

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL COURT
BETWEEN

SCI 2013 01477

THE TRUST COMPANY (NOMINEES) LIMITED (ACN 004 134 441)

Plaintiff

and

MICHAEL FUNG IN HIS CAPACITY AS RECEIVER AND MANAGER OF ALIGN
FUNDS MANAGEMENT LIMITED (RECEIVER & MANAGER APPOINTED)
(ACN 105 684 231) IN ITS CAPACITY AS THE RESPONSIBLE ENTITY OF THE
TIMBERCORP ORCHARD TRUST & ORS

Defendants

SECOND AFFIDAVIT OF YU-CHIAO HSUEH

Date of document: 25 March 2014
Filed on behalf of: The Second and Third Defendants
Macpherson + Kelley
Lawyers
Level 22, 114 William Street
MELBOURNE VIC 3000

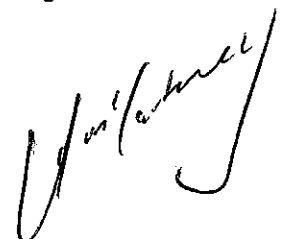
Solicitor's Code: 041547
DX 174 Melbourne
Tel: 03 8615 9900
Fax : 03 8615 9999
Ref: MJF:229731
Email: michael.fernon@mk.com.au

I, **YU-CHIAO HSUEH** of Level 22, 114 William Street, Melbourne, solemnly and sincerely declare and affirm that:

- 1 I am an employee of the firm Macpherson + Kelley Lawyers (**M+K Lawyers**), the solicitors for the Second and Third Defendants, being the persons appointed as representatives of all of the growers in the Timbercorp project of which they are a member (together the **Representative Growers**). I have carriage of this matter on behalf of the Representative Growers under the supervision of my principal, Michael Fernon, and I am authorised to make this affidavit on their behalf.
- 2 Except where otherwise indicated, I make this affidavit from my own knowledge. Where I depose to matters from information or belief, I believe those matters to be true.
- 3 M+K Lawyers also acts for growers appointed as representative growers in the Timbercorp Kangara Rights Proceeding (Supreme Court of Victoria Proceeding No S CI 2013 01478).
- 4 I make this affidavit in connection with the application for approval of the deed of compromise of this proceeding executed by the parties on 14 January 2014 (**Deed of Compromise**).

Advice to the Representative Growers

- 5 Prior to entering into the Deed of Compromise, the Representative Growers sought and received the advice of Senior and Junior Counsel.



- 6 On 11 November 2013, I held a conference in person with the Second Defendant, Garry Bigmore QC (in attendance by telephone) and Samuel Hopper of Counsel. During this conference, Counsel provided their advice to the Second Defendant verbally and answered his queries.
- 7 On 15 November 2013, I held a conference over the telephone with the Third Defendants and Messrs Garry Bigmore QC and Samuel Hopper. During this telephone conference, Counsel provided their advice to the Third Defendants verbally and answered their queries.
- 8 On 18 November 2013, I provided the Representative Growers with a copy of Counsel's written advice (**Advice**) by email. Now produced and shown to me marked **confidential exhibit YCH-3** are copies of the emails to the Representative Growers dated 18 November 2013 enclosing the Advice. The Advice and my correspondence to the Representative Growers are privileged and they do not waive that privilege.
- 9 On 20 December 2013, I provided the Representative Growers with the final Deed of Compromise for execution along with a supplementary advice from M+K Lawyers explaining the amendments made to the Deed of Compromise since the Advice was given to them. Now produced and shown to me marked **confidential exhibit YCH-4** are copies of the letters to the Representative Growers dated 20 December 2013. This letter is privileged and the Representative Growers do not waive that privilege.
- 10 Confidential exhibits YCH-3 and YCH-4 are contained in a sealed envelope and the Representative Growers will make an application for an order that they be kept confidential. The other parties to the proceeding have been informed of that application and have consented to it.
- 11 A copy of the Advice will be provided to any grower (or their solicitor) who requests a copy of it and who provides to M+K Lawyers a deed acknowledging and undertaking to protect the confidentiality and privilege of the advice.
- 12 As at the date of this affidavit, no grower has requested a copy of the Advice.

Steps taken pursuant to the Deed of Compromise

- 13 On 14 January 2014, the parties to this proceeding and Timbercorp Securities Limited (in liquidation) (**TSL**) executed the Deed of Compromise in this proceeding. A copy of the Deed of Compromise is exhibited to the Second Affidavit of Clinton Charles Hinchin dated 12 March 2014 (**Second Hinchin Affidavit**) at exhibit **CCH-3**.
- 14 Unless otherwise defined, capitalised terms in this section of this affidavit adopt the definition given to that term in the Deed of Compromise.
- 15 Pursuant to clause 6.1(a) and (b) of the Deed of Compromise, the Representative Growers through their solicitors M+K Lawyers prepared and conferred with the other Parties in good faith to finalise the First Notice to Participant Growers.

- 16 Pursuant to clause 6.1(c)(xvi), the Representative Growers through their solicitors M+K Lawyers have prepared a set of frequently asked questions and related answers (**FAQ**) for the benefit of growers who would be receiving the First Notice to Participant Growers and finalised those terms in good faith with the other Parties.
- 17 Pursuant to clause 6.2(a) of the Deed of Compromise, the Representative Growers caused M+K Lawyers to upload the First Notice to Participant Growers on the M+K Lawyers website. The First Notice to Participant Growers was uploaded on the M+K Lawyers website on 3 March 2014.
- 18 Pursuant to clause 6.2(b) of the Deed of Compromise, the Representative Growers have through their solicitors M+K Lawyers instructed TSL to:
- (a) cause the First Notice to Participant Growers to be uploaded on the KordaMentha and Arnold Bloch Leibler websites;
 - (b) send to all of the Participant Growers a short letter notifying them of the First Notice to Participant Growers (**First Letter to Participant Growers**);
 - (c) publish an advertisement in *The Australian* newspaper containing similar information as that set out in the First Letter to Participant Growers (**Advertisement**).
- 19 I am informed by Jing Chang of Arnold Bloch Leibler (solicitors for TSL) and believe that:
- (a) on 3 March 2014, the First Letter to Participant Growers was sent to them by post and by email to their last known postal and email addresses most recently communicated to TSL;
 - (b) on 3 March 2014, the First Notice to Participant Growers and FAQ were uploaded on the KordaMentha website;
 - (c) on 3 March 2014, the First Notice to Participant Growers and FAQ were uploaded on the ABL website; and
 - (d) on 4 March 2014, the Advertisement was published.

Copies of the First Letter to Participant Growers, FAQ and the Advertisement are exhibited to the Third Hinchey Affidavit at exhibit **CCH-4**.

- 20 Pursuant to clause 9(b) of the Deed of Compromise, the Representative Growers through their solicitors M+K Lawyers requested that TSL establish and operate an appropriate telephone hotline facility and email facility to receive and, in accordance with instructions from the Representative Growers, address comments and questions from growers in connection with the Deed of Compromise and the Approval Application and receive any objections to the Deed of Compromise made by the growers (**Grower Notification and Consultation Process**).

- 21 Pursuant to clause 9(e) of the Deed of Compromise, TSL was required to provide the Representative Growers on a timely basis a record with appropriate detail of:
- (a) all comments, questions and answers given by TSL in accordance with the protocol agreed pursuant to clause 9(d) of the Deed of Compromise, which did not require preparation of a response by the Representative Growers;
 - (b) all comments and questions requiring preparation of a response from the Representative Growers;
 - (c) any objections by the growers to which TSL has provided a response in accordance with the agreed protocol; and
 - (d) any objections requiring the preparation of a response by the Representative Growers.
- 22 During the Grower Notification and Consultation Process, I received emails from Ishbel Moodie on behalf of TSL attaching a spreadsheet which recorded details of all telephone, email and facsimile communications with growers for periods from 3 March 2014 to 12 March 2014 (inclusive) and 13 March 2014 to 23 March 2014 (inclusive) during the course of the Grower Notification and Consultation Process (**Communication Spreadsheets**). Now produced and shown to me marked **confidential exhibit YCH-5** is are copies of the emails from Ishbel Moodie of TSL attaching the Communication Spreadsheets.
- 23 Confidential exhibit YCH-5 is contained in a sealed envelope and the Representative Growers will make an application for an order that they be kept confidential as the Communication Spreadsheets contain Growers' personal information.
- 24 Under clause 9(d) of the Deed of Compromise, any comments, questions and objections of which TSL was unable to respond was to be escalated to M+K Lawyers as the Representative Growers' solicitors (**Escalated Queries or Comments**). As at the date of this affidavit, no such requests, comments or objections were passed onto M+K Lawyers.

Results of the Grower Notification and Consultation Process

- 25 I have read the Communication Spreadsheets and note that a total of 49 growers made comments or questions in relation to the Deed of Compromise. Among them:
- (a) 12 growers had difficulties accessing the First Notice to Participant Growers, FAQ, Bank Account Nomination Form and/or Direction to Pay Form and/or requested that they be emailed or posted to them;
 - (b) four growers requested information in relation to the particulars of their investments such as how many lots they had invested in or which scheme they had invested in;
 - (c) four growers requested financial information such as how much they were entitled to under the Deed of Compromises or how much TSL or TFL indebtedness they had;

- (d) 15 growers returned their Bank Account Nomination Form and/or their Direction to Pay to TSL;
- (e) five growers requested more information about the Deed of Compromise in general;
- (f) five growers notified TSL of a change of address or change of contact details;
- (g) no growers lodged objections or made Escalated Queries or Comments; and
- (h) there were also 12 Return to Sender notifications sent to TSL.

26 On 24 March 2014, I sent an email to Jing Chang of Arnold Bloch Leibler, TSL's solicitors, that relevantly stated:

I note that there are a number of growers with corresponding entries marked "RTS". Are you able to find out from your client if any steps have been taken to provide the communications to such growers?

On the same day, I received the following response from Ms Chang of Arnold Bloch Leibler:

I have passed on your query and asked my client for further details. I will let you know their response.

Now produced and shown to me marked **YCH-6** is a copy of the email exchange between Ms Chang and me dated 24 March 2014.

27 Separately:

- (a) I directly received a number of telephone calls from two growers in relation the First Notice to Participant Growers. I provided them with information of a general nature regarding the Deed of Compromise and this proceeding and referred both of them to the hotline for details relating to their particular investments; and
- (b) M+K Lawyers received an email request from a grower requesting that their mailing address be updated. I forwarded this request to the Timbercorp investor queries email address specified in the First Notice to Participant Growers.

Affirmed by **YU-CHIAO HSUEH**)

at *Melbourne* in the State of Victoria)

this *25th* day of March 2014)

Before me: *[Signature]*

BEFORE ME
Anne Louise McCartney
 An Australian Legal Practitioner
 (within the meaning of the Legal Profession Act 2004)
 Level 22, 114 William St, Melbourne Vic 3000