

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

LIST E

No 9998 of 2009

IN THE MATTER OF TIMBERCORP SECURITIES LIMITED
(IN LIQUIDATION)

ACN 092 311 469

TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)
ACN 092 311 469 IN ITS CAPACITY AS RESPONSIBLE
ENTITY OF EACH OF THE MANAGED INVESTMENTS
SCHEMES LISTED IN SCHEDULE 1 OF THE ORIGINATING
PROCESS AND ORS ACCORDING TO THE SCHEDULE
Plaintiffs

AFFIDAVIT OF ANDREW MALARKEY

Date of document: 11 November 2009

Filed on behalf of: the Plaintiffs

Prepared by:

Arnold Bloch Leibler
Lawyers and Advisers
Level 21
333 Collins Street
MELBOURNE 3000

Solicitor's Code: 54
DX 38455 Melbourne
Tel: 9229 9999
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Ref: 011499489

(Leon Zwier lzwier@abl.com.au/
Bridgette Toy-Cronin btoycronin@abl.com.au)

I, **ANDREW MALARKEY** of Level 24, 333 Collins Street, Melbourne, Chartered Account, **SAY**
ON OATH that:

- 1 I am a chartered accountant and a partner of the firm KordaMetha Pty Ltd (ACN 100 169 391) (**KordaMentha**). My partners Mark Korda, Leanne Chesser and Mark Mentha are the Third, Fourth and Fifth Plaintiffs (**Liquidators**) and are the liquidators of the other plaintiffs.
- 2 Except where I otherwise indicate, the matters deposed to in this affidavit are deposed to from my own personal knowledge of the facts. Where I depose to matters from information and belief, I believe such matters to be true.

- 3 I am the partner responsible for the operation of the Timbercorp horticulture assets and management of the sale or recapitalisation process.
- 4 I have read the affidavit of Mark Anthony Korda filed in this proceeding. In that affidavit he defines a number of terms and I adopt those definitions here.

Stephen Blair's Bid

- 5 One of the bids made for the Olive Assets was by Stephen Blair. A summary of Stephen Blair's bid appears in confidential exhibit MAK-17 to Mark Korda's affidavit.
- 6 On 6 October 2009, I met with Stephen Blair to discuss his bid. I had a number of concerns about his bid including that:
- (a) His bid consisted only of a one page Excel schedule and we required a written expression of interest providing further information;
 - (b) He and his equity provider (whose identity he would not disclose) had only undertaken preliminary due diligence and would not conclude his due diligence by 9 October 2009 when we intended to select a preferred bidder; and
 - (c) He did not have funding in place to manage the olive groves to completion.
- 7 On 7 October 2009, I sent a letter to Stephen Blair recording these concerns. Now produced and shown to me marked **AM-1** is my letter to Stephen Blair of 7 October 2009. He did not reply to this letter or provide any of the further information requested. His bid was not therefore successful.

Great Land Olives Limited (GLO) Rejected Bid

- 8 Another of the unsuccessful bids was from GLO. George Kalil is a director of GLO and I have read the draft affidavit of George Kalil provided by Clarendon Lawyers on 10 November 2009. George Kalil is also a Grower in the 2000 Private Offer Scheme and a member of the TSL Committee of Inspection (**Committee of Inspection**).
- 9 GLO made a bid which it then revised and resubmitted during the bidding process. I wrote to George Kalil on 9 October 2009 commenting on GLO's revised bid and requesting further information. This included requests for details of any conditions associated with the proposed debt of \$1.5m, details of funding for reimbursing BBL for the maintenance of the olive groves, the conditions attaching to the appointment of a new RE, GLO's own funding and details of the underwriting agreement. The letter appears as exhibit GK-11 to George Kalil's draft affidavit.



- 10 George Kalil's reply appears as exhibit GK-12 to his draft affidavit. It did provide information requested but not the material required to satisfy my concerns. For example, he asserted that funding was available but did not support this with evidence.
- 11 Given the conditions of GLO's bid it presented a significant completion risk. GLO also only made an offer for the Boort Scheme assets. It was therefore not the most favourable bid, taking into account all the relevant factors including price, ability to fund the assets prior to completion, and completion risk. George Kalil said he was disappointed at his bid being rejected. He wrote to me on 13 October 2009 (exhibited as GK-14) expressing his disappointment and making a number of allegations with which I disagreed. I replied on 15 October 2009 (exhibited as GK-15) and responded to the allegations and explained why we considered the BBL offer was superior to GLO's offer.

GLO's New Bid

- 12 In his affidavit George Kalil puts forward a new GLO bid. I believe he has done so only after reading Mark Korda's affidavit which provided greater detail of the BBL offer. He has had every opportunity from the earliest time in the process to put forward a competitive bid. He has been fully appraised of the developments during the liquidation. He appeared in person during the winding up application in the Supreme Court in July 2009. He is a member of the Committee of Inspection and the TGG and has attended meetings with the Liquidators in those capacities. I have met with him and corresponded with him for many months over the numerous queries he has raised and provided him with information. The bid set out in the affidavit comes 4 weeks after the BBL bid was accepted. The Liquidators have entered into an agreement with BBL.
- 13 In any event, leaving aside other issues, the GLO bid set out in the affidavit has a number of aspects that demonstrate it is not more favourable than BBL's bid:
- (a) The conditions of the bid mean that it has a significant completion risk, a risk that is much greater than BBL's bid:
 - (i) The \$54m relies on capital raising from Growers who may or may not be willing to invest more funds. George Kalil deposes that "the majority of growers wanted the schemes to continue". This is based on voting at the Olive Meetings on "aspirational" resolutions. While a majority of Olive Growers who voted at the Meetings voted in favour of the Schemes continuing, a minority of Growers (by size of investment) actually voted at the Meetings. Furthermore, when those Growers voted they were not

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being asked to contribute further funds. There is no certainty that a sufficient number of Growers will participate in capital raising.

- (ii) George Kalil deposes that only \$15m of the purchase price is underwritten. I have no information about the ability of the underwriter to meet that commitment, the terms of that underwriting or evidence from the underwriter such an agreement exists;
 - (iii) Working capital is to be obtained from an unnamed "first tier bank". There is no evidence of a commitment from this bank.
- (b) The payment of the purchase price is also delayed with only \$6m of the purchase price paid within 30 days and the remaining \$54m is payable within 5 months. This delays completion and means the operational risk remains with the Liquidators in the interim;
 - (c) I believe GLO has minimal infrastructure or employees. There would be considerable operational risk in transitioning management of the orchards from BBL to GLO. This risk would be borne by the Liquidators as completion under the GLO offer is not anticipated until Feb 2010;
 - (d) There is no information about how GLO would harvest and process fruit at the Boundary Bend groves. The processing facility is owned by the Boundary Bend companies and is not part of the Olive Assets for sale.
- 14 As a general observation, liquidators would never be able to sell and realise assets if the underbidders can seek to impugn the sale transaction entered into.

Crop Sale Agreements with Boundary Bend

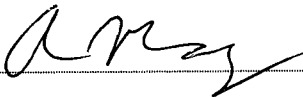
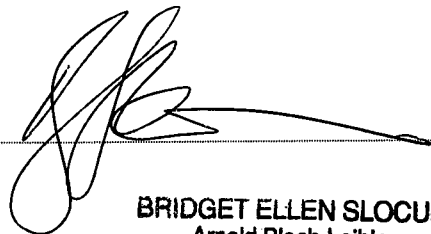
- 15 George Kalil also questions BBL's expenditure on maintenance of the olive groves (paragraphs 32- 37 of George Kalil's draft affidavit).
- 16 The payment to BBL was to pay them for the maintenance services they had provided. They had taken the risk that they might not be paid for the services they had provided, for example if the crop was lost due to hail, fire, flood or drought. BBL were only prepared to take this risk on the basis that the sale process that KordaMentha was undertaking would result in them being paid for those services. Select Harvest who maintain the almond orchards faced the same risks and wanted the same assurance. The Liquidators were not in a strong negotiating position. They were faced with a wasting crop and the only real option was to use existing managers to perform limited services.

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- 17 George Kalil was aware of the details of the arrangement with BBL as these arrangements were openly discussed at the Committee of Inspection meetings and copies of the crop sale agreements were tabled. He is a member of the Committee of Inspection and attended the relevant meeting. He insisted on a minor amendment to the crop sale agreements which we made. He then voted in favour of them.
- 18 George Kalil deposes to a request that he made for details of BBL's September expenditure. BBL have provided an explanation as to why horticultural conditions resulted in an actual expenditure that was lower than \$1.7m budgeted for September. This included rainfall, timing of pruning to avoid frosts, and the delay of fertilisation due to higher than expected rainfall. Now produced and shown to me marked **AM-2** is an email from Leandro Ravetti and Rob McGavin explaining those horticultural conditions. BBL and the Liquidators have also executed an extension to the crop sale agreements which includes a provision to reconcile the amount paid to BBL for maintenance against the amount actually spent. That agreement appears as confidential exhibit MAK-32 to the affidavit of Mark Korda.

SWORN by the abovenamed deponent at)
 Melbourne in the State of Victoria)
 this 11th day of November 2009)

Before me:

BRIDGET ELLEN SLOCUM
 Arnold Bloch Leibler
 Level 21, 333 Collins Street
 Melbourne 3000
 An Australian Legal Practitioner within the
 meaning of the Legal Profession Act 2004

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TIMBERCORP SECURITIES LIMITED
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IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE
MANAGED INVESTMENTS SCHEMES LISTED IN SCHEDULE 1
AND ORS ACCORDING TO THE SCHEDULE

Plaintiffs

CERTIFICATE OF EXHIBIT

Date of document: 11 November 2009
Filed on behalf of: the Plaintiffs

Prepared by:
ARNOLD BLOCH LEIBLER
Lawyers and Advisers
Level 21
333 Collins Street
MELBOURNE 3000

Solicitor's Code: 54
DX 38455 Melbourne
Tel: 9229 9999
Fax: 9229 9900
Ref: 01-1499489
(Leon Zwier lzwier@abl.com.au)

This is the exhibit marked "**AM**.-1" now produced and shown to **ANDREW MALARKEY** at the time of swearing his affidavit on 11 November 2009.

Before me: _____

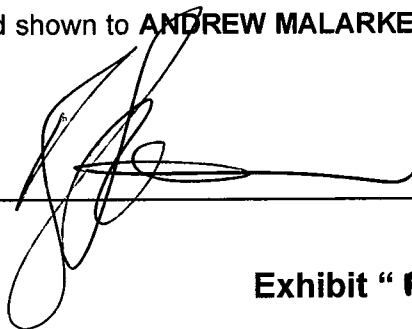
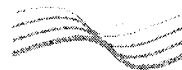


Exhibit "**AM**.-1"

Letter to Stephen Blair of 7 October 2009

BRIDGET ELLEN SLOCUM
Arnold Bloch Leibler
Level 21, 333 Collins Street
Melbourne 3000
An Australian Legal Practitioner within the
meaning of the Legal Profession Act 2004

"AM-1"



KordaMentha

7 October 2009

Stephen Blair
"Telford"
4 Hindleton Road
Tallangatta VIC 3700

By email: stephenblair@ozemail.com.au

Dear Stephen

Olivecorp Land Pty Ltd (In Liquidation) and BB Olives Pty Ltd (In Liquidation)

I refer to our meeting on 5 October 2009 and your interest in certain assets of the above companies ("the Olive Assets").

As you are aware, we called for final, unconditional offers on 2 October 2009 and advised you we would look to select a preferred bidder and execute a Sale and Purchase Deed in the week commencing 5 October 2009. To date we have only received a one page Excel schedule from you and, despite repeated assurances from yourself that you would be providing a written expression of interest providing further information in relation to your interest in the Olive Assets, we have not received anything further.

Time is of the essence. As previously notified to you, the incumbent service provider (Boundary Bend) ceased to manage the olive groves on 30 September 2009 and, at present, no work is being undertaken to manage and preserve the groves. It is imperative to execute a Sale and Purchase Deed as soon as possible with a party who is willing and capable of funding the management of the olive groves until completion of a sale.

At our meeting on 6 October 2009 you confirmed, amongst other things, the following:

- You have only undertaken preliminary due diligence (commenced on Thursday 1 October 2009);
- Your proposed equity provider has only undertaken preliminary due diligence and, at this stage, they are uncommitted and not willing to disclose their identity;
- You have had only preliminary discussions with a proposed debt provider (Rabobank) and, at this stage, do not have a term sheet or a letter of comfort from them;
- You have not yet reverted with any comments in relation to the proposed Sale and Purchase Deed;
- You do not wish to continue with the incumbent service provider and have identified an alternative service provider (albeit you are not willing to disclose their identity at this stage);
- You understand the need to manage the olive groves prior to completion but you do not have funding in place to enable the groves to be managed; and

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- You confirmed that you will not be in a position to conclude your due diligence by Friday 9 October 2009 and therefore any Sale and Purchase Deed entered into on or around that date would be conditional upon further due diligence.

In the absence of a detailed expression of interest satisfactorily addressing the issues raised above, we are not able to progress your interest in the Olive Assets. We are continuing to negotiate with other parties with a view to executing a Sale and Purchase Deed.

Yours sincerely

A handwritten signature in black ink, appearing to read 'A Malarkey', written in a cursive style.

ANDREW MALARKEY
For MARK KORDA
Liquidator

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CERTIFICATE OF EXHIBIT

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Prepared by:

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(Leon Zwier lwier@abl.com.au)

This is the exhibit marked "**AM-2**" now produced and shown to **ANDREW MALARKEY** at the time of swearing his affidavit on 11 November 2009.

Before me: 

Exhibit "**AM-2**"

Emails of 8 and 16 October 2009 regarding horticultural requirements

BRIDGET ELLEN SLOCUM

Arnold Bloch Leibler

Level 21, 333 Collins Street

Melbourne 3000

An Australian Legal Practitioner within the
meaning of the Legal Profession Act 2004

Anne Treleaven

From: Rob McGavin [mcgavin@riverland.net.au]
Sent: Friday, 16 October 2009 9:30 AM
To: Andrew Malarkey
Cc: Andrew Ryan; 'Ravetti, Leandro'; Paul Riordan
Subject: FW: Boort

Hi Andrew

I would like you to read the email chain below. As you know Leandro is BBL's technical director and you will see I sent him an email on the 7th of October and he responded on the 8th.

I hope this helps clarify the management of the groves to the end of October.

cheers

Rob McGavin
0418 955363

From: Leandro Ravetti [mailto:l.ravetti@modernolives.com.au]
Sent: Thursday, 8 October 2009 1:38 PM
To: 'Rob McGavin'
Cc: 'Paul Riordan'
Subject: RE: Boort

Hi Rob,

Thank you for your email. First of all, I would like to clarify that all technical activities performed at both groves (Boundary Bend/Wemen and Boort) over the past months have been carried out according to your instructions. That is to continue managing the grove as we always did aiming to the maximum possible level of cost-efficiency and according to the best horticultural practices with special emphasis on maintaining at all costs the 2010 crop potential.

In the case of the Boundary Bend/Wemen groves irrigation and fertilisation were carried out as planned with minimal variations mainly due to slightly above average rainfall in September (40.5mm (Actual) vs. 27.9mm (Budget)). Consequently, Boundary Bend/Wemen groves received to date just 130ML less than budgeted (-9%) but a bit more than that was compensated by the additional rain (1mm = 11.3ML at BBE, hence 12.6mm x 11.3ML = 142ML).

Fertilisation in the form of fertigation, particularly Nitrogen, Phosphorus and Potassium has been carried out as per budget with an approximate difference of 8%. This difference is proportional to the irrigation water reduction. As you know, there is no point in loading up fertiliser applications to compensate as this fertiliser will be deep leached with negative economic and environmental consequences.

Pruning work has been carried out as planned. Almost all the older trees that required manual pruning have been pruned, particularly in the higher areas where there were no frost risks. Pruning of younger trees has been always conducted between October and November to avoid possible frost damage.

In the case of the Boort Grove, water application and fertilisation were carried out as planned with some variations related to above average rainfall levels in September (49.6mm (Actual) vs. 28.3mm (Average) - Charlton data from weatherzone.com). Consequently, the Boort grove received approximately 193ML of irrigation water during September vs. 778ML budgeted. The difference has been mostly supplied by the excess rainfall. At Boort, 1mm = 25.52ML across the farm, hence an excess of 21.3mm equals 544ML. Consequently, 193ML irrigation + 544ML excess rainfall = 737ML of water vs. 778ML budgeted (-5%). This minor variation is explained by the lower than average minimum temperatures that led to a lower than anticipated ETo for September. This water analysis

9/11/2009

is important to explain the forced variations in the fertilisation program. Despite the reduced amount of irrigation, there was a lot of activity in that front bringing all the Enviroscan back on line after harvest and the power blackout and adjusting all valve pressures after the guarantee drip line replacement job.

Due to the restricted amount of water that we could apply as a consequence of the excess rainfall, the technical team decided to give priority to the nitrogen (the most critical element at this time of the year) over other elements which are naturally present in the Boort soils such as Potassium and Phosphorus. As it was explained before, it is not technically sound to increase the concentration of fertilisers as we would be increasing the salinity of the water, risking deep leaching of chemical products and wasting money. Furthermore, the nutritional levels of those elements in the leaf analysis performed early this year indicate an excellent nutritional balance that would not compromise by any means the development of the trees and flowering potential during these early stages. All required nitrogen was applied as per the budget.

Regarding pruning, it is important to point out that one of our main objectives with pruning is not only to maintain the shape of the trees but also to be able to adjust the crop load with adequate branch thinning. Consequently, any pruning work needs to start only once we have a good idea of the flowering potential of the different areas. The wetter and cooler conditions at Boort delayed the budding process by 2-3 weeks and it is only now at the beginning of October that there is a good enough indication of the flowering potential of the different areas in the grove. Furthermore, there has been some late September frost warnings which in combination with the previous explanation determined that delaying the pruning activities for a few more weeks was the most technically sound alternative. Given the cold fronts that went across Victoria during the last part of September, I am glad that we made this decision; otherwise the crop potential for 2010 could have been seriously compromised. At a more general level, we conducted a couple of workshops with the key groves' staff about what pruning needed to be carried out and they are fully trained on that and we have already organised and trialled the mechanical pruning works (Height, angles, etc.) that will need to be performed between November and January as planned.

Kindest regards,

Leandro

Leandro Ravetti
Technical Director
Modern Olives
Mbl: 0407 694 089
Ph: 03 5272 9550
Fax: 03 5272 9599

From: Rob McGavin [mailto:mcgavin@riverland.net.au]
Sent: Wednesday, 7 October 2009 9:11 PM
To: l.ravetti@modernolives.com.au
Cc: Paul Riordan
Subject: Boort

Hi Leandro

One of the Timbercorp MIS growers is questioning the amount of fertilizer and pruning that we carried out at Boort during September. Can you please confirm what occurred.
cheers

Rob McGavin
0418 955363
BOUNDARY BEND LIMITED

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9/11/2009

natural, full of antioxidants and is cholesterol and preservative free.

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- **'Best Oil in Show' – 2008 Royal Canberra Show Olive Oil Competition – Cobram Estate**
- **2008 Australian Olive Grove of the Year – Boundary Bend Management (Boort) / Boort Estate**
- **Australian Agribusiness Exporter of the Year 2007**
- **Cobram Estate – Australia's most awarded olive oil brand - 2 best in show, 10 gold, 15 silver, 14 bronze**

address: PO Box 92 | Lara | Victoria | 3212 | AUSTRALIA | web: www.boundarybend.com

phone: +61 3 5272 9500 | fax: +61 3 5272 9599 | email: mcgavin@riverland.net.au

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