

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

LIST E

No 7114 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
First Plaintiff**

**MARK ANTHONY KORDA and LEANNE CHESSER
Second and Third Plaintiffs**

**AFFIDAVIT OF ANDREW MALARKEY
IN SUPPORT OF APPLICATION FOR APPOINTMENT OF SPECIAL PURPOSE
LIQUIDATOR**

Date of document: 18 September 2009

Filed on behalf of: the Plaintiffs

Prepared by:

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

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Ref: 011499489
(Leon Zwier)

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) (**KordaMetha**). My partners Mark Korda and Leanne Chesser are the Second and Third Plaintiffs and are liquidators of the First Plaintiff (**Liquidators**), Timbercorp Securities Limited (In Liquidation) (ACN 092 311 469) (**TSL**). Mark Korda, along with our partner Mark Francis Xavier Mentha, is also the liquidator of Olivecorp Land Pty Limited ACN 090 141 512 (In Liquidation) (**Olivecorp**).

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- 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.

TSL and Olivecorp


- 4 TSL is the responsible entity of the **Olive Schemes** (those numbered 8-14 in Schedule 1 of the Originating Process). In the 2001, 2002, 2003 and 2004 Olive Schemes, Olivecorp owns land on which the Olive Schemes are operated (**Land**). Olivecorp leases the Land to TSL.
- 5 In the 2003 and 2004 Olive Schemes, TSL subleases the Land to the Growers. In the 2001 and 2002 Olive Schemes, TSL leases the Land back to Olivecorp and Olivecorp then associates itself with the Growers in a licence and joint venture agreement (**LJVA**). The LJVA grants the Growers a licence to occupy the Land.
- 6 The details of the lease arrangements differ for each Olive Scheme and are described in paragraph 5.2 of each of the Olive Scheme affidavits of Mark Antony Korda sworn 3 July 2009 and in MAK-14 in each of the Olive Scheme affidavits of Mark Antony Korda sworn 9 July 2009.

Sale or Recapitalisation Process

- 7 On 13 August 2009, the Liquidators initiated a sale or recapitalisation process for the Olive Schemes. The sale or recapitalisation process for the Almond Schemes (those numbered 1-7 in the originating process) is explained in the affidavit of Mark Antony Korda sworn 17 August 2009 (paragraphs 43-49) and filed in this proceeding. The process is the same for the Olive Schemes.
- 8 Final bids for the olive assets closed on 11 September 2009. The Liquidators are now negotiating with the bidders.

Olivecorp's and TSL's Interests in the Sale or Recapitalisation

- 9 If a sale proceeds, a purchaser may require Olivecorp to sell the land free from all encumbrances. In order for Olivecorp to sell the land unencumbered, Olivecorp's lease to TSL and TSL's sublease to the Growers (or Olivecorp's LJVA in respect of the 2001 and 2002 Olive Schemes) may need to be surrendered. TSL has amended the Olive Scheme constitutions granting TSL the power to surrender the sub-leases and LJVAs on behalf of each Grower.

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- 10 In order for TSL to exercise the power to surrender the sub-leases or LJVA, TSL and Olivecorp may need to reach agreement about the value of the sub-lease or LJVA. That is, they may need to agree a dollar amount to be assigned as consideration for the surrender of the sub-lease or LJVA. The agreement between Olivecorp and TSL would be exchanged contemporaneously, or as a condition precedent, with the agreement between Olivecorp and the purchaser.
- 11 As has previously been explained to the Court in this proceeding, there are potential issues of conflict in the liquidators fulfilling the role of liquidator for multiple Timbercorp Group Companies. In this case, one of the liquidators of Olivecorp and TSL is the same person. A potential for conflict arises if a liquidator has to negotiate with himself to determine the price for the surrender of the sub-leases or LJVA.
- 12 The same issue arose in relation to the Almond Schemes, though in the Almond Schemes the Liquidators are both the liquidators of TSL and the land owning company. In relation to the Almond Schemes, the Liquidators retained Ian Carson of PPB by private treaty to fulfil the role of special purpose liquidator to assist them. Mr Carson has been a Chartered Accountant for over 20 years and is a managing partner of PPB. Now produced and shown to me marked **AM-1** is a copy of Mr Carson's curriculum vitae. On 14 September 2009 Justice Robson of the Supreme Court of Victoria directed that the Liquidators were justified in entering into the retainer with Mr Carson.
- 13 In relation to the Olive Schemes, the application is for a Court appointed special purpose liquidator, rather than by private treaty.
- 14 The scope of Mr Carson's appointment in relation to the Olive Schemes is to be limited to the following matters:
- 14.1 to negotiate with Olivecorp, on behalf of the TSL, either alone or with the Liquidators, the extinguishment or surrender of any lease between Olivecorp and TSL (**Head Lease**);
 - 14.2 to negotiate with Olivecorp, on behalf of TSL, either alone or with the Liquidators, the extinguishment or surrender of any lease, sublease or licence between TSL and third parties including but not limited to the grower investors claiming an interest in or in respect of land leased by Olivecorp to TSL (**Subleases**);
 - 14.3 to engage jointly with the Liquidators one or more experts as deemed necessary to assist the Special Purpose Liquidator, in relation to the matters set out in orders 14.1 and 14.2; and

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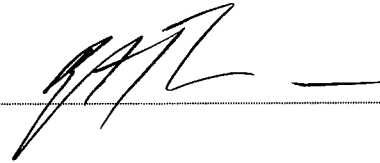
14.4 to provide, if deemed necessary or appropriate, to the Court a report which identifies the activities undertaken by the Special Purpose Liquidator in discharging the above functions.

15 The Liquidators therefore seek an order pursuant to s 511 of the *Corporations Act (Cth) 2001* that Mr Carson be appointed as special purpose liquidator, without limiting the powers and duties of the Liquidators, to fulfil the role described in paragraph 14 above.

SWORN by the abovenamed deponent at)
Melbourne in the State of Victoria)
this 18th day of September 2009)



Before me:



BRIDGETTE AILSA TOY-CRONIN
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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First Plaintiffs**

**MARK ANTHONY KORDA and LEANNE KYLIE CHESSER
Second and Third Plaintiffs**

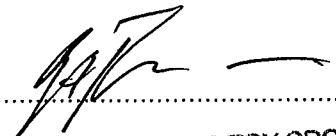
CERTIFICATE IDENTIFYING EXHIBIT

Date of document: 18 September 2009
Filed on behalf of: the Plaintiffs
Arnold Bloch Leibler
Lawyers and Advisers
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333 Collins Street
MELBOURNE 3000

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This is the exhibit marked **AM-1** now produced and shown to **ANDREW MALARKEY** at the time of swearing his affidavit on 18 September 2009.

Before me:


BRIDGETTE AILSA TOY-CRONIN
Arnold Bloch Leibler
Level 21, 333 Collins Street
Melbourne 3000
an Australian Legal Practitioner within the
meaning of the Legal Profession Act 2004

**Exhibit AM-1
Copy of Ian Carson's CV**



Ian Carson

Ian is Managing Partner in Melbourne PPB office and a PPB Board member.

Background and significant appointments

Ian has been a Chartered Accountant for over 20 years, forming Carson & McLellan PPB in 1992, after spending 12 years at Coopers & Lybrand, Melbourne.

Some significant recent appointments include:

- Advisor to MFS Living and Leisure - advisor on restructure and recapitalisation of \$100m rights issue;
- City Pacific - Receiver;
- Global Property Trust - \$1b in assets;
- Parmalat - advisor to syndicate - \$200m workout;
- Property - major Australian listed company involving in the order of \$2b of assets;
- Confidential Review of Global Enterprise - \$8b turnover – manufacturer, advising bank syndicate;
- Reach Telecommunications - advised member of banking syndicate;
- ION Australia - advised secured creditor;

Recent MIS Roles of Ian

Primary Yield Finance Pty Ltd
(Receivers and Managers appointed)

Ian is currently acting as Receiver and Manager of Primary Yield Finance Pty Ltd (Receiver and Manager appointed)(PYF). PYF provided finance to investors in MIS that were managed by Environinvest Limited (Receiver and Manager appointed)(EIL).

Acting as Receiver has involved:

- Managing the collection of PYF's loan book;
- Providing strategic advice to the secured creditor of PYF, regarding the enforcement of its rights stemming from the assignment of loans originated by PYF and other EIL group companies;
- Providing assistance to the court appointed Receiver charged with assessing the viability and solvency of EIL schemes;
- Negotiating with lawyers representing investors in the various EIL schemes; and
- Coordinating the company's involvement in legal proceedings, currently before the Supreme Court of Victoria.

Treecorp Group

Ian was appointed Receiver and Manager of companies within the Treecorp Group, including the Responsible Entity for a number of forestry MIS. Undertaking the receivership involved dealing with the following issues:

- Managing the ongoing forestry operations;
- Conducting a sale of group assets including softwood plantations, freehold property, nursery operations and a sawmill.
- Dealing with the claims of approximately 3,000 growers to an interest in group assets, including establishment of a hotline to deal with grower enquiries about the receivership process and the receiver's realisation strategy; and
- Liaison with ASIC regarding the competing claims being made by various stakeholders to the group's assets.

Industry experience and specialised expertise

Ian is experienced in corporate recovery, business turnarounds, investigations and strategic financial advice.

He has been involved in numerous reviews of businesses, many in the manufacturing industry. Ian has acted for industry funds in assessing fund managers and due diligence on alternative asset investments; has carried out due diligence reviews of management buy-outs on behalf of private equity funds; and worked to ensure businesses are 'investment ready'.

He specialises in private equity, property/property trusts, MIS schemes, agriculture and telecommunications.

Ian represented the Australian Institute of Directors on the Voluntary Administration Law Reform Committee of the Insolvency Practitioners Association of Australia and is a member of the Federal Court Insolvency Users Group.

Qualifications and memberships

Bachelor of Economics Degree
Post Graduate Diploma of Accounting
Fellow of the Institute of Chartered Accountants
Official Liquidator
Fellow of the Institute of Directors