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### **[134] BCLB 5: Dr Marcel Fernandes**

In this edition, Robin Bowley and Andrew Farag-Girgis discuss the Victorian Court of Appeal's significant recent decision in *Woodcroft-Brown v Timbercorp Securities Ltd* [2013] VSCA 284 (*Timbercorp*). The court dismissed in its entirety an appeal from Judd J's first instance decision in *Timbercorp*, discussed in a recent edition of the bulletin, involving construction of the product disclosure requirements in Div 2 of Pt 7.9 CA. The court unanimously rejected arguments concerning Judd J's quite commercial construction of the relevant provisions, in particular the meaning to be attributed to the statutory phrase "significant risk" in s 1013D CA, under which a Product Disclosure Statement (PDS) must disclose significant risks. In accordance with Judd J's approach, the court held that potential adverse matters or events that would escalate any problems the scheme might experience were not necessarily significant risks, particularly where they were such as would arise on a day to day or run of the mill basis. Such potential events, which were being managed, were not significant risks until they had crystallised into an actual risk and could not be adequately managed. Further, the court rejected a construction of "significant risk" that focused predominantly or exclusively on the significant consequences of any risk, as opposed to also focusing on the probability of that risk occurring. The court therefore held that the meaning of "significant risk" did import a notion of the probability of the risk, as inherent in the meaning of the word "risk". The court also confirmed that the PDS did not need to disclose generally available information such as that found in publicly available ASX releases and annual reports. The court also clarified that the requirement to disclose based on knowledge meant actual knowledge of an event that constituted a significant risk.

In *Forty Two International Pty Limited v Barnes* [2014] FCA 85, the dispute involved directors' duties in the context of a transaction involving a group of companies and whether directors, who were directors of one company only, had breached their duties for non-disclosure of personal interest under s 182 and s 191 CA. By entering the company into the transaction, the directors both benefited the company and therefore their own personal interests under earn out provisions of an agreement to sell their shares in the company to another company. The purchaser of the shares, which was the parent company, had to pay out \$16 million under the share sale agreement due to the transaction. The parent company complained that the directors did not disclose their involvement in funding the transaction when the share sale agreement was being negotiated and that it would not have entered into the agreement if that had been disclosed and nor would it have been liable to pay the extra earn out amount. The court dismissed the claims for damages based on breach of directors' duties, principally on the basis that the directors were not also directors of the parent company and their actual company had benefited from the transaction. Nevertheless, the parent company was successful in obtaining damages from the directors for breach of an implied term of disclosure in the share sale agreement and for misleading and deceptive conduct.

## **Article**

### **[135] A clarification on the obligation to disclose significant risks in Product Disclosure Statements: *Woodcroft-Brown v Timbercorp Securities Ltd* [2013] VSCA 284; BC201313617**

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#### **[1] Introduction**

In the first Australian appellate decision on Division 2 of Part 7.9 of the Corporations Act 2001, the Victorian Court of Appeal (VCA) unanimously affirmed an earlier Victorian Supreme Court determination<sup>1</sup> that member companies and directors of the collapsed Timbercorp Group had not breached s 1013D of the Corporations Act 2011 through failing to disclose significant risks within Product Disclosure Statements (PDSs). The appellant argued Timbercorp had failed to disclose the risk that it might fail due to insufficient cash, and the risk of failure caused by an adverse ATO ruling and the effects of the Global Financial Crisis. In firmly rejecting these arguments, the VCA clarified that these *potentially* adverse matters were not "significant risks" under s 1013D(1)(c) because they were being successfully managed. The VCA's decision also clarified the general limitation under s 1013F on the extent to which "generally available" information is required to be included within a PDS; the requirement under s 1013C(2) that information needs only be included in PDS if it is "actually known" to the issuer; and the defences under s 1022B(7) of taking "reasonable steps" to ensure a PDS is not defective.

## [2] Background

Since 1992 the Timbercorp Group (Timbercorp) had operated various horticultural and forestry management investment schemes (MISs), investing over \$2 billion on behalf of some 18,500 investors.<sup>2</sup> Timbercorp Securities Ltd operated and was the Responsible Entity for the MISs, and Timbercorp Finance Pty Ltd lent up to 90% of the value of investments in the schemes. Timbercorp charged licensing and management fees and sold interests to investors to generate long-term revenue. Developed lands were also sold to third parties under sale and lease back agreements or to property trusts in which Timbercorp would retain equity. Timbercorp also derived working capital and funding for its infrastructure through bonds and bank facilities using its loan book as security, and arranged debt facilities, sold assets, raised equity and securitised its loans.<sup>3</sup>

Between 6 February 2007 and 23 April 2009 (the Relevant Period), Timbercorp maintained finance facilities with Commonwealth Bank, ANZ, HBOS and Westpac (the Banks).<sup>4</sup> An announcement by the Australian Taxation Office (ATO) on 6 February 2007 threatened to disentitle claims for upfront deductions for investors of non-forestry MISs (the announcement). As this was not to come into effect until after the end of the 2007-2008 financial year, Timbercorp commenced a test case against the ATO to ascertain the effect of the announcement.<sup>5</sup> It also engaged Goldman Sachs JBWere (Goldman Sachs) and Deloitte Touche Tohmatsu (Deloitte) to undertake a strategic review and audit report respectively.<sup>6</sup>

Goldman Sachs' report of 30 March 2007 indicated that Timbercorp's earnings would be in the negative for three years. Acting on the report, Timbercorp devised a plan to align its profit and cash flow in order to be able to pay dividends. On 27 November 2007, a report by Deloitte which considered the announcement indicated that Timbercorp would remain profitable into the future although somewhat less-so after the 2007-2008 financial year.<sup>7</sup> During the relevant period Timbercorp was also involved in negotiations with Munchmeyer Petersen Capital AG (Munchmeyer) and Harvard Management Company (Harvard) relating to a sale and lease back arrangement of two of its properties. However, after the collapse of Lehman Brothers on 15 September 2008 those negotiations<sup>8</sup> ceased. Throughout the relevant period, Timbercorp kept the Banks informed of developments regarding both the announcement and its negotiations with Munchmeyer and Harvard.<sup>9</sup> Consequently, the Banks made substantial amendments and concessions to Timbercorp's facility agreements to assist the group in avoiding a breach.<sup>10</sup>

A November 2008 report of Timbercorp's Audit, Risk and Compliance Committee noted concerns by the group's auditors about the business as a going concern due to a working capital deficiency of \$82.8 million. Shortly after, on 30 December 2008 Timbercorp released its Annual Report which represented that Timbercorp was in an "apparently healthy position".<sup>11</sup> Similarly, remarks made in the same report by Deloitte stated that if the Banks continued to support them by making concessions, Timbercorp would be able to continue as a going concern.<sup>12</sup> The Banks continued to support Timbercorp until April 2009 when Timbercorp entered into voluntary administration, and by 29 June 2009 Timbercorp's creditors resolved to wind up the group.

At the time of Timbercorp's collapse, Timbercorp Finance had outstanding loans to over 14,500 investors totalling

\$477.8 million, and Timbercorp's liquidators commenced recovery actions against those investors to recover the outstanding debt.<sup>13</sup> In response to the liquidator's recovery action, Mr Allen Woodcroft-Brown, an investor in one of Timbercorp's companies, commenced proceedings against the Timbercorp Group and several of its former directors (the respondents)<sup>14</sup> on behalf of himself and others who had interests in Timbercorp during the relevant period.

Woodcroft-Brown firstly alleged that Timbercorp had breached its disclosure obligations under the Corporations Act 2001 through failing to disclose information in its PDSs issued to investors during the relevant period about significant risks (in breach of s 1013D), or other information that might reasonably be expected to have a material influence on the decision of retail clients about whether to acquire the product (in breach of s 1013E).<sup>15</sup> Once a breach of these provisions was established, it was then necessary to show the respondents "actually" knew of the "significant risks" or "any other information".<sup>16</sup> Furthermore, s 1013F(1) provides that the information required by s 1013D or s 1013E need only be included in the PDS if it would be reasonable for a retail client to expect the inclusion of such information in the PDS.<sup>17</sup> Woodcroft-Brown argued that these provisions required Timbercorp to disclose two categories of risks in its PDSs.<sup>18</sup> Firstly, the "structural risk" that Timbercorp might fail due to insufficient cash, thereby threatening the viability of its schemes;<sup>19</sup> and secondly the risk that "adverse matters" -- being the effect of the tax announcement and the Global Financial Crisis (GFC) -- could jeopardise Timbercorp's financial survival.<sup>20</sup>

Secondly, Woodcroft-Brown alleged that two of Timbercorp's financial reports contained false or misleading statements in breach of s 1022A or 1041H(1) of the Corporations Act, s 12 DA of the Australian Securities and Investments Commission Act 2001 (Cth) (ASIC Act) and s 9 of the Fair Trading Act 1999 (Vic) (FTA).<sup>21</sup> Section 1022B(7) provides a defence to liability under s 1022A if it can be shown that reasonable steps had been taken to ensure that a PDS, or a statement within it, was not defective.<sup>22</sup>

Woodcroft-Brown alleged that Timbercorp had mislead investors by firstly representing that the group was financially strong enough to ensure that its MISs would be managed for the foreseeable future, and that the principal risks associated with the relevant MISs were fully disclosed;<sup>23</sup> and secondly that investors had been misled to believe that their MIS contributions would be sufficient to fund the relevant MIS.<sup>24</sup>

### **[3] Victorian Supreme Court decision**

At trial Mr Woodcroft-Brown failed to establish reliance on the alleged non-disclosures or misleading statements, meaning that questions of causation and loss did not arise.<sup>25</sup> It was therefore unnecessary for Judd J to consider the defences under ss 1022B, 1317S or 1318 or any associated proportionate liability claim.<sup>26</sup> Nevertheless, at trial the respondents denied all allegations, arguing they had taken reasonable steps to ensure the PDSs were not defective, and that they should be entitled to rely on the defence in s 1022B(7).<sup>27</sup> The former Timbercorp directors relied on expert evidence from forensic accountants who concluded there was not "significant risk" of Timbercorp failing to have the financial capacity to manage its schemes to completion whilst it had the support of its banks.<sup>28</sup>

Judd J rejected Mr Woodcroft-Brown's arguments that Timbercorp ought to have disclosed information about the so-called "structural risk" that the group might fail for five reasons. First, the "structural risk" as articulated by Woodcroft-Brown was not a risk about which a retail client would require information in deciding whether to invest in Timbercorp. Second, given that expert forensic accounting evidence had concluded that Timbercorp had strong cash flows and maintained the support of the Banks during the Relevant Period until early 2009, no significant "structural risk" actually arose.<sup>29</sup> Third, information regarding the so-called "structural risks" was generally available -- meaning that such information would not be of a kind that would reasonably warrant inclusion within a PDS under s 1013F.<sup>30</sup> Fourth, while he considered the risk that Timbercorp's counterparties might fail to discharge their contractual obligations to manage the projects due to financial incapacity to be an "everyday risk"<sup>31</sup> which a reasonable person would expect to be disclosed in accordance with s 1013F (and which would therefore be a "significant risk" in accordance with s 1013D(1)(c)),<sup>32</sup> Judd J found that this risk was actually disclosed in Timbercorp's PDS.<sup>33</sup> Finally, Judd J could not conclude from the evidence before him that the respondents possessed the "actual knowledge" during the relevant period that Timbercorp's banks would withdraw financial support after the collapse of Lehman Brothers or

that the negotiations with Munchmeyer and Harvard would terminate their dealings with Timbercorp as required by required by s 1013C(2).<sup>34</sup>

Judd J also rejected Mr Woodcroft-Brown's arguments that Timbercorp ought to have disclosed the information about the "adverse matters" for six reasons. First, the adverse matters had no independent status as risks, and the only way they might have required disclosure would be as events which, if left unchecked or unmanaged, might crystallise the pleaded risk into reality.<sup>35</sup> Second, even if each "adverse matter" were characterised as a risk under s 1013D(1), information about such matters (and also information about the tax announcement) would not be the kind that a retail client would reasonably require under s 1013E. Judd J also considered the risk posed to Timbercorp from the GFC was indiscernible, with the respondents having no 'actual knowledge' until the collapse of Lehman Brothers. He also found there was adequate information in the public domain about the GFC and its potential impact for the purposes of s 1013F.<sup>36</sup> Third, Judd J determined that Timbercorp actually had made disclosure about the potential impact of the adverse matters in its PDS insofar as it was required.<sup>37</sup> Fourth, Judd J determined that the "adverse matters" did not constitute a risk requiring disclosure under s 1013F because Timbercorp had been successfully managing these risks -- which had not yet crystallised. He considered it would be oppressive, unrealistic and unreasonable to require the disclosure of information relating to the existence or impact of an event (even if catastrophic if left unmanaged) in a PDS.<sup>38</sup> Fifth, he determined that Timbercorp's directors had no actual knowledge that the adverse matters posed a risk to Timbercorp until the Banks had withdrawn their support for the group.<sup>39</sup> Finally, Timbercorp's continuous disclosure obligations under s 674 did not extend to requiring the disclosure of information about the "adverse matters" -- as these were events of the type that management deals with on a day to day basis, and were being addressed -- and that it is not until management realises it cannot successfully manage these events to avert the risk "crystallising" that the continuing disclosure obligations are engaged.<sup>40</sup>

#### **[4] Victorian Court of Appeal decision**

Mr Woodcroft-Brown appealed against the decision of Justice Judd in the Victorian Court of Appeal (VCA). He argued 14 grounds of appeal, one of which was not pressed at hearing.<sup>41</sup> After reviewing the evidence about events which were significant to the appeal,<sup>42</sup> the VCA dismissed all of his grounds of appeal. The VCA's key reasons for dismissing the appeal are examined under the five headings below. Several other grounds of Woodcroft-Brown's appeal are not examined because they related solely to the facts of the trial decision, or because they largely repeated the conclusions of other grounds of appeal.<sup>43</sup>

##### **[4.1] Construction of "significant risk" under s 1013D(1)(c)<sup>44</sup>**

Woodcroft-Brown first argued that Judd J had erred in construing "significant risk" through considering both the likelihood of the occurrence, and the consequence, of the risk. Instead, Mr Woodcroft-Brown submitted that a risk should be characterised as "significant" if it has important consequences to a retail client in determining whether to acquire a financial product.<sup>45</sup> In rejecting these arguments, the VCA also provided further explanation on how "significant risk" should be understood.

Whilst acknowledging the broad thrust of Mr Woodcroft-Brown's argument, the VCA considered his formulation of 'significant risk' as over-simplified and offering little practical guidance in identifying the particular information and risks that ought to be disclosed in a PDS in a given case.<sup>46</sup> The VCA agreed with Judd J that s 1013D(1) also required a consideration of the decision-making process of a retail client in determining whether to acquire a particular financial product -- with considerations of the probability of the risk occurring and the possible consequences of its occurrence needing to be adjusted by considering what information a person would, and would not, reasonably require in making an investment decision.<sup>47</sup> In agreeing with Justice Judd that 'significant' means important or notable and that "risk" means exposure to chance of hazard or loss,<sup>48</sup> the VCA added that it would be erroneous to look only at the consequence of a risk when the very definition of risk involves the notion of probability.<sup>49</sup> The VCA also considered that placing undue emphasis upon consequence without probability would lead to an inappropriate focus on "significance" to the investor, and inadequate attention to "risk". They also considered Woodcroft-Brown's formulation

of significant risk "set the bar too low", and diluted the expression "significant" (which means important or notable), meaning that the word "risk" would play next to no role at all.<sup>50</sup> The VCA held that Judd J has correctly characterised "significant risk" as being a flexible requirement tailored to the type of product involved and its particular circumstances, and concluded that:

Amongst the constellation of issues in weighing "significant risk", there is the probability of the occurrence, the degree of impact upon investors, the nature of the particular product and the profile of the investors together with other matters. The constellation or group of issues is not closed and will vary depending upon particular circumstances.<sup>51</sup>

#### **[4.2] The "risk management" grounds**

Woodcroft-Brown's next argument was expressed in four related grounds of appeal.<sup>52</sup> The essence of these grounds of appeal was that the trial judge had erred in holding that the "adverse matters" (particularly the external financing risk) were not "significant risks" under s 1013D(1)(c) because they were capable of successful management, and were in fact being managed by Timbercorp during the relevant period.

Mr Woodcroft-Brown argued that unless the chance of a particular risk materialising within a relevant timeframe was negligible, it would be reasonable for an investor to expect the disclosure of such risks in a PDS.<sup>53</sup> In rejecting this argument, based on the notion that a risk would be "significant" if it was "non-negligible", the VCA emphasised that "non-negligibility" and significance are very different concepts, and set the bar at different heights. They held that s 1013D(1)(c) does not contemplate that ordinary, run of the mill risks must be disclosed in a PDS.<sup>54</sup> On this basis the VCA considered the trial judge had correctly concluded that despite worsening financial market conditions, the risk of Timbercorp being unable to perform its management obligations was being addressed through the continuing sound relationship with the Banks -- meaning that such adverse financial market conditions were not material to the performance risk.<sup>55</sup>

Nor could the VCA find any error in the trial judge's view that a risk will not cease because a potentially catastrophic event is being managed. They also considered he had validly criticised Woodcroft-Brown's formulation of "significant risk" which would have effectively required Timbercorp to disclose to investors information about how an event might elevate the possibility of Timbercorp being unable to perform its obligations -- but without any mention of the likelihood of such events, nor the measures Timbercorp had in place to manage such events.<sup>56</sup>

The VCA also dismissed Mr Woodcroft-Brown's argument that the trial judge had erred in holding that because the risks associated with external financing identified by Timbercorp were subject to management strategies and processes, they were not "significant risks" within the meaning of s 1013D(1)(c) -- particularly given that Timbercorp investors were locked into long-term illiquid investments. The VCA considered the trial judge had correctly determined that it was not until management realised that an event may not be capable of successful management to avoid crystallisation of the performance risk that Timbercorp was obliged to inform investors pursuant to its continuing disclosure obligation, that such events would become a "significant risk".<sup>57</sup> Furthermore, the VCA concluded that evidence presented at trial indicated Timbercorp had managed its exposure to the risks associated with external financing through scaling down its businesses and not embarking upon new horticultural projects. Similarly, whilst Timbercorp's internal documents had expressed concerns about the potential adverse implications arising from the tax announcement, the VCA determined this did not elevate the risk of Timbercorp being unable to perform its management functions -- with Timbercorp still having enough cash due to the support of its banks.<sup>58</sup>

The VCA also concurred with the trial judge's conclusion that the "adverse matters" as pleaded by Mr Woodcroft-Brown were "escalating factors" rather than risks in their own right,<sup>59</sup> and which did not require disclosure because they were events of the kind "that management is required to grapple with on a day to day basis".<sup>60</sup>

#### **[4.3] Construction of s 1013F(2): Whether generally available information required disclosure in a PDS**

Mr Woodcroft-Brown argued that the trial judge had erred by construing s 1013F(2) to mean that if information concerning Timbercorp's financial situation was generally available within the meaning of ss 674 and 675, such information was not required to be included in a PDS.<sup>61</sup> In particular, Woodcroft-Brown submitted that Judd J should not have taken into account ss 674 and 675 because the illiquid interests in Timbercorp's projects were not always enhanced disclosure (ED) securities -- including at the time the PDSs were issued, and only became ED securities when 100 investors subscribed.<sup>62</sup> He also disagreed with the trial judge's conclusion that information about Timbercorp's financial position was generally available in its annual reports and ASX releases -- arguing these documents were directed at shareholders and not directed at retail clients and therefore were not likely to come to their attention;<sup>63</sup> and that the information contained in these documents did not provide information about significant risks in a clear, concise and effective manner as required by s 1013C(3).<sup>64</sup>

In dismissing this argument, the VCA held the trial judge had correctly concluded that information concerning (and impacting on) Timbercorp's financial position<sup>65</sup> was generally available "to the world" through Timbercorp's ASX releases and financial reports, its website, and research, analytical and media reports.<sup>66</sup> The VCA also determined that the trial judge had correctly concluded that Timbercorp's PDSs were required to disclose the "performance risk", which Judd J found had actually been disclosed.<sup>67</sup> They concluded by clarifying that "... s 1013D(1)(c) is not concerned with the articulation of the risk itself, but information about it. To accurately provide information about the so-called "financing risk" would effectively require the non-selective disclosure of the entire accounting information such as is contained in the Annual Report".<sup>68</sup>

#### **[4.4] Error in concluding directors of Timbercorp had no actual knowledge of information requiring disclosure until the collapse of Lehman Brothers in late 2008**

Mr Woodcroft-Brown submitted that the trial judge erred in concluding that directors of Timbercorp Securities Ltd had no knowledge of anything requiring disclosure until late 2008 after the collapse of Lehman Brothers.<sup>69</sup>

In dismissing this argument, the VCA held that the trial judge had correctly concluded that the question which must be shown for disclosure under s 1013D was not whether the directors of Timbercorp Securities *knew about* the tax announcement but rather whether they had *actual knowledge of a significant risk* flowing from the tax announcement. They considered that from the evidence before the Victorian Supreme Court (including information from Timbercorp's internal documents, testimony from its directors and bankers, and contemporaneous information from market analysts and rating agencies), the trial judge had correctly found there was no actual knowledge on the part of Timbercorp's directors of information requiring disclosure in a PDS prior to the collapse of Lehman Brothers.<sup>70</sup> On this point, the VCA noted that the evidence before the trial judge indicated that it was not until Timbercorp's directors realised that bank support (which depended upon asset sales that were unlikely to take place) became equivocal, that the directors had actual knowledge of a significant risk that Timbercorp Securities would be unable to continue to manage its schemes.<sup>71</sup> The VCA criticised Mr Woodcroft-Brown's case as being "substantially argued with the benefit of hindsight".<sup>72</sup> Finally, while the point did not arise on appeal, the VCA considered that if Timbercorp's directors were otherwise found liable for failing to disclose information in a PDS, that they would have a good defence under s 1022B(7) through having taken reasonable steps to ensure that Timbercorp's PDSs were not be defective.<sup>73</sup>

#### **[4.5] Error in concluding that there had been no reliance on the alleged non-disclosures**

Mr Woodcroft-Brown submitted that the trial judge had erred when making three related findings. Firstly that there had been no relevant reliance by himself and another investor on the alleged non-disclosures in Timbercorp's PDSs; secondly that the sole driver for their investment decisions was the tax-effective nature of Timbercorp's projects; and thirdly that these investors had been indifferent to the content of the PDSs.<sup>74</sup>

The VCA pointed out that in order to recover damages under s 1022B(2)(c) for a breach of s 1022A, or under s 1041I(1) for a breach of s 1041H, Woodcroft-Brown needed to show that the representations contained in Timbercorp's PDSs constituted a decisive consideration in his decision to invest in the schemes.<sup>75</sup> On this point they determined the trial

judge had rightly concluded from the evidence before him that Mr Woodcroft-Brown and the other investor had failed to demonstrate such reliance.

The trial judge had placed little reliance on the "formulaic evidence" presented by Woodcroft-Brown and the other investor (who were the only Timbercorp investors to give evidence) -- with their witness statements recording that they had read the PDSs, and stating their reliance on the representations in terms which were virtually identical, and which echoed the allegations in the statement of claim.<sup>76</sup> Furthermore, under cross-examination Woodcroft-Brown had admitted making his decision to invest in Timbercorp during a two hour meeting with his financial adviser. At this meeting he had expressed his desire to reduce his tax liability, and the financial adviser had presented him with documents relating to three investment schemes -- with Woodcroft-Brown having "'skimmed through' each of these three documents'... which to him '... very much appeared to be similar type of documents'".<sup>77</sup>

From this evidence, Judd J concluded that Woodcroft-Brown had not read Timbercorp's PDSs in any detail (not having had the time to do so) -- but rather that he had acted on his financial adviser's recommendation with the motive of obtaining a tax deduction; and that the actual content of the PDS had not induced his investment in Timbercorp.<sup>78</sup> At a subsequent two hour meeting with his financial adviser in May 2008, Woodcroft-Brown became aware that he faced a tax liability of around \$1 million. He discussed five potential investment schemes to reduce his tax liability. Similarly, the evidence Woodcroft-Brown gave at trial about his reading of the PDSs for these schemes did not persuade the trial judge that his review of these disclosure documents was "... more than a perfunctory glance, if that".<sup>79</sup> The VCA therefore dismissed this ground of Mr Woodcroft-Brown's appeal.<sup>80</sup>

## **[5] Conclusion**

Whilst over recent years concerns have been expressed about the volume and complexity of information requiring inclusion in a PDS,<sup>81</sup> this first Australian appellate decision on Division 2 of Part 7.9 of the Corporations Act 2001 has provided a very practical clarification about the concept of "significant risk" under s 1013D(1)(c), and the extent to which such information may require disclosure in a PDS. The decision also provides useful guidance on the extent to which "generally available" information may require inclusion within a PDS under s 1013F; the operation of s 1013C(2) which provides that information needs only be included in PDS if it is "actually known" to the issuer; and (whilst not examined in detail in the appeal) some thoughts about the how the defence of taking "reasonable steps" to ensure a PDS is not defective under s 1022B(7) might operate.

1 *Woodcroft-Brown v Timbercorp Securities Ltd & Ors (No 2)* [2011] VSC 526.

2 [2013] VSCA 284 at [11]. The background to the case is outlined by the [2013] VSCA 284 at [1]-[24].

3 [2013] VSCA 284 at [12].

4 [2013] VSCA 284 at [13]-[15].

5 [2013] VSCA 284 at [15].

6 [2013] VSCA 284 at [16]-[18].

7 [2013] VSCA 284 at [17]-[18].

8 [2013] VSCA 284 at [19].

9 [2013] VSCA 284 at [14]-[15], [23]-[24].

10 [2013] VSCA 284 at [14]-[15], [23]-[24].

11 [2011] VSC 526 at [5].

12 [2013] VSCA 284 at [23].

13 [2013] VSCA 284 at [2].

14 [2013] VSCA 284 at [3], [5]. The first respondent was Timbercorp Securities Ltd (a member of the Timbercorp Group and the Responsible Entity for horticultural and forestry managed investment schemes); the second respondent was Mr Gary William Liddell (a director of Timbercorp at the time of its 2008 Annual Report and Chairman of its Audit, Risk and Compliance Committee); the third respondent was Mr Robert James Hance (the founder of the Timbercorp Group, and at the time of its 2008 Annual Report, a director; and a former CEO of the Timbercorp Group); the fourth respondent was Mr Sholom Carles Rabinowicz (a director and the CEO of Timbercorp Group at the time of its collapse); and the fifth respondent was Timbercorp Finance Pty Ltd (which lent money to investors to invest in Timbercorp's managed investment schemes).

15 [2013] VSCA 284 at [29].

16 [2013] VSCA 284 at [30]-[31].

17 [2013] VSCA 284 at [32].

18 [2013] VSCA 284 at [34].

19 [2013] VSCA 284 at [35].

20 [2013] VSCA 284 at [36].

21 [2013] VSCA 284 at [7], [58]-[60]

22 [2013] VSCA 284 at [58].

23 [2013] VSCA 284 at [61].

24 [2013] VSCA 284 at [61].

25 [2013] VSCA 284 at [67]-[68].

26 [2013] VSCA 284 at [70].

27 [2013] VSCA 284 at [8].

28 [2013] VSCA 284 at [26], [41].

29 [2013] VSCA 284 at [41].

30 [2013] VSCA 284 at [43].

31 [2011] VSC 526 at [53].

32 [2013] VSCA 284 at [44].

33 [2011] VSC 526 at [56]-[57].

34 [2013] VSCA 284 at [46].

35 [2013] VSCA 284 at [48].

36 [2013] VSCA 284 at [49].

37 [2011] VSC 526 at [44]; [2013] VSCA 284 at [50].

38 [2013] VSCA 284 at [51].

39 [2011] VSC 526 at [52].

40 [2013] VSCA 284 at [53].

41 [2013] VSCA 284 at [87]-[91].

42 This included evidence about the collapse of Lehman Brothers at [92]-[99]; the support by Timbercorp's bankers at [100]-[108]; Timbercorp's equity raisings at [109]; Timbercorp's sources of inflows at [110]-[112]; Timbercorp's securitisation process at [113]; Timbercorp's cash flows at [114]-[117]; and information about Timbercorp's financial status that were available in the public domain (including the group's annual reports) at [2013] VSCA 284 at [118]-[124].

43 These included Ground 7 (that the trial judge erred in holding that Timbercorp's PDSs contained adequate disclosure of the risk of its projects failing for "performance reasons": see [2013] VSCA 284 at [174]-[177]); Grounds 10 and 11 (that the trial judge erred in the interpretation of information in joint experts' reports: see [2013] VSCA 284 at [186]-[190]); and Ground 13 (that the trial judge erred in assessing whether Timbercorp's representations about financial and project contributions were misleading or deceptive for an ordinary and reasonable reader: see [2013] VSCA 284 at [212]-[225]).

44 [2013] VSCA 284 at [125]-[132].

45 [2013] VSCA 284 at [125]-[126].

46 [2013] VSCA 284 at [126].

47 [2013] VSCA 284 at [127].

48 [2011] VSC 526 at [101]-[102].

49 [2013] VSCA 284 at [130].

50 [2013] VSCA 284 at [131].

51 [2013] VSCA 284 at [132].

52 These included Ground 2 ([2013] VSCA 284 at [133]-[141]), Ground 5 ([2013] VSCA 284 at [158]-[168]), Ground 6 ([2013] VSCA 284 at [169]-[173]) and Ground 8 ([2013] VSCA 284 at [178]-[181]).

53 [2013] VSCA 284 at [136]-[137].

54 [2013] VSCA 284 at [138]-[139].

55 [2013] VSCA 284 at [139]; [2011] VSC 526 at [557].

56 [2013] VSCA 284 at [140]; [2011] VSC 526 at [150].

57 [2013] VSCA 284 at [162].

58 [2013] VSCA 284 at [164].

59 [2013] VSCA 284 at [179].

60 [2013] VSCA 284 at [173].

61 [2013] VSCA 284 at [144]-[157] (Appeal Ground 4). Mr Woodcroft-Brown's 9th ground of appeal (that the trial judge had erred holding that information concerning the Group's financial position was generally available under s 674 from public information sources), which the VCA examined at [182]-[185], was considered to have been adequately addressed in Appeal Ground 4

62 [2013] VSCA 284 at [148].

63 [2013] VSCA 284 at [149].

64 [2013] VSCA 284 at [150].

65 In [2011] VSC 526 at [178], the trial judge had noted this information included 'information about Timbercorp's business model, cash flows, debt levels, debt and finance instruments, assets, asset sales, strategic changes, adverse events including the tax announcement, the

emerging credit crisis, the going concern issues, the operating income and working capital positions and other information that would inform an investor about the performance risk, should the investor be interested'.

66 [2013] VSCA 284 at [151]-[153].

67 [2013] VSCA 284 at [154].

68 [2013] VSCA 284 at [157].

69 [2013] VSCA 284 at [191]-[211].

70 [2013] VSCA 284 at [195]-[196].

71 [2013] VSCA 284 at [198].

72 [2013] VSCA 284 at [210].

73 [2013] VSCA 284 at [197], [210].

74 [2013] VSCA 284 at [226].

75 [2013] VSCA 284 at [227]-[228].

76 [2013] VSCA 284 at [229].

77 [2013] VSCA 284 at [230].

78 [2013] VSCA 284 at [231].

79 [2013] VSCA 284 at [232].

80 [2013] VSCA 284 at [236].

81 See for example Andrew Serpell 'Treating Consumers Fairly in the Australian Financial Services Sector' (2010) 25(1) *Australian Journal of Corporate Law* 26, 39-41

## Recent Cases

### [136] Administrators seek leave to transfer shares

*Ben Langford, Lawyer, Ashurst*

*Lewis, in the matter of Diverse Barrel Solutions Pty Ltd (Subject to a Deed of Company Arrangement)* [2014] FCA 53 (7 February 2014, White J)

[CA ss 435A, 444GA, 601AD]

*Court grants leave to transfer shares for no consideration where shares have no residual value.*

#### Facts