



15 February 2010

Macpherson+Kelley Lawyers Pty Ltd  
ACN 129 746 470  
Website www.mk.com.au

**Dandenong**  
40-42 Scott St  
Dandenong Victoria 3175  
DX 17501 Dandenong  
Telephone +61 3 9794 2600

**Melbourne**  
Level 22, 114 William St  
Melbourne Victoria 3000  
DX 174 Melbourne  
Telephone + 61 3 8615 9900

## **Update for Investors in Timbercorp and Great Southern MIS Projects**

We provide this update as a service to our clients. It will cover frequently asked questions and give further insights and reassurance to each of our clients.

Part A covers Timbercorp and Part B covers Great Southern.

Clients who are investors in Great Southern projects are encouraged to read our report concerning Timbercorp as well because many of the issues are expected to play out in a similar way for them.

### **A. Update for Investors in Timbercorp**

#### **Class Action Status**

- On Thursday this week the Victorian Supreme Court will resume hearing the application which was adjourned from 15 December 2009. In the application we are requesting an order allowing the case to proceed against the corporate defendants. This is necessary because those defendants Timbercorp Securities Limited and Timbercorp Finance Pty Ltd are both in liquidation. Extensive written submissions have been filed with the Court, along with supporting evidence.
- Once the required orders are made, which we expect will happen on Thursday, the Court will set dates by which the corporate defendants and the directors Sol Rabinowicz, Robert Hance and Gary Liddell are to file their defences.
- Beyond that, the next major milestone will be accessing all relevant documents held "inside Timbercorp". This happens under a procedure called discovery of documents. Each side needs to make a sworn list of documents they hold or control which might have some bearing on the issues in the case. For Timbercorp Securities and Timbercorp Finance the documents will need to be made available by KordaMentha as Liquidators for us to see. Our inspection and analysis of those documents will be an intensive and important exercise, especially in uncovering detail of what was known by Timbercorp and not made known to investors when, according to our claim, those things ought have been made known.

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### **Strengthened claim**

- Last Friday, 12 February 2010, we filed an Amended Statement of Claim. It contains much more detail and significantly strengthens the claim originally filed. It tracks what we so far believe the directors knew but did not pass on to investors, leading the investors into suffering losses.
- Our objective was to add a level of sophistication to the claim which highlighted the many ways in which the promoter and operating company Timbercorp Securities Limited was interconnected with the finance company Timbercorp Finance Pty Ltd. Their businesses were heavily reliant on each other. They operated in tandem and their services were offered to investors as a package. The directors who are defendants to the case were directors of both companies and knew the business affairs of each company.
- Our case is that the directors also knew the survival challenges each company faced but did not inform the investors of the serious financial risks for the projects about which investors ought have been told.

### **Key events where Timbercorp's disclosure to investors was lacking**

- So far as concerns the claim based on non-disclosure to investors of the Timbercorp Group being on the verge of collapse since about February 2007, the following key events feature prominently:
  - (a) The implications on cash flow and Group revenue from the announcement on 6 February 2007 that the tax law would no longer allow upfront tax deductions to be claimed in respect of investments in and payments to non-forestry managed investment schemes.
  - (b) The implications of the global financial crisis, especially on Timbercorp's ability to continue operating the projects for their contemplated duration. Asset values were depressed and Timbercorp's ability to sell assets to raise cash was restricted.
  - (c) By September 2008 the Timbercorp Group was in breach of certain loan covenants in respect of its bank facilities totalling approximately \$360 million.
- When the case comes on for trial we will be arguing that Timbercorp Securities Limited, in failing to make disclosure to investors of the impact of those things, did not act in the best interests of the investors. Section 601FC of the *Corporations Act* required it to act in the best interests of investors in the projects.
- We will also be arguing that Timbercorp Securities Limited faced a conflict between its own interests and the interests of the investors. If Timbercorp Securities Limited had made disclosure to investors of its rapidly deteriorating financial position its cash inflows would have dried up even faster, accelerating the Timbercorp Group's demise. Conversely, by being told early that Timbercorp was going to struggle to survive, investors would not have committed their own funds or borrowed money to invest in what were to be long-term agribusiness projects the investors expected would generate investment returns over time.

- Section 601FC of the *Corporations Act* also required Timbercorp Securities Limited to give priority to the interests of the investors over its own interests whenever there was a conflict of interests. We will be arguing that Timbercorp Securities Limited acted unlawfully in giving preference to its own interests above the interests of investors.
- We will also be arguing by reference to a number of other provisions in the *Corporations Act*, the *Australian Securities and Investments Commission Act* and the *Fair Trading Act* that Timbercorp Finance Pty Ltd and its directors are implicated in the non-disclosure and any misleading or deceptive conduct which is proved at trial through their “connectedness” with Timbercorp Securities Limited, which was the Responsible Entity for all of the projects. Timbercorp Finance Pty Ltd and its directors should, according to our case, also be accountable for the loss and damage suffered by investors.
- Hence, for our “non-borrower” clients who used their own funds (or funds borrowed from lenders other than Timbercorp Finance) we are seeking damages awards for them. Damages awards are also being sought in the case for our “borrower” clients, (those who borrowed from Timbercorp Finance). Additionally, for our borrower clients we are seeking a declaration from the Court that challenged loans which investors took from Timbercorp Finance are void or unenforceable. If successful this will mean investors represented in the class action would likely be released from liability to pay out the affected loans.

#### **1998 and 1999 Double Rotation Timber Projects**

- Quite a number of investors in these projects have recently approached M+K seeking advice about their particular situation. We have now almost reached a firm view about investors’ rights and remedies. We have read the relevant documentation peculiar to those projects. We have also spoken with a number of investors in those projects and will shortly take up their cause with the Liquidators in respect of loan balances the Liquidators are looking to recover from people who borrowed for those projects.
- If you are invested in those projects and want to retain our services to provide advice to you, please contact one of our senior lawyers who is across the issues, Markus Salins. You can email him on [markus.salins@mk.com.au](mailto:markus.salins@mk.com.au) or telephone (03) 9794 2680. We would be especially interested to hear from you if you were told the loans you were obtaining would be non-recourse or limited-recourse loans (i.e. you wouldn't become liable for repayment of any amount beyond the value of the timber lots you acquired).

#### **Information about the services offered by Macpherson + Kelley**

- For our clients who have not yet received an information pack about the class action or for people who have questions about it, please contact our Timbercorp coordinators or our 15 lawyers who have been working on the case. Our coordinators will direct enquiries to the applicable team member. The coordinators are:

Katrina Slifka: Ph (03) 9794 2620 or e-mail [katrina.slifka@mk.com.au](mailto:katrina.slifka@mk.com.au)

Stacey Hudson: Ph (03) 9794 2539 or e-mail [stacey.hudson@mk.com.au](mailto:stacey.hudson@mk.com.au)

## **B. Update for Investors in Great Southern**

### **Class Action progress**

- We have continued gathering information and evidence over recent months with a view to being ready to launch a class action on behalf of investors whenever it happened that Bendigo and Adelaide Bank started court action against Great Southern investors who had stopped making loan repayments.
- News came through to M+K on 2 February 2010 that, according to an article published that day in the *Australian Financial Review*:

*“Bendigo and Adelaide Bank has begun suing a select group of Great Southern investors who are refusing to repay loans in a move which raises the stakes in the bank’s battle to recover the \$510 million it is owed”.*

- That article named three people who now have been sued by that bank. We believe two of those people live on the Gold Coast and one in Melbourne, with the first procedural hearing scheduled this coming Friday, 19 February 2010 in the Victorian Supreme Court.
- We suspect the timing of the Writs was driven by the bank’s desire to report to its shareholders today (15 February 2010) that it was taking stronger measures now to collect in the loans. Today is the day the bank delivered its results for the six months ended 31 December 2009.
- We are nearly ready to launch an investors’ class action to pursue the rights and remedies of all our clients, borrowers and non-borrowers alike.
- As was the case with Timbercorp, a suitable person needs to be identified as the claimant in whose name the class action is brought. That person would bring the claim on their own behalf and as the representative party on behalf of all the other investors who fall within the defined class of people who have claims against the relevant Great Southern companies, Great Southern directors and inter-connected lenders whose loans to investors were established through personnel working in the offices of Great Southern Finance Pty Ltd. M+K is presently interviewing clients on a short-list of candidates who could assume the role of “lead Plaintiff” (the representative party bringing the claim for the investor group). We expect to have a class action launched on behalf of our clients shortly.
- The team of barristers we have retained for our clients, after several conferences with us, has finished the drafting of the formal claim to be used in the case. That claim sets the foundation for the “common issues” the Court is asked to adjudicate upon for all of our investor clients. These are issues of fact around what we see as material non-disclosure by Great Southern and those connected with Great Southern of financial information which would have been important information for investors to have. There are also issues of law, essentially focussed on whether the defendants breached provisions of the *Corporations Act*, *Australian Securities and Investments Commission Act* and *Fair Trading Act* and whether our clients are entitled to awards of damages or compensation. For those who funded their investments by loans obtained originally from Great

Southern Finance or a financier (such as Bendigo and Adelaide Bank or a subsidiary ABL Nominees Pty Ltd, which had some sort of agency arrangement or other connection in place with Great Southern Finance) the additional common issue of law is whether those loans are to be declared void or unenforceable.

#### **Key events and where Great Southern's disclosures to investors was lacking**

- Our clients' claim is based on non-disclosure to investors since 2005 of the serious risk of the Great Southern Group being destined for total collapse, which would leave it unable to see the long-term agribusiness projects of its investors through to completion.
- More evidence is expected to emerge once we gain access to the relevant books and records of the relevant Great Southern companies. Meanwhile, among the key events which appear to us not to have been adequately disclosed to investors ahead of their deciding to invest in the relevant year's agribusiness projects are the following:
  - (a) By 2005 the information held by Great Southern revealed the plantation projects of 1994 and 1995 would not yield sufficient harvests to enable returns to be paid to investors in line with what had been projected.
  - (b) In the absence of continually increasing sales revenue being achieved from each year's offerings of agribusiness projects, Great Southern Managers Australia Limited (the Responsible Entity for the projects) would likely become insolvent.
  - (c) Similarly, that company was likely to become incapable of continuing its role as Responsible Entity to take its investors' long-term agribusiness projects through to completion.
  - (d) The Great Southern Group's half-year financial statement showed that as at 31 March 2007 the doubtful debts provision stood at \$778,000. A year later, on 31 March 2008 it had grown by about \$36.4m.
  - (e) The Great Southern Group incurred a net loss after tax for the half-year to 31 March 2008 of \$49.1m, compared with a profit of \$14.9m for the half-year to 31 March 2007.
  - (f) Great Southern's sales of its agribusiness projects for the period ended 30 June 2008 decreased by approximately 24% from the prior year.
  - (g) On a consolidated basis, the allowance for the Great Southern Group's doubtful debts had grown to \$55.6m as at 30 September 2008, which amount represented 46% of the total term trade receivables.
  - (h) In the year ended 30 September 2008, the Great Southern Group incurred a net loss after tax of \$63.8m.
- When the case comes on for trial we will be arguing that Great Southern Managers Australia Limited ("GSMAL"), in failing to make disclosure to investors of the impact of those things, did not act in the best interests of the investors.

Section 601FC of the *Corporations Act* required it to act in the best interests of investors in the projects.

- We will also be arguing that GSMAL faced a conflict between its own interests and the interest of the investors. If GSMAL had made disclosure to investors of its rapidly deteriorating financial position its cash inflows would have dried up even faster, accelerating the Great Southern Group's demise. Conversely, by being told early that Great Southern was going to struggle to survive, investors would not have committed their own funds or borrowed money to invest in what were to be long-term agribusiness projects expected by investors to generate investment returns over time.
- Section 601FC of the *Corporations Act* also required GSMAL to give priority to the interests of the investors over its own interests whenever there was a conflict of interests. We will be arguing that GSMAL acted unlawfully in giving preference to its own interests above the interests of investors.

**Information about the services offered by Macpherson + Kelley**

- For our clients who have not yet received an information pack about the proposed class action or for people who have questions about it, please contact our Great Southern coordinators or our 15 lawyers who have been working on the case. Our coordinator will direct inquiries to the applicable team member. The coordinator is:

Tonya McDougal: Ph (03) 9794 2690 or e-mail [tonya.mcdougal@mk.com.au](mailto:tonya.mcdougal@mk.com.au)

Yours faithfully



**Macpherson + Kelley**

RON WILLEMSSEN

Principal

Accredited Commercial Litigation Specialist 

TEL: +61 3 9794 2620 | FAX: +61 3 9794 2560

EMAIL: [ron.willemsen@mk.com.au](mailto:ron.willemsen@mk.com.au)

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