

**IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY**

No. M82 of 2014

ON APPEAL FROM THE SUPREME COURT OF VICTORIA, COURT OF APPEAL

BETWEEN:

MARK KORDA
First Appellant

and

BRIAN WEBSTER
Second Appellant

and

S.E.A.S. SAPFOR FORESTS PTY LTD
(ACN 007 872 120)
Third Appellant

and

S.E.A.S. SAPFOR HARVESTING PTY LTD

(ACN 007 511 211)
Fourth Appellant

and

GUNNS LIMITED

(ACN 009 478 148)
Fifth Appellant

and

AUSTRALIAN EXECUTOR TRUSTEES (SA) LIMITED
(ACN 007 870 644)
Respondent

APPELLANTS' REPLY



Date of document: 24 October 2014
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Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Reply

A. The Language in the Relevant Documents

2. The Respondent identifies “five ways” in which the intention to create a trust¹ is manifested.² Reliance on those matters is misplaced for the following reasons.
3. The covenantholders’ entitlement was not to a “portion of the *actual* timber and land sale proceeds”.³ As Robson AJA observed, the covenantholders merely had a contractual right to a numerical proportion of the output from a much greater area of land than was referable to their particular covenant.⁴
4. The express reference to the covenantholders’ interest being to a payment in respect of the “value” of the land⁵ is not an “infelicity in drafting.”⁶ The reference to the land value payment in clauses 27 and 29 of the Trust Deed cannot be elevated into a beneficial interest in the land by reliance on phrases such as “Land Interest” in the Prospectuses. The “Land Interest” is described in the 1984 Prospectus⁷ as being an entitlement to the distribution of the value ascertained by the Independent Valuer – a description entirely consistent with the nature of the right conferred by clause 27 of the Trust Deed and clause 6 of the covenant. As Robson AJA noted, “all the relevant documents addressed the value of land and not the land itself”.⁸ Whilst the Respondent relies heavily on language in the 1984 Prospectus such as “INCLUDES LAND INTEREST”,⁹ it fails to explain how that reference creates an expanded trust to include the land, particularly in circumstances where the 1980 Prospectus makes no such reference to a land interest and under the 1977, 1978 and 1981 planting years the covenantholders were not offered a payment in respect of the value of land.¹⁰
5. Clause 8 of the Tripartite Deed does not “oblige” the Forest Company and Milling Company to treat funds received by them separately to other funds.¹¹ The clause facilitated the performance of the Respondent’s obligations under the Trust Deed and the Forest Company’s obligation under the applicable statutory regime. The Respondent (as trustee) was required to open a bank account for the covenantholders of each planting year for the purpose of holding the net proceeds.¹² The Forest Company, as a “management company” was obliged by the statutory regime to “keep a register of the holders of interests under the

¹ Respondent’s Outline of Submissions at [11] to [34]. ~~Emphasis Added.~~ 

² Respondent’s Outline of Submissions at [11] to [34].

³ Cf. Respondent’s Outline of Submissions at [16]. Contrary to the Respondent’s submissions “land sale proceeds” is not an accurate description of the entitlement of covenantholders under clause 27 of the Trust Deed. Nor is the Respondent’s description of the covenantholder’s entitlement as being “95%... of the timber apportionable” accurate (Respondent’s Outline of Submissions at [28]). The entitlement is to the “net proceeds of the timber” – see clause 1 of the covenant.

⁴ See *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [283] and [271] per Robson AJA. See also Clause 1 of the covenant at pp.7 and 10 of the 1984 Prospectus.

⁵ Clause 27 of the Trust Deed.

⁶ Respondent’s Outline of Submissions at [18].

⁷ See p.4 of the 1984 Prospectus.

⁸ See *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [273] per Robson AJA

⁹ Respondent’s Outline of Submissions at [28].

¹⁰ See *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [267]-[268] and [273]-[276] per Robson AJA.

¹¹ Cf Respondent’s Outline of Submissions at [23].

¹² Trust Deed clause 20(A)(b).

deed and enter therein....(b) the extent of the holding of each [covenant]holder.”¹³ The existence of an obligation on the part of the Milling Company to keep books and records identifying the entitlements of each class of covenantholders merely enabled the Respondent and the Forest Company to perform their obligations.

6. Clauses 9 to 10A of the Tripartite Agreement impose no obligation on the Milling Company to keep the "actual" sale proceeds in a separate account or "intact as a fund".¹⁴ The use of the word "retained" in clause 9(d) of the Tripartite Agreement exemplifies that "retained", when used in the introductory words of clause 9, means "kept for its own use".¹⁵ As Robson AJA observed: the delay permitted by clause 9(f) in the payment by the Milling Company to the Forest Company carried with it the implication that the Milling Company was able to use the sale proceeds as it saw fit;¹⁶ and, the prohibition in clause 10 on paying a dividend unless and until all monies had become "due and payable" by the Milling Company to the Forest Company¹⁷ made no commercial sense if the sale proceeds were held on trust.¹⁸
7. Furthermore, the Tripartite Agreement cannot be used to imply that the "land value" payments are to be held on trust. The Forest Company's dealings with the land value payments are not governed in any way by the Tripartite Agreement.
8. The Respondent's right to lodge a caveat in respect of lands used pursuant to the covenants was granted for the specified purpose of securing the Forest Company's compliance with the contractual obligations assumed by it under the covenants and Trust Deed.¹⁹ The prefatory words of the clause of the covenants dealing with caveats state that the steps identified therein (including the right to lodge caveats) are "[i]n order to adequately secure [the Forest Company's] due compliance with the terms [of the covenant]".²⁰ The acquisition of a covenant in the scheme did not of itself confer a caveatable interest upon that particular investor.²¹
9. At its highest therefore, any caveat lodged by the Respondent was a form of security protecting the right of covenantholders until they received their contractual income stream.²² The limited right of the Respondent to lodge a caveat (and then, later, an encumbrance)²³ and the language employed by the parties to confer that right, also tell

¹³ See, s.84 Companies Act, s.84 1980 Act, s.172 Companies Code.

¹⁴ Cf Respondent's Outline of Submissions at [22].

¹⁵ See clauses 10A, 12(d) and 32 of the Trust Deed.

¹⁶ *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [251] per Robson AJA.

¹⁷ Pursuant to clause 9 of the Tripartite Agreement.

¹⁸ *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [252] per Robson AJA.

¹⁹ Cf. Respondent's Outline of Submissions at [30].

²⁰ This purpose is evident from the language of the covenant and the Trust Deed. See clause 2(d)(v) of the Trust Deed and clauses 6 and 8 of the covenant.

²¹ The conclusion that the commercial purpose of the right to lodge a caveat is to "secure due compliance" by the Forest Company of its obligations in *toto* rather than to any specific covenantholder is reinforced by the fact that the obligation on the Forest Company to deliver the Certificates of Title and the right of the Respondent to lodge a caveat over the land is only conferred when "(75%) of the total purchase price fixed for all the covenants issued or intended to be issued for that planting year" has been paid. See clause 2(d)(v) of the Trust Deed. See also, *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [270] per Robson AJA.

²² See the introductory words to clause 2(d) of the Trust Deed.

²³ Such a conclusion is consistent with and reinforced by clause 3.1 of the Indenture executed on 13 December 1988, which varied the terms of the Trust Deed by: "...deleting the final sentence of Clause 2(d)(iv) thereof and substituting therefore the following: 'The Trustee shall prepare and the parties hereto shall execute an encumbrance in the form or to the effect of the encumbrance set out in the Tenth Schedule to the Real Property Act 1886 as amended in respect of such land prohibiting any dealings therewith otherwise than with the consent of the Trustee and to secure the performance and observance of all and singular the terms and conditions and covenants...' (Emphasis added). The right to lodge

against an imputed trust. The trustee held a security interest in the land and trees, but beneficial ownership remained with the Forest Company.²⁴

10. The agreement of the Forest Company not to sell or encumber the plantation land is not “revelatory of an intention to create a trust”,²⁵ but instead “suggest[s] that all the property rights in the plantation lands were vested in the Forest Company.”²⁶
11. Finally, clause 20B(a) of the Trust Deed does not assist the Respondent in establishing a broader or additional trust.²⁷ Clause 20B(a) was mandated by the statutory framework.²⁸

B. The Statutory and Commercial Context

- 10 12. The Respondent appears to contend that the statutory framework “does not speak to” the “broader or additional trust” over assets in the hands of the Forest Company or Milling Company.²⁹ If that is the contention, it cannot be correct, unless the parties were in non-compliance with the statutory regime (which has not been suggested). Specifically, if the covenantholders have a proprietary interest in the land and trees and/or the proceeds thereof, it is an interest created by their entry into the covenant. That alleged interest is a defined “interest” under a defined “investment contract” for the purposes of the statutory framework.³⁰ Accordingly, the statutory framework mandated the existence of an approved deed “*in relation to the interest*”.³¹ That “approved deed” must provide “full particulars of the trust”.³² If the “broader trust” contended for existed, the parties would be in breach of the statutory regime.
- 20 13. Section 80(1)(d) of the *Companies Act 1962* (SA) does not relevantly engage with the facts of the present case or operate in the manner asserted by the Respondent.³³
 - (a) *First*, the effect of the Respondent’s submission appears to be that any investment scheme which did not ensure that investment moneys were the subject of additional or broader trust protection at all stages during the life of the scheme, would be in breach of the applicable statutory regime. Such a contention extends well beyond the meaning of s.80(1)(d) of the *Companies Act*.
 - (b) *Secondly*, the contention that an additional trust existed over assets in the hands of the management company is not supported by the statutory framework. Parliament enacted a comprehensive range of provisions to govern schemes of the type under

an encumbrance in the form set out in the tenth schedule to the *Real Property Act 1886* (SA) (Act) was created by section 128 of that Act, which relevantly provided that: “[w]henver any land is intended to be charged with, or made security for, the payment of an annuity, rent-charge, or sum of money, in favour of any person, the registered proprietor shall execute an encumbrance in the form of the tenth schedule hereto.” (Emphasis added)

²⁴ This Court has pointed out the distinction between a trust and a security interest (such as a charge): *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd* (2000) 202 CLR 588. See at [5], [6] and [51] per Gaudron, McHugh, Gummow and Hayne JJ.

²⁵ Respondent’s Outline of Submissions at [34] and footnote 52 thereto.

²⁶ See *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [269] per Robson AJA. Further, Robson AJA observed (also at [269]) that “[t]he agreement by the Forest Company not to sell or encumber the plantation land (enforced by removing the certificates of title from the exclusive possession of the Forest Company) suggests that, but for those promises, the Forest Company was free to encumber or sell the plantation land as it saw fit”.

²⁷ Cf. Respondent’s Outline of Submissions at [33].

²⁸ Regulation 2(1)(d)(ii) Companies Regulations and 1980 Regulations; clause 4(d), Schedule 5 to the 1984 Regulations.

²⁹ Respondent’s Outline of Submissions at [53]-[54].

³⁰ See s.76 Companies Act, s.76 1980 Act, s.164 Companies Code.

³¹ See s.83 Companies Act, s.83 1980 Act, s.171 Companies Code.

³² See Appellants’ Outline of Submissions at [27] and footnote 44 thereto.

³³ Cf. Respondent’s Outline of Submissions at [45]-[50].

consideration,³⁴ and that detailed legislative framework did not provide for more than one trustee per scheme and made no provision for the management company being an additional trustee over assets in its hands.³⁵

10 (c) *Thirdly*, the Respondent's contention is that the "investment moneys...would be used to purchase assets that became part of the assets of the Forest Company and Milling Company".³⁶ However, that is not the structure of arrangements presently under consideration. As the covenant made clear, the land and the trees were acquired *prior* to the covenantholders' payment of the application monies. The covenant states that the "Company **has** planted with pine trees the areas of land hereunder".³⁷ *A fortiori*, it cannot be contended that in the absence of a trust over the timber and land value payments, the covenantholders' application monies would relevantly constitute an investment in either the Forest Company or Milling Company.³⁸

(d) *Fourthly*, the prohibition in s.80(1)(d) of the *Companies Act* does not relate to *proceeds* but rather "monies available for investment". Here, of course, the timber and land value payments are not "monies available for investment" but are the product of the investment scheme.³⁹

14. The Respondent erroneously endeavours to rely upon a contention that the tax benefit that "would have been lost" by the imposition of the broader additional trust is not identified.⁴⁰
20 The potential lost tax benefit is clear. As Robson AJA held, "[i]f the land, timber and timber sale proceeds were held on trust ...the covenantholders ran a risk that any subsequent payment to them of the net timber proceeds **may have been assessable under the Income Tax Assessment Act 1936 and liable to income tax.**"⁴¹ The existence of that risk strongly militates against the imputation of a broader or additional trust. In circumstances where the Prospectuses expressly advertised that the timber proceeds were not assessable and referred to the High Court decisions underpinning that view,⁴² the objective circumstances suggest that the parties would not have actively taken steps to jeopardise the effectiveness of that tax treatment in return for an unarticulated desire to diminish "investment risk".⁴³

30 15. Relatedly, the assertion that "protection of the financial investment of covenantholders was of essential importance"⁴⁴ is undermined by the fact that the prospectuses had represented that distributions from earlier plantings had to date shown very high returns.⁴⁵ One might

³⁴ See Annexure A and B to the Appellants' Primary Outline of Submission.

³⁵ Cf. Respondent's Outline of Submissions at [54].

³⁶ Respondent's Outline of Submissions at [48].

³⁷ See clause 2 of the covenant at p.7 and p.10 of the 1984 Prospectus. Emphasis Added.

³⁸ Cf. Respondent's Outline of Submissions at [46]-[48].

³⁹ The statutory framework therefore does not prohibit the provision of *proceeds* to the management company, which form part of the assets of that company. Cf. Respondent's Outline of Submissions at [46].

⁴⁰ Respondent's Outline of Submissions at [80].

⁴¹ *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [260] per Robson AJA. Emphasis Added.

⁴² 1980 Prospectus at p.4, 1984 Prospectus at p.4, 1985 Prospectus at p.3, 1986 Prospectus at p.3, 1988 Prospectus at p. 7.

⁴³ Respondent's Outline of Submissions at [80].

⁴⁴ Respondent's Outline of Submissions at [72].

⁴⁵ A return of "10 to 20 times the original investment" in the case of the 1980 prospectus: 1980 Prospectus at p. 4. And, "more than 20 times the original investment" in the case of the 1984 Prospectus: 1984 Prospectus at p.4.

reasonably conclude that a putative investor would have been quite willing to accept *extraneous*⁴⁶ risks in light of the potential for extremely high tax-free returns.

C. The Notice of Contention

16. The trial judge was correct in concluding that communications⁴⁷ made 48 years after execution were unlikely to be capable of creating an express trust.⁴⁸ Similarly, Robson AJA was correct in holding that the evidence relied upon by the Respondent was “of little value in deciding the question to be addressed”.⁴⁹

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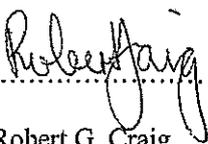
17. The first communication was a memorandum of 31 July 2012.⁵⁰ Mr Nguyen⁵¹ deposed that it was drafted to be used as a “submission...in negotiating with the Lenders, whereby the Covenant Holder’s case was to be put at its highest.”⁵² Mr Nguyen was aware that Messrs L’Estrange⁵³ and Frame⁵⁴ both held the view that the Lenders took priority ahead of any liabilities owed to the covenantholders.⁵⁵ He also said that he considered this submission to reflect a commercial position or “ambit claim” on the issue.⁵⁶ Mr Nguyen was unable to identify any documents to support the “ambit claim”.⁵⁷

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18. The memorandum of 31 July 2012, and Mr Nguyen’s evidence about it, reveals the true context in which the subsequent communications relied upon by the Respondent were sent.⁵⁸ None of the communications constitute an admission as to the existence of the asserted trust. Nor could it be said that Mr Nguyen had the relevant authority to make the purported “admission” on behalf of the Forest and Milling Company.⁵⁹

Dated: 24 October 2014

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⁴⁶ *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [33] per Maxwell P and Osborn JA. Emphasis Added.

⁴⁷ Notice of Contention dated 3 September 2014. See further: *Australian Executor Trustees (SA) Limited v Korda & Ors* [2013] VSC 7 at [89]-[91] per Sifris J.

⁴⁸ *Australian Executor Trustees (SA) Limited v Korda & Ors* [2013] VSC 7 at [95] per Sifris J.

⁴⁹ *Korda & Ors v Australian Executor Trustees (SA) Limited* [2014] VSCA 65 at [241] per Robson AJA.

⁵⁰ *Australian Executor Trustees (SA) Limited v Korda & Ors* [2013] VSC 7 at [91] per Sifris J.

⁵¹ Group General Counsel of Gunns Limited.

⁵² Affidavit of Tri Duc Nguyen sworn 6 December 2012 at [22]. See also, affidavit of Gregory Philip L’Estrange sworn 6 December 2012 at [26]-[27].

⁵³ Managing director of the Milling Company and Forest Company.

⁵⁴ Chief Financial Officer of Gunns Limited.

⁵⁵ See: affidavit of Tri Duc Nguyen sworn 6 December 2012 at [18(e)]; affidavit of Calton John Frame affirmed 6 December 2012 at [22].

⁵⁶ Affidavit of Tri Duc Nguyen sworn 6 December 2012 at [22].

⁵⁷ Affidavit of Calton John Frame affirmed 6 December 2012 at [22].

⁵⁸ *Australian Executor Trustees (SA) Limited v Korda & Ors* [2013] VSC 7 at [89]-[90] per Sifris J.

⁵⁹ See, s.87 of the *Evidence Act 2008 (Vic)*.