds is of course controversial because growers are  
30 contending, on the one hand that they are entitled to a  
31 greater share of the proceeds than the secured creditors,

1 the secured creditors maintain that their security would  
2 entitle them to all of the money. What ultimately has  
3 been occurring has been a negotiation which is going to  
4 come quickly to a head and will probably culminate in us  
5 making an urgent application to the court on one of two -  
6 in relation to one of two possibilities. One possibility  
7 is everyone reaches agreement on apportionment, and we  
8 would then come to the court seeking a direction that we  
9 are justified in entering into the agreement, we would  
10 need the direction because the grower group doesn't  
11 represent all growers, they just represent some growers,  
12 so it would be possible for "a grower" or some growers, to  
13 object to the apportionment. So the liquidators would  
14 need a direction if it were consensual between the  
15 protagonists at the moment.

16 Alternatively, if agreement cannot be reached with  
17 the growers one other possibility is, the secured  
18 creditors may come to the liquidators saying, "We are  
19 prepared to allocate, out of the sale proceeds, the  
20 following amount for the liquidator, of TSL, for the  
21 benefit of the growers, then the court would be asked to  
22 make a direction that they are justified in allowing that  
23 allocation, which would be I suspect, a contested  
24 application. But again, given that the sunset date of  
25 9 October is looming, we would be asking the court at some  
26 time to urgently give us a trial of that issue, either the  
27 consensual application or the contested application, so  
28 that the parties can meet the conditions precedent.

29 Your Honour will appreciate, in relation to almonds,  
30 it is a wasting asset. The almond groves need tending  
31 immediately, the sale consideration is in excess of \$140

1 million, it affects numerous growers, if a transaction  
2 falls over there will be significant wastage. So that in  
3 the suite of applications in Timbercorp, that is one of  
4 them and again, in relation to forestry, Your Honour, the  
5 liquidators would be unable to sign the sale agreement to  
6 the preferred purchaser on forestry without a direction  
7 before they do so, again, that is an application that they  
8 would seek to bring before the court, again, sometime next  
9 week.

10 So Your Honour in a sense this application is  
11 connected to the forestry application as well, and it may  
12 be as well if we could ask the court for the indulgence of  
13 a judge, one particular judge, to deal with the suite of  
14 applications. Insofar as counsel, the liquidator's  
15 position is, they will take whatever date is available.  
16 They have already accepted the fact that they just can't  
17 be choosers of their counsel, and we will brief whoever we  
18 have to brief to appear.

19 HIS HONOUR: I am sure the rest of the Bar is delighted to hear  
20 that. The position about the court is this; Judd J is not  
21 available until the week after next, and I am then not  
22 available for two weeks. On the other hand I can tell you  
23 that I can give you hearing dates if you need them in the  
24 early part of November and possibly late October, although  
25 that is difficult. If there is something urgent that  
26 comes up next week I can certainly deal with it. I don't  
27 know what Judd J's timetable is, so if the parties want,  
28 then I am happy to transfer the matter to my list, give  
29 you a hearing date in November and deal with the matter  
30 next week if it arises, if it anything arises on two  
31 weeks, then you will have to get somebody else. We will

1 see how we go.

2 MR ENIER: Your Honour, the difficulty from the liquidator's  
3 perspective with the November hearing is this; the sale  
4 that they wish to consummate in relation to the trees on  
5 the land - - -

6 HIS HONOUR: Is the 9th October?

7 MR ENIER: No, we will be signed up next week with the  
8 intention that that transaction will be completed by end  
9 of October. So they need an answer in relation to whether  
10 or not they can sign the leases, the subject of this  
11 application, before that date. So that a hearing date  
12 in November renders the value of these trees to the  
13 growers as probably being significantly impaired.

14 HIS HONOUR: You are asking, I thought, for the trial to be set  
15 down on the first available date after 12 October?

16 MR ENIER: That was in the draft orders, or directions, we are  
17 seeking, on the assumption that the court may be able to  
18 accommodate an early hearing date soon thereafter, we were  
19 going to ask the court at that time, not only to hear it,  
20 but to try and give us an answer by the end of the month.

21 HIS HONOUR: I don't know how - this is one of those things one  
22 discovers in life, I think, that the more one tries to be  
23 helpful and accommodating, the less one seems to succeed  
24 in doing so. I have said to you that I can give you time  
25 next week, I am physically not available the following two  
26 weeks. I can give you time, not much the following week,  
27 but towards the end possibly of October. I have not  
28 faintest idea what Judd J's position is, and Robson J is  
29 not around also. What would you like me to do.

30 MR ENIER: What I would like Your Honour to do if it were  
31 possible, is to perhaps refer this matter to Judd J, who

1 does have a hearing date on 6 October in relation to  
2 olives, for us to make inquiries of both Judd J and Robson  
3 J's chambers in the meantime, to see whether we can obtain  
4 hearing dates from either of them. I think both the  
5 defendant and plaintiff in this case are ready and we want  
6 to get this done quickly. Your Honour, make no mistake,  
7 I appreciate the assistance the court has provided  
8 throughout, the difficulty is, it is just such a complex  
9 and problematic - - -

10 HIS HONOUR: Mr Enier, if that's what you want and the parties  
11 agree, I am happy to do that.

12 MR ENIER: My friend wants me - asks me to qualify with Your  
13 Honour, whether Your Honour said you had a hearing date in  
14 late October. I had thought you said you couldn't take  
15 this trial until November?

16 HIS HONOUR: I may be able to put you in the week of the 26th,  
17 but it would not be easy to do that.

18 MR ENIER: Your Honour, the difficulty is, the sale will be  
19 complete by October, therefore the sale of the trees on  
20 this land and the assigning lease would create some  
21 insurmountable difficulties for the liquidators. So  
22 I think we will make inquiries of another judge, if that  
23 is convenient?

24 HIS HONOUR: That is perfectly alright by me, I have no  
25 particular eagerness to take it on, I just thought I would  
26 be helpful, bearing in mind that Judd J won't be returning  
27 until 5 October and if you are looking for him to deal  
28 with the matter on the 6th, it may be difficult.

29 MR ENIER: I understand that. We are before Robson J on the  
30 6th, and will make inquiries of the chambers of both those  
31 judges and then we might be able to find that there is a

1 day in which this can be dealt with. It doesn't have too  
2 many novel propositions, I don't think, and we can keep  
3 working through the interlocutory steps in the meantime.  
4 HIS HONOUR: All I can say to you, Mr Enier, is best of luck.  
5 What would you like me to do?  
6 MR ENIER: To adjourn to a further hearing of these directions.  
7 HIS HONOUR: Simply adjourn it?  
8 MR ENIER: Yes, to 6 October before Robson J, in the meantime  
9 we will make inquiries at both their chambers to see if we  
10 can get a judge to hear it.  
11 HIS HONOUR: The matter is not in fact before Robson J, the  
12 matter is before Judd J, List B.  
13 MR ENIER: I understand that, would it be convenient to refer  
14 the matter to - I am told by those who instruct me that  
15 there are other Timbercorp proceedings before Judd J,  
16 concerning Timbercorp Finance, and those court proceedings  
17 are in any event before Judd J on 5 October for directions  
18 only. So it may be convenient to refer it to Judd J's  
19 list on 5 October for directions, then we can put the  
20 matter to Judd J on that day.  
21 HIS HONOUR: I am happy to do that.  
22 MR ENIER: If Your Honour pleases.  
23 HIS HONOUR: I will adjourn the further hearing for directions  
24 to 5 October, before Judd J.  
25 MR RUBENSTEIN: If you can reserve costs as well, please, Your  
26 Honour.  
27 HIS HONOUR: And I shall reserve costs.  
28 MR ENIER: Your Honour, in relation to the other urgent matters  
29 that are brewing, which will come to a head in the next  
30 24, 48 or 72 hours, would it be convenient Your Honour, if  
31 we make inquiry at Your Honour's chambers first, for the

