

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

LIST E

S CI 2010 971

**IN THE MATTER OF THE MANAGED INVESTMENT
SCHEMES LISTED IN SCHEDULE 1**

**TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)
ACN 092 311 469 IN ITS CAPACITY AS RESPONSIBLE ENTITY
OF THE MANAGED INVESTMENT SCHEMES LISTED IN SCHEDULE 2
AND ORS ACCORDING TO SCHEDULE 1**

Plaintiffs

and

**TGG ALMOND COMMITTEE INC (A0053489A)
AND ORS ACCORDING TO SCHEDULE 1**

Defendants

AFFIDAVIT OF ANTONY SCOTT MUNRO

Date of document: 9 April 2010
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: 011532584
(Leon Zwier - lzwier@abl.com.au)

I, **ANTONY SCOTT MUNRO** of Level 24, 333 Collins Street, Melbourne, VICTORIA,
Chartered Accountant, **MAKE OATH AND SAY** that:

- 1 I am a Chartered Accountant and Director of KordaMentha. My principals Mark Korda and Leanne Chesser are the liquidators of the first plaintiff (**TSL**) (**Liquidators**). The Liquidators have authorised me to make this affidavit on behalf of TSL and the Liquidators.



- 2 Except where I otherwise indicate, I make this affidavit from my own knowledge. Where I depose to matters from information or belief, I believe those matters to be true.

Meetings

- 3 Since the affidavit of Mark Korda was sworn on 24 February 2010, the following events have occurred.

- 4 On 25 February 2010, I attended the meetings of members of the following schemes at the Powerhouse at Albert Park.

- (a) 2001 Timbercorp Almond Project (ARSN 095649746)
- (b) 2002 Timbercorp Almond Project (ARSN 099 611 935)
- (c) 2003 Timbercorp Almond Project (ARSN 103 197 299)
- (d) 2004 Timbercorp Almond Project (ARSN 108 336 670)
- (e) 2005 Timbercorp Almond Project (ARSN 112 935 092)
- (f) 2006 Timbercorp Almond Project (ARSN 118387974)
- (g) 2007 Timbercorp Almond Project (ARSN 122511 040)

(Almond Meetings)

- (h) 2004 Timbercorp Citrus Project (ARSN 108 887 538)
- (i) 2005 Timbercorp Citrus Project (ARSN 114 091 299)

(Citrus Meetings)

- (j) 2001 Timbercorp Olive Project (ARSN 094 382 082)
- (k) 2002 Timbercorp Olive Project (ARSN 098 233 455)
- (l) 2003 Timbercorp Olive Project (ARSN 104 648 473)
- (m) 2004 Timbercorp Olive Project (ARSN 108744378)
- (n) 2006 Timbercorp Olive Project (ARSN 119 182 179)
- (o) 2007 Timbercorp Olive Project (ARSN 123 155 715)
- (p) 2008 Timbercorp Olive Project (ARSN 129 307 722)

(Olive Meetings)

(collectively, **Meetings**).



- 5 At the Meetings, Michael Pointer was appointed as Chairperson. He said that the Meetings were called by five per cent of the members of each of the Schemes. I observed approximately 75 persons in attendance at the Meetings.
- 6 Mr Pointer told the Meetings that it was the instruction of "the Judge" that the Meetings were to be adjourned for seven days. Resolutions were purportedly passed at the Meetings, separately for each Scheme, to adjourn each of the Meetings for one week.
- 7 On 26 February 2010, the Liquidators' solicitors, Arnold Bloch Leibler (**ABL**) wrote to Mr Tom May of Herbert Geer, the solicitors on the record for the defendants in this proceeding regarding a report posted on the website for the first to third defendants, www.tggalmondandolivegrowers.com.au (**Website**) regarding the Meetings held on 25 February 2010. Now produced and shown to me an marked "**AM-1**" is a copy of this correspondence.
- 8 On 4 March 2010, I attended the adjourned Meetings. Approximately 12 people were in attendance including the first defendant Ms Bezencon, myself and an ABL lawyer. Mr Pointer was again appointed Chairperson. The 16 adjourned Meetings were run concurrently. The adjourned Meetings were further adjourned to 18 March 2010.
- 9 On 18 March 2010, I attended the adjourned Meetings which were held at level 15, 470 Collins Street, Melbourne. In attendance was Ms Bezencon, Alex Gulabovski, Rex Booker and myself. Ms Bezencon chaired the Meetings. She said they would be held concurrently and a resolution was put that the adjourned Meetings be further adjourned to 25 March 2010. Mr Gulabovski and Mr Booker said they each had proxies across all schemes.
- 10 On 25 March 2010, at approximately 12 pm, I attended offices at Level 6, 470 Collins Street, Melbourne with Lucy Kirwan of ABL, to attend the adjourned Meetings. Now produced and shown to me marked "**AM-2**" is a printout from the Website, downloaded on 25 March 2010, which records the proposed business of the adjourned Meetings on 25 March 2010.
- 11 At about 12 pm, Kerree Bezencon, Michael Pointer, Stephen Blair, Rex Booker, Alex Gulabovski and Lucy Kirwan and I gathered in a small meeting room. Mr Blair asked the group whether there was any objection to his attending the meetings as an observer. No-one objected to Mr Blair's presence. A register was handed around the table for each person present to sign. Ms Kirwan and I signed that register.



- 12 Ms Bezencon told the group that she proposed to resign as chairperson of the Meetings and Mr Pointer was appointed as Chairperson of the Meetings.

Almond and Olive Meetings

- 13 Mr Pointer said that the Almond and Olive Meetings would be held together.
- 14 Mr Pointer declared the Almond and Olive Meetings open at approximately 12.15pm. He told us that a quorum was present, because there were five people present who held proxies equivalent to more than 10 per cent of the members of each of the relevant Almond and Olive schemes. He said that the Chair held 10 per cent of each of the relevant Almond and Olive schemes in his own right. It was not clear to me that a quorum was, in fact, present, as neither the proxies, nor the evidence of the Chair's interest in the Almond and Olive Schemes were tabled. No-one objected to the assertion from the Chairperson that a quorum was present.
- 15 Mr Pointer said that it was intended that the Almond and Olive Meetings be adjourned for a further month. Ms Bezencon moved a motion to adjourn the Almond and Olive Meetings for one month to 29 April 2010. Mr Gulabovski seconded that motion.
- 16 There was then a discussion about whether a further 21 days' notice would be required if the Almond and Olive Meetings were so adjourned. There was also general discussion about whether the Almond and Olive Meetings had been properly convened. At approximately 12.30 Mr Pointer declared the Almond and Olive Meetings closed. I do not recall Mr Pointer saying that the motion to adjourn the Almond and Olive Meetings to 29 April 2010 had been passed.

Citrus Meetings

- 17 After the Almond and Olive meetings were closed, there was a discussion about whether the Citrus Meetings had been validly called. Ms Kirwan and I indicated that we had "no comment" on this aspect of the discussion. Mr Pointer said he believed the Citrus Meetings had been called properly.
- 18 Mr Pointer said that he intended to run the two Citrus Meetings concurrently. He said that he would record the attendance at the Citrus Meetings consistently with the attendance recorded for the Olive and Almond Meetings. It was not clear to me that a quorum had been reached, as there was no discussion as to which members of the



- group held interests in the Citrus Scheme, and whether those interests represented ten percent or more of the votes able to be cast at each of the Citrus Meetings.
- 19 Ms Bezencon put a motion that the Citrus Meetings be run concurrently and Mr Gulabovski seconded that motion. No vote was held on this motion.
- 20 Ms Bezencon said she would resign as chairperson of the Citrus Meetings and proposed that Mr Pointer be appointed chair of the Citrus Meetings. Mr Gulabovski seconded Ms Bezencon's proposal.
- 21 Ms Bezencon then said that the substantive motions in the notices of the Citrus Meetings should go forward, subject to "clarification" of the validity of the Citrus Meetings. This is contrary to the statement on the website which is exhibited to this Affidavit as "**AM-1**". Either Ms Bezencon or Mr Pointer said that the substantive motions were as recorded on the notice paper, amended to provide for the fact that the motions were subject to "confirmation" of the validity of the Citrus Meetings.
- 22 At this point, I recall Ms Kirwan asking Ms Bezencon and Mr Pointer who they proposed would provide confirmation of the validity of the Citrus Meetings. A short discussion followed, and I recall Mr Blair saying that the chairperson of the Citrus Meetings should provide the confirmation but no common understanding was reached.
- 23 Mr Pointer then described the two substantive motions which would be subject to confirmation of the validity of "this" meeting. It was not clear to me which of the Citrus Meetings he was referring to. Mr Pointer said the first substantive motion was that the "RE" be removed and that the second substantive motion was that Mediterranean Olives Estates Limited be appointed as the new responsible entity for each of the Citrus Schemes.
- 24 Mr Gulabovski then said that he seconded the amendment to the validity of the Meetings. I assumed that he meant that he seconded the motion to amend the resolutions in the manner described by Mr Pointer.
- 25 Mr Pointer said he accepted that it was not open to the Meeting to substantially alter the motion. However, he said that if the substantive resolutions were passed, then the resolutions would come into force, as soon as confirmation of the validity of the Meetings had been given. Ms Kirwan and I both indicated that we had "no comment" on this aspect of the discussion.



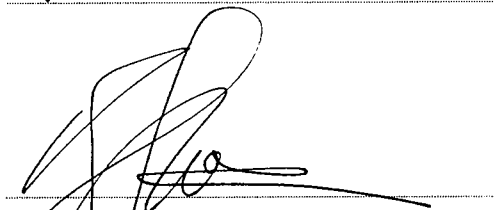
- 26 Mr Pointer said that, as the second substantive resolution was contingent upon the first substantive resolution being passed, the first and second substantive resolutions could be voted upon concurrently.
- 27 Mr Pointer then said that he would take the two substantive motions concurrently. He said that the proxies had already been calculated and declared that the motions for the 2004 Citrus Scheme Meeting had been defeated and that the motions for the 2005 Citrus Scheme Meeting had passed. Mr Pointer did not conduct a poll. Mr Pointer then said that the proxies were in his car and that he could retrieve them from his car if anyone wanted to see them.
- 28 Mr Pointer then stated that, as there was no further business, the Citrus Meetings were closed.
- 29 Ms Kirwan informed the meeting that a directions hearing was scheduled for 26 March 2010 at about 10.00am. Ms Bezencon expressed surprise at that fact.
- 30 At approximately 12.40 pm, Ms Kirwan and I left the office.
- 31 Now produced and shown to me marked “AM-3” are two pages printed from ASIC’s website www.asic.gov.au on 25 March 2010 which relate to the Australian financial services licence held by Mediterranean Olives Estates Limited.
- 32 On 8 April 2010, ABL sent a letter to Ms Bezencon with proposed consent orders attached. Now produced and shown to me and marked “AM-4” is a copy of ABL’s letter of 8 April 2010.

SWORN at Melbourne
in the State of Victoria
by **ANTONY SCOTT MUNRO** this 9th day
of April 2010

)
)
)
)



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

SCHEDULE OF PARTIES

TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)
ACN 092 311 469 IN ITS CAPACITY AS RESPONSIBLE ENTITY
OF THE 2005 TIMBERCORP CITRUS PROJECT (ARSN 114 091 299)
First Plaintiff

MARK ANTHONY KORDA
Second Plaintiff

LEANNE KYLIE CHESSER
Third Plaintiff

and

TGG ALMOND COMMITTEE INC
(A0053489A)
First Defendant

TGG OLIVE COMMITTEE INC
(A0053490J)
Second Defendant

TGG CITRUS COMMITTEE INC
(A0053635L)
Third Defendant

KERREE ANNE BEZENCON
Fourth Defendant

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

LIST E

S CI 2010 971

IN THE MATTER OF THE MANAGED INVESTMENT
SCHEMES LISTED IN SCHEDULE 1

TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)
ACN 092 311 469 IN ITS CAPACITY AS RESPONSIBLE ENTITY
OF THE MANAGED INVESTMENT SCHEMES LISTED IN SCHEDULE 2
AND ORS ACCORDING TO SCHEDULE 1

Plaintiffs

and

TGG ALMOND COMMITTEE INC (A0053489A)
AND ORS ACCORDING TO SCHEDULE 1

Defendants

CERTIFICATE IDENTIFYING EXHIBIT

Date of document: 9 April 2010
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: 01-1531208
(Leon Zwier - lzwier@abl.com.au)

This is the exhibit marked "**AM-1**" now produced and shown to **ANTONY SCOTT MUNRO**
at the time of swearing his affidavit on 9 April 2010.

Before me:

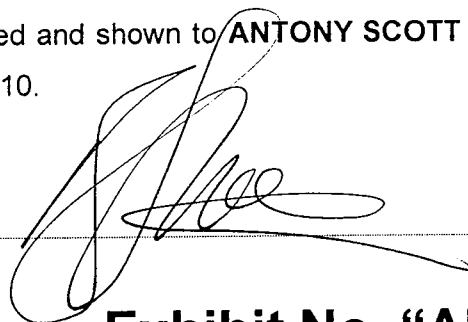


Exhibit No. "AM-1"
ABL Correspondence to Herbert Geer dated
26 February 2010

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

Matilda Martinez

From: Lucy Kirwan
Sent: Friday, 26 February 2010 11:06 AM
To: 'Tom May'
Cc: Celia.Armstrong@clarendonlawyers.com.au; Jane Sheridan; Michael Fernon (michael.fernon@clarendonlawyers.com.au)
Subject: Proceeding SCI 2010 971
ABL File: -1

Dear Mr May

We are instructed that a report has been posted on the website of the TGG Almond, Olive and Citrus Committees Inc regarding the meetings held yesterday. The report is said to have been authored by Ms Bezencon. The report states:

"As a consequence of hearings earlier this week in the Supreme Court of Victoria before Her Honor Justice Davies who required the resolutions to be adjourned for seven days, the meetings resolved ... "

This statement is incorrect in a number of respects:

1. First, undertakings were sought by the liquidators' counsel that the meetings be adjourned. Those undertakings were proffered by you on behalf of Ms Bezencon and the other Defendants.
2. The undertakings were not "required" by Justice Davies.
3. Her Honour made no orders regarding the meetings.
4. It is also incorrect to state that the meetings were adjourned "as a consequence of [the] hearings". If it was your intention to refer to the "hearings" held on Monday and Wednesday, the concerned the 2005 Citrus Project and the Receivers' sale of assets. They did not relate to the meetings. Only the mention on Wednesday related to the meetings.

We request that these inaccuracies be rectified by 1.30 pm today. If they are not, we intend to bring this matter to the attention of the Court at the directions hearing in this proceeding this afternoon.

Yours faithfully

Lucy Kirwan | Senior Associate

Arnold Bloch Leibler | Level 21, 333 Collins Street, Melbourne Victoria 3000
T: +61 3 9229 9655 | F: +61 3 9916 9515
lkirwan@abl.com.au | www.abl.com.au

Arnold Bloch Leibler acknowledges the traditional owners of country throughout Australia.

From: Tom May [mailto:TMay@herbertgeer.com.au]
Sent: Thursday, 25 February 2010 6:55 PM
To: Lucy Kirwan; matthew.whittle@aar.com.au; Celia.Armstrong@clarendonlawyers.com.au; Patricia.Athanasiadis@justice.vic.gov.au
Subject: Timbercorp Citris

Please find attached Affidavit of Mr A H May which was made a few minutes ago.

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

LIST E

S CI 2010 971

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ACN 092 311 469 IN ITS CAPACITY AS RESPONSIBLE ENTITY
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AND ORS ACCORDING TO SCHEDULE 1

Plaintiffs

and

TGG ALMOND COMMITTEE INC (A0053489A)
AND ORS ACCORDING TO SCHEDULE 1

Defendants

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Date of document: 9 April 2010
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Prepared by:
ARNOLD BLOCH LEIBLER
Lawyers and Advisers
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333 Collins Street
MELBOURNE 3000

Solicitor's Code: 54
DX 38455 Melbourne
Tel: 9229 9999
Fax: 9229 9900
Ref: 01-1531208
(Leon Zwier - lzwier@abl.com.au)

This is the exhibit marked "**AM-2**" now produced and shown to **ANTONY SCOTT MUNRO**
at the time of swearing his affidavit on 9 April 2010.

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

Exhibit No. "AM-2"
Print out from
www.tggalmondandolivegrowers.com.au
downloaded on 25 March 2010



TGG Almonds and Olives Growers

[Home](#) [Meetings](#) [Admin](#) v1.06b**Committee Members****Chair**

Kerree Bezencon
almonds@litigationoz.info

Committee Inquiries

Michael Pointer
0418 391 820

Connections

[Early Timbercorp Grower Group Information](#)

Notices

IMPORTANT: All Growers
Not voting means Korda Mentha &
Banks decide your fate, please
make sure you fill in and assign
your proxy vote now.
Proxy Forms are [HERE](#).
Proxy forms are to be sent to
mpointer@yca.com.au
or via fax to
03 5962-6086 or 03 9326-7779

Editorials

Select Please choose then a document

ADJOURNED MEETINGS[Locate](#)**Editorial****ADJOURNED MEETINGS**

Please note that the meetings adjourned on 18th March to be held on 25th March will now be held at 12:00 Noon at 6th Floor, 470 Collins Street Melbourne.

PLEASE NOTE - IT WILL BE MOVED TO ONCE AGAIN ADJOURN THESE MEETINGS AND OR AN AMENDMENT TO THE MOTIONS WILL BE MOVED

Author : Kerree Bezencon



TGG Almonds and Olives Growers dedicated to the Growers of Australia.



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

LIST E

S CI 2010 971

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ACN 092 311 469 IN ITS CAPACITY AS RESPONSIBLE ENTITY
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CERTIFICATE IDENTIFYING EXHIBIT

Date of document: 9 April 2010
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: 01-1531208
(Leon Zwier - lzwier@abl.com.au)

This is the exhibit marked "**AM-3**" now produced and shown to **ANTONY SCOTT MUNRO**
at the time of swearing his affidavit on 9 April 2010.

Before me
BRIDGET ELEN SLOCUM
Arnold Bloch Leibler
Level 21, 333 Collins Street
Melbourne 3000

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

Exhibit No. "AM-3"

**Two pages downloaded from www.asic.gov.au
on 25 March 2010**

"AM-3"

**ASIC**Australian Securities & Investments
Commission**Australian financial
services licensing**

AFS licensee register

SEARCH AGAIN

Extracted from ASIC's database at AEST 13:18:16 on 25/03/2010

Licence No.	246263
Name	MEDITERRANEAN OLIVES ESTATE LIMITED
ACN	091 024 396
Commenced	23/12/2003

Condition start date time 23/12/2003

1. This licence authorises the licensee to carry on a financial services business to:
 - (a) deal in a financial product by:
 - (i) issuing, applying for, acquiring, varying or disposing of a financial product in respect of the following classes of financial products:
 - (A) interests in managed investment schemes limited to:
 - (1) own managed investment scheme only; and
 - (ii) applying for, acquiring, varying or disposing of a financial product on behalf of another person in respect of the following classes of products:
 - (A) deposit and payment products limited to:
 - (1) basic deposit products;
 - (2) deposit products other than basic deposit products; and
 - (B) general insurance products; and
 - (b) operate the following kinds of registered managed investment schemes (including the holding of any incidental property) in its capacity as responsible entity:
 - (i) "Mediterranean Olives Project" scheme (ARSN: 095 573 872),
 - (A) a scheme that is promoted to raise funds solely to finance primary production ventures as an active commercial enterprise limited to:
 - (1) horticulture;

to retail and wholesale clients.

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**ASIC**Australian Securities & Investments
Commission**Australian financial
services licensing**

AFS licensee register

SEARCH AGAIN

Extracted from ASIC's database at AEST 14:18:21 on 25/03/2010

Licence No.	246263
Name	MEDITERRANEAN OLIVES ESTATE LIMITED
ACN	091 024 396
Commenced	23/12/2003

Condition start date time 31/05/2004

1. This licence authorises the licensee to carry on a financial services business to:
 - (a) provide general financial product advice for the following classes of financial products:
 - (i) interests in managed investment schemes limited to:
 - (A) own managed investment scheme only;
 - (b) deal in a financial product by:
 - (i) issuing, applying for, acquiring, varying or disposing of a financial product in respect of the following classes of financial products:
 - (A) interests in managed investment schemes limited to:
 - (1) own managed investment scheme only; and
 - (ii) applying for, acquiring, varying or disposing of a financial product on behalf of another person in respect of the following classes of products:
 - (A) deposit and payment products limited to:
 - (1) basic deposit products;
 - (2) deposit products other than basic deposit products; and
 - (B) general insurance products; and
 - (c) operate the following kinds of registered managed investment schemes (including the holding of any incidental property) in its capacity as responsible entity:
 - (i) "Mediterranean Olives Project" scheme (ARSN: 095 573 872),
 - (A) a scheme that is promoted to raise funds solely to finance primary production ventures as an active commercial enterprise limited to:
 - (1) horticulture;
- to retail and wholesale clients.

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IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
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COMMERCIAL COURT

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SCHEMES LISTED IN SCHEDULE 1

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ACN 092 311 469 IN ITS CAPACITY AS RESPONSIBLE ENTITY
OF THE MANAGED INVESTMENT SCHEMES LISTED IN SCHEDULE 2
AND ORS ACCORDING TO SCHEDULE 1

Plaintiffs

and

TGG ALMOND COMMITTEE INC (A0053489A)
AND ORS ACCORDING TO SCHEDULE 1

Defendants

CERTIFICATE IDENTIFYING EXHIBIT

Date of document: 9 April 2010
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: 01-1531208
(Leon Zwier - lzwier@abl.com.au)

This is the exhibit marked "**AM-4**" now produced and shown to **ANTONY SCOTT MUNRO**
at the time of swearing his affidavit on 9 April 2010.

Before me: _____



Exhibit No. "AM-4"
ABL Correspondence to Ms Bezencon dated
8 April 2010

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-4"

From: Jane Sheridan
Sent: Thursday, 8 April 2010 2:48 PM
To: Kerree Bezencon; Lucy Kirwan
Cc: tmay@herbertgeer.com.au
Subject: Timbercorp Meetings

Dear Kerree,

Please see the attached letter.

Regards

Jane

Jane Sheridan | Partner

Arnold Bloch Leibler | Level 21, 333 Collins Street, Melbourne Victoria 3000
T: +61 3 9229 9815 | F: +61 3 9229 9944 | M: 0418 323 679
jsheridan@abl.com.au | www.abl.com.au

Arnold Bloch Leibler acknowledges the traditional owners of country throughout Australia.

Arnold Bloch Leibler

Lawyers and Advisers

8 April 2010

By Post and E-mail: Kerree@siger.com.au

Kerree Bezencon
953 Don Road
Healesville VIC 3777

TGG Citrus Committee Inc
C/- Kerree Bezencon
953 Don Road
Healesville VIC 3777

Our Ref JCS
File No. 011499489

Contact
Jane Sheridan
Direct 61 3 9229 9815
Facsimile 61 3 9229 9944
jsheridan@abl.com.au



Level 21
333 Collins Street
Melbourne
Victoria 3000
Australia
DX38455 Melbourne
www.abl.com.au
Telephone
61 3 9229 9999
Facsimile
61 3 9229 9900

Dear Ms Bezencon

SCI 2010 971 Timbercorp Securities Limited (in liquidation) ("TSL") & Ors v TGG Almond Committee Inc & Ors ("Proceeding")

- 1 We refer to our previous correspondence, and to the orders made by the Honourable Justice Davies at the directions hearing on 26 March 2010. At that directions hearing you appeared unrepresented. As it is not apparent whether Tom May of Herbert Geer is continuing to represent the defendants to this Proceeding, we are sending this letter to both you and Mr May.

History of the Proceeding

- 2 On 9 February 2010 we wrote to you seeking information regarding purported notices of meetings of members of the Timbercorp Citrus, Almond and Olives Schemes scheduled to take place on 25 February 2010 (**Meetings**). Our client had previously obtained copies of the purported notices from a third party.
- 3 On 22 February 2010, you wrote to our client by email attaching the purported notices of meeting, apparently in response to the letter dated 9 February 2010. (We note that one of the purported notices referred to a meeting to be held on 24 February 2010.)
- 4 On 24 February 2010 the Proceeding was filed seeking declarations that the purported notices for the Meetings were invalid.
- 5 On 24 February 2010 the parties appeared before the Honourable Justice Davies to seek an urgent hearing date. At that hearing, Mr May appeared on behalf of the defendants to the Proceeding and provided an undertaking to the Court on behalf of the defendants that the only

MELBOURNE SYDNEY

Partners
Mark M Leibler AC
Henry D Lanzer
Joseph Borenszlajn
Leon Zwiier
Philip Chester
Ross A Paterson
Stephen L Sharp
Kenneth A Gray
Kevin F Frawley
Michael N Dodge
Jane C Sheridan
Steven Klein
Leonie R Thompson
Zaven Mardrossian
Jonathan M Wenig
Paul Sokolowski
Paul Rubenstein
Peter M Seidel
Alex King
John Mitchell
Nicole Gordon
Ben Mahoney
Sam Dollard
Lily Tell
Henry Skene
Andrew Silberberg
Lisa Merryweather
Jonathan Milner

Senior Litigation
Counsel
Robert J Heathcote

Special Counsel
Danuta Czuchwicki
Simonne Einfeld

Senior Associates
Kirsten Myers
Katie Morrison
John Mengolian
Melanie Alderton
Sue Kee
Jorja Cleeland
Caroline Goulden
Matthew Lees
Genevieve Sexton
Lucy Kirwan
Jeremy Leibler
Amelia Kelly
Benjamin Marshall
Kristina Verney

Consultants
Allan Fels AO
Steven M Skala AO

resolution to be put at the Meetings would be to adjourn the Meetings for one week. Orders were made at the Directions Hearing on 24 February 2010 to adjourn the Proceeding for directions on 26 February 2010.

- 6 On 25 February 2010, the Meetings were purportedly held.
- 7 The affidavit of your solicitor, Tom May, dated 25 February 2010 alleges that:
 - (a) approximately 5100 members were represented at the Meetings (although it is not clear whether each of the 5100 members is a member of each relevant Scheme); and
 - (b) those members in attendance agreed to adjourn the Meetings for one week.
- 8 At the directions hearing on 26 February 2010 the Court made orders for an expedited timetable for the hearing of the Proceeding. Later that day, you posted a misleading statement on your website regarding the reason for the adjournment of the 25 February 2010 Meetings, namely that Justice Davies "*required* the resolutions to be adjourned for seven days". This was untrue as Mr May volunteered the undertaking to the Court, presumably on your instructions.
- 9 On 4 March 2010 the Meetings were adjourned for a further two weeks to 18 March 2010. Accordingly the hearing date of 10 March 2010 and the directions for an expedited hearing were vacated by consent, and a further directions hearing was scheduled for 19 March 2010.
- 10 Following a further adjournment of the Meetings on 18 March 2010 to 25 March 2010, the directions hearing on 19 March 2010 was also adjourned by consent to 26 March 2010.
- 11 Prior to 25 March 2010, your website disclosed that, at the Meetings on 25 March 2010, "it will be moved to once again":
 - (a) adjourn the meetings; and/or
 - (b) move an amendment to "the motions".
- 12 At the two purported Citrus Scheme Meetings on 25 March 2010, which were held concurrently, those present purported to amend the resolutions set out in the relevant notices and pressed the substantive, purportedly amended resolutions without having given prior notice to scheme members, or our clients, that you would do so. The substantive resolutions were purportedly passed for the 2005 Timbercorp Citrus Project ARSN 114 091 299 (**2005 Citrus Scheme**) only. The purported resolutions were apparently defeated in the case of the 2004 Citrus Scheme. The Meetings for the Olive and Almond Schemes were purportedly adjourned to 29 April 2010.
- 13 Our clients deny that those resolutions are valid, for a number of reasons. However, now that the purported resolutions have been

passed in relation to the 2005 Citrus Scheme, the validity of the relevant notice and the resolutions must be determined by the Court.

- 14 At the hearing scheduled for 3 May 2010, our clients' counsel will submit that the Meeting and resolutions for the 2005 Citrus Scheme are invalid, and our clients will seek appropriate orders.
- 15 As previously discussed with you, the hearing and interlocutory steps leading up to it may be avoided if you consent to the orders which our clients seek. We **enclose** proposed consent orders for your consideration (**Proposed Orders**). Please let us know by **5.00 pm on Friday 9 April 2010** whether you will consent to the Proposed Orders. In considering the Proposed Orders, you should have regard to the matters set out below.
- 16 **We encourage you to seek independent legal advice about the matters raised in this letter, including in relation to the Proposed Orders.**

Invalidity of notices for the 2005 Citrus Scheme Meeting

- 17 The notice of the 2005 Citrus Scheme Meeting was invalid for several reasons.

Persons calling Meeting not identified

- 18 Section 252D of the *Corporations Act 2001* (Cth) (**Act**) requires that members who call a meeting of scheme members must hold interests carrying at least 5% of the votes that may be cast at the relevant meeting. The notice of the 2005 Citrus Scheme Meeting did not identify the persons who called the Meeting. To the extent that the Defendants were the persons who called the Meeting, they are not members who hold interests carrying at least 5% of the vote that may be cast at the 2005 Citrus Scheme Meeting.
- 19 In addition, s 252L of the Act requires notice of resolutions proposed by members at a meeting to be in writing and signed by the members giving the notice. The notice in relation to the 2005 Citrus Scheme Meeting was not signed by any members, and referred to an attached list of members calling the Meeting which was in fact blank.

Inadequate and insufficient notice of Meeting

- 20 Section 252G of the Act requires that notice of a meeting be given to the members, the directors of the current responsible entity and the compliance plan auditor. A number of ABL's clients which are entities within the Timbercorp group of companies are members of the 2005 Citrus Scheme. None of our clients received a copy of the purported notice of the Meeting prior to 4 February 2010 (21 days prior to the meeting on 25 February 2010). The liquidators of TSL first received a copy of the notice of meeting from a third party. Further, we are informed that neither the directors, nor the auditor of the 2005 Citrus Scheme were given the purported notice prior to 4 February 2010.

- 21 Section 252F of the Act requires that at least 21 days' notice of the 2005 Citrus Meeting be given to members of the 2005 Citrus Scheme. Article 27.1 of the constitution for the 2005 Citrus Scheme also provides that notices sent by post are deemed to have been received 48 hours after posting.
- 22 You have informed our client that the notice for the 2005 Citrus Meeting, was sent to members of the Citrus Scheme on 2 February 2010. You have not responded to our queries regarding whether the notice was sent by post, or by some other means, to all of the members of the 2005 Citrus Scheme. As TSL does not have fax details or email addresses for all of the members of the 2005 Citrus Scheme, we have assumed that you do not hold this information either.
- 23 To the extent that the notice was sent by post, the members of the 2005 Citrus Scheme did not receive 21 days' notice of the Meeting. Accordingly the Meeting purportedly held on 25 February 2010 was invalid, and the adjournments of this Meeting (to 4, 18 and 25 March 2010) were also invalid.

Adjournment of 2005 Citrus Meeting

- 24 Section 252K of the Act provides that a new notice of an adjourned meeting must be provided if the meeting is adjourned for one month or more. The decision of the Takeovers Panel in *Re Colonial First State Property Funds II* (1 January 2002) (**attached** for your convenience), applied to s 252K, means that there is a cumulative effect if the relevant meeting(s) are adjourned more than once.
- 25 The 2005 Citrus Scheme Meeting was adjourned three times, ultimately to 25 March 2010. More than one month had passed between the date when the meeting was first purportedly held and when it was finally purportedly held. Accordingly, the 2005 Citrus Scheme Meeting was invalidly convened because there was no valid notice.

Misleading notices and Explanatory Memoranda for the 2005 Citrus Scheme Meeting

- 26 The notice of the 2005 Citrus Scheme Meeting and the relevant Explanatory Memorandum (**EM**) are misleading and/or deceptive in a number of respects. A non-exhaustive list of the misleading/deceptive statements in the notice and the EM are set out below:
- (a) the notice does not identify which members have called the Meeting, as the "List of Members Calling the Meeting" section has been left blank;
 - (b) the EM (page 3) states that the members who are calling the 2005 Citrus Scheme Meeting consider that members: "*are better served by the removal of KordaMentha as responsible entity*". It is TSL, not KordaMentha, that is the responsible entity of the 2005 Citrus Scheme. Moreover, the resolutions concern the removal of TSL, not KordaMentha;

- (c) the EM (dot-point two of the Statement of Purpose) states that: *"assets have been sold at a price substantially below replacement costs"*. In fact:
 - (i) only some of the assets associated with the 2005 Citrus Scheme (the Solora Estate) have been sold; and
 - (ii) you are not appraised of the purchase price of those assets, because it remains confidential.
- (d) the EM (dot-point three of the Statement of Purpose) states that: *"had the sale process been handled differently by KordaMentha the growers [sic] benefits would have been dramatically improved"*. In fact:
 - (i) KordaMentha was not involved in the sale process for the assets on the Solora Estate; and
 - (ii) the sale process for the Solora Estate assets was handled by PriceWaterhouseCoopers, as receivers and managers of the registered proprietor of the Solora Land;
- (e) the EM (dot-point four of the Statement of Purpose) states, without foundation, that the purchasers of the Solora assets will become more profitable due to:
 - (i) reduced water prices;
 - (ii) increased world demand for citrus;
 - (iii) reduced fertilizer costs; and
 - (iv) a more "realistic value" of the Australian dollar.
- (f) the EM asserts that the 2005 Citrus Scheme's profitability will be enhanced *"once excessive Timbercorp costs are removed"* (dot-point five in the Statement of Purpose in the EM):
 - (i) without setting out the costs of the expenses of the proposed replacement responsible entity, Mediterranean Olives Estate Limited (ACN 091 024 396) (**Mediterranean Olives**);
 - (ii) despite the statement in the EM that the compensation to be paid to Mediterranean Olives will be *"in the same way as KordaMentha"* (item ten of the Statement of Purpose in the EM); and
 - (iii) without setting out the cost of the (unidentified) *"extensive experienced consultants"* described in item 2 of the Statement of Purpose in the EM;

- (g) the EM (dot-point six in the Statement of Purpose) states that: *"KordaMentha are hopelessly conflicted - as they try to act for both banks/secured creditors as liquidators as well as taking on the role as RE for growers. The result is that growers interests have taken second place."* In fact:
- (i) the liquidators of TSL act in the best interests of TSL creditors, and also in the best interests of members of the 2005 Citrus Scheme;
 - (ii) the Federal Court held that the liquidators must act in the interests of all creditors and that the growers' interests do not outweigh the interests of other creditors; and
 - (iii) during the Timbercorp liquidation, each time the liquidators believed a decision was or was likely to be controversial, they have sought directions from the Court as to the appropriate course of action.
- (h) the EM (item one of the Statement of Purpose) states that a new RE can *"maintain a check on KordaMentha charges"*; however the RE has no role in relation to reviewing KordaMentha's ongoing costs; further, it makes no reference to the Committee of Inspection, which is already charged with this task;
- (i) the EM (item four of the Statement of Purpose) states that a new RE can: *"pursue any legal arguments on the growers [sic] behalf"* and (item eight of the Statement of Purpose) that a new RE can *"achieve legal standing for the grower group that individual growers on their own cannot achieve"*; however the Timbercorp Growers' Group, represented by Clarendons, have been charged with this task by the Supreme Court in proceedings currently on foot relating to some of the Almond schemes;
- (j) the EM (in item five of the Statement of Purpose) states that a new RE can: *"protect and maximise the financial benefit derived from growers [sic] rights in [the Citrus Schemes]- land, water, capital works, infrastructure. All these assets have been established and built from growers [sic] financial contributions"*. In fact:
- (i) whether the growers have any rights to the land, water, capital works and infrastructure (**Assets**) is unclear, and this issue is currently before the Supreme Court for determination in relation to some of the Almond Projects; and
 - (ii) the majority of the Assets were built or established by the land owner of the relevant land, who leased the Assets for the purpose of the 2005 Citrus Scheme.
- (k) the EM (item seven of the Statement of Purpose) states that: *"substantial fees have been paid to KordaMentha to act as the*

responsible entity"; however KordaMentha has received no fees of this nature. Mark Korda and Leanne Chesser were appointed liquidators of TSL, following a vote by the creditors of TSL to wind up the company, and have incurred fees as liquidators in carrying out their legal obligations to wind up TSL; all of the TSL liquidators' fees are approved by the TSL Committee of Inspection;

- (l) the EM (item eleven of the Statement of Purpose) states that a new RE can *"arrang[e] prompt payment of harvest proceeds to growers"*. There are minimal crop proceeds available to growers as the 2009 crop for the 2005 Citrus Scheme was sold to Costa Exchange to pay for the maintenance of the crop. The available crop proceeds are expected to be distributed by the liquidators by the end of May;
- (m) the EM (item twelve of the Statement of Purpose) states that with a new RE, other Timbercorp schemes *"continued operating successfully with a positive future outlook"*. In fact, in the schemes to which you refer (namely, Avocadoes and Mangoes):
 - (i) the members have paid additional fees; and
 - (ii) parts of some of the schemes have been abandoned.

Further, you have not provided any evidence for your assertion that the Avocado and Mango schemes have a *"positive future outlook"*.

- (n) the EM (item thirteen of the Statement of Purpose) states, without foundation, that other schemes (Great Southern) have *"substantially"* improved grower position after the appointment of a new responsible entity;
- (o) the EM states that Mediterranean Olives has *"transparent fees"* but does not identify those fees;
- (p) the EM does not clarify whether Mediterranean Olives has, in fact, consented to act as the new RE or has applied or intends to apply to amend its AFSL to enable it to so act (and we understand from ASIC that no such application has been received by ASIC);
- (q) the EM states that: *"in the event that a resolution is not passed by the requisite majority, the meeting will be adjourned to another date for a resolution to be put a second time"*; however this statement is contrary to s 252U(2) of the Act; and
- (r) the EM does not disclose that you, and/or interests associated with you, have bid for the assets of the Kangara Estate, upon which part of the 2005 Citrus Scheme is conducted as you informed us on 26 March 2010, even though your website now discloses that a bid has been made.

- 27 Each of the misrepresentations outlined above is sufficient to raise serious doubt as to the accuracy of the information provided to members prior to the 2005 Citrus Scheme Meeting. The cumulative effect of the misrepresentations invalidates the notice of Meeting.
- 28 In addition, the TGG website states that "*Not voting means Korda Mentha & Banks decide your fate*". This is plainly wrong and also misleading.
- 29 Our clients reserve their rights to raise additional complaints about the notice and the EM in the future.

Invalidity of 2005 Citrus Scheme Meeting in the way it was conducted

Concurrent Meetings

- 30 The 2005 Citrus Scheme Meeting was purported to be held concurrently with the Meeting of the 2004 Timbercorp Citrus Project. The presence of, and participation by, persons other than the members of the 2005 Citrus Scheme at a meeting may invalidate its proceedings. Accordingly, there should be separate deliberation between the members of the 2005 Citrus Scheme Meeting on the matters that are the concern of that Scheme, as opposed to any other Scheme.
- 31 This did not occur.

Quorum

- 32 Article 22.3(a) of the Constitution provides that a quorum (of 5 persons holding, or representing by proxy at least 25% of the aggregate number of citrus lots issued to growers) must be present a meeting of members. We are instructed that physical attendance at the 2005 Citrus Scheme Meeting on 25 March 2010 was low — being only four (4) persons — and that five (5) scheme members were not present. Nor was it clear that those four (4) members carried 25% of the proxy votes.
- 33 If a quorum was not present at a Meeting which purported to pass adjournment resolutions, any resolutions to adjourn those Meetings were invalid. Consequently, the adjourned Meeting which purported to pass substantive resolutions was also invalid. Further, if a quorum was not present at the Meeting which purported to pass substantive resolutions, these resolutions are also invalid.

Amendment of the 2005 Citrus Meeting Resolutions

- 34 A motion was purportedly put to amend the resolutions on the notice to read as follows (the added words in bold and underlined):

"Subject to confirmation of the validity of this meeting:

Extraordinary Resolution 1– Removal of Current Responsible Entity

Subject to Extraordinary Resolution 2 being passed, that the current responsible entity of the Project, Timbercorp Securities Limited ACN092311469 (In Liquidation) be removed as responsible entity of the Project, effective from the time referred to in Extraordinary Resolution 2

Extraordinary Resolution 2 – Appointment of New Responsible Entity

Mediterranean Olives Estate Limited ACN091024396 to be appointed as the new Responsible Entity (RE), such appointment to take effect immediately upon the AFSL of Mediterranean Olives Estate Limited being amended to allow it to accept such appointment

35 It is unclear whether the amending words were to apply to each resolution separately, or whether the meeting had agreed that the resolutions were contingent upon the purported amendment. Further, it is unclear how, by, and to whom, the validity of the meeting is to be confirmed. In either case, the purported amendment, and hence the purportedly amended resolutions, were invalid for lack of certainty.

36 No vote was taken to amend the resolutions as proposed.

Poll

37 Section 601FM of the Act requires that any resolution to remove a responsible entity must be done by extraordinary resolution. Section 253J of the Act provides that extraordinary resolutions are to be decided by poll.

38 We are instructed that a poll was not taken in relation to the proposed resolution to remove TSL as the responsible entity of the 2005 Citrus Scheme. Accordingly, that purported resolution is invalid.

Capacity of Replacement Responsible Entity to Operate Scheme

39 Under s 601FK of the Act, a company cannot be chosen or appointed as a responsible entity unless it meets the criteria of s 601FA. Section 601FA provides that the responsible entity of a managed investment scheme must hold a financial services licence authorising it to operate a managed investment scheme.

40 The financial services licence referred to in s 601FA must apply to the relevant managed investment scheme, in this case, the 2005 Citrus Scheme: *Australian Olives Limited v Stout* [2007] FCA 1958 (at [47]). The proposed replacement responsible entity, Mediterranean Olives, did not hold on 25 March 2010 (nor, we are instructed, has it applied for) a financial services licence which authorised it to operate the 2005 Citrus Scheme.

41 Accordingly, the resolution to appoint Mediterranean Olives is invalid. We assume that Mediterranean Olives' failure to apply for the requisite

licence means that, if it ever actually consented to act as responsible entity, such consent has now been withdrawn.

Application to the Almond and Olive Schemes

- 42 Most of the deficiencies identified above apply equally to the notices of meetings of members of the Almond and Olive Schemes. Accordingly, if you consent to the attached proposed order, we invite you to also consent to similar orders with regard to the notices of the Almond Meetings and the Olive Meetings.

Legal Costs

- 43 To date, our clients have incurred significant legal and professional costs in the preparation and prosecution of the Proceeding.
- 44 These costs have been incurred unnecessarily as:
- (a) you have been on notice since 9 February 2010 that our clients had concerns about the validity of the notices of Meeting;
 - (b) our clients have met with you in person on at least three occasions to explain the defective manner in which the Meetings have purportedly been called;
 - (c) our clients have written to you directly in relation to the Meetings and the defective manner in which they have purportedly been called;
 - (d) despite this, and the commencement of the Proceeding on 24 February 2010, you:
 - (i) failed to take steps to re-draw the notices to comply with the Act; and
 - (ii) proceeded to put substantive resolutions to the participants of the 2005 Citrus Scheme Meeting on 25 March 2010, without notice to our clients that you would do so, notwithstanding that the Proceeding was on foot; and
 - (e) despite being on notice that the notices for the meetings of members of the Almond and Olive Schemes were also invalid, you have failed to take steps to withdraw or amend those notices.
- 45 Unless you consent to the Proposed Orders, our clients intend to pursue this Proceeding to hearing and final determination. Our clients will incur significant further costs as a result. The liquidators' costs in pursuing this Proceeding are paid by the creditors of Timbercorp. It has been open to the defendants to call off the Meetings and issue fresh notices which comply with the Act. The defendants have been on notice since 24 February 2010 of the orders sought by our clients, yet the Meetings have been continually adjourned and no effort made to formally rectify

the complaints made by our clients. At no stage have the defendants insisted that the Meetings were validly called. In fact, the resolutions at the 2005 Citrus Meeting were purportedly amended to take account of their invalidity. The defendants have expressly and/or impliedly acknowledged that the notices are invalid and do not comply with the requirements of the Act, yet have taken no formal steps to deal with the consequences of this acknowledgment.

- 46 If the orders sought by our clients or orders substantially in the form sought, are made by the Court, our clients intend to enforce any costs orders they obtain against the defendants. Our clients intend to seek their costs on an indemnity basis, and will produce this letter to the Court on the question of costs.
- 47 However, if the defendants consent to the Proposed Orders, our clients will agree to have their costs of the Proceeding taxed on a party-party basis. By way of explanation, the Court makes costs orders on a number of different bases which reward the successful party to a lesser or greater amount of the actual legal costs incurred. Costs on a party-party basis are generally approximately 50% to 60% of the actual legal costs incurred. Costs on an indemnity basis are 100% of the legal costs incurred. This means that the defendants are willing to forgo some of the costs they would seek at a final hearing, if you consent to the attached orders now.
- 48 Please let us know by **5pm on Friday 9 April 2010** whether you will consent to the Proposed Orders.

Yours sincerely



Jane Sheridan
Partner

cc.

Mr Tom May
Herbert Geer
tmay@herbertgeer.com.au

TGG Olives Committee Inc
C/- Kerree Bezencon
953 Don Road
Healesville VIC 3777

TGG Almond Committee Inc
C/- Kerree Bezencon
953 Don Road
Healesville VIC 3777

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

LIST E

S CI 2010 971

IN THE MATTER OF THE MANAGED INVESTMENT
SCHEMES LISTED IN SCHEDULE 1

**TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)
ACN 092 311 469 IN ITS CAPACITY AS RESPONSIBLE ENTITY
OF THE MANAGED INVESTMENT SCHEMES LISTED IN SCHEDULE 2
AND ORS ACCORDING TO SCHEDULE 1**

Plaintiffs

and

**TGG ALMOND COMMITTEE INC (A0053489A)
AND ORS ACCORDING TO SCHEDULE 1**

Defendants

PROPOSED MINUTES OF CONSENT ORDERS

Judge: The Honourable Justice Davies

Date made:

Originating process: Originating Process filed 24 February 2010

How obtained: By consent

Other matters: Not applicable

THE COURT ORDERS BY CONSENT THAT:

- 1 That the purported meeting of members of the registered managed investment scheme described as the 2005 Timbercorp Citrus Project (ARSN 114 091 299) held on 25 March 2010 was invalid.
- 2 That the resolutions purported to have been passed at the purported meeting of members of the registered managed investment scheme described as the 2005 Timbercorp Citrus Project (ARSN 114 091 299) held on 25 March 2010 were invalid.
- 3 That the defendants pay the plaintiffs' costs on a party-party basis.

Date: April 2010

Arnold Bloch Leibler

Arnold Bloch Leibler
Solicitors for the Plaintiffs

Kerree Ann Bezencon
First Defendant

Kerree Ann Bezencon
For the Second Defendant

Kerree Ann Bezencon
For the Third Defendant

Kerree Ann Bezencon
For the Fourth Defendant

4 of 16 DOCUMENTS: Unreported Judgments Takeovers Panel

34 Paragraphs

Re COLONIAL FIRST STATE PROPERTY FUNDS II - BC200208523

Takeovers Panel

Ms Jennifer Seabrook (sitting President), Ms Karen Wood (sitting Deputy President) and Ms Teresa Handicott

1 January 2002

Colonial First State Trust Group 02 [2002] ATP 16

These are our reasons for declining an application by the Responsible Entity for the Colonial Funds in relation to Mirvac Funds Ltd's takeover bid for the Colonial Funds.

Ms Jennifer Seabrook (sitting President), Ms Karen Wood (sitting Deputy President) and Ms Teresa Handicott.

[1] The application sought urgent interim orders to restrain dispatch of the bidder's statement in Mirvac Funds Ltd's (**Mirvac**) takeover bid for the four funds which make up the Colonial First State Property Trust Group (**Colonial Funds**). The application was made by CFS Managed Property Ltd (**Colonial Responsible Entity**) on 23 September 2002.

[2] The sitting Panel for the application was Ms Jennifer Seabrook (sitting President), Ms Karen Wood (sitting Deputy President) and Ms Teresa Handicott.

[3] The Panel decided not to conduct proceedings in relation the application.

[4] The Panel advised the parties of its decision in this matter on 23 September 2002.

Background

[5] On 11 September Mirvac lodged a bidder's statement with the Australian Securities and Investments Commission (**ASIC**) and the Colonial Responsible Entity. The bidder's statement would be available for dispatch on Thursday 26 September.

[6] In correspondence between them, Commonwealth Property Office Fund (**Commonwealth**) raised a number of disclosure issues and constitutional issues with Mirvac in relation to Mirvac's bidder's statement.

[7] Mirvac prepared a replacement bidder's statement (**Replacement Bidder's Statement**) which appeared to deal with many of the issues which had been in contention between the parties concerning disclosure.

[8] On Friday 20 September 2002 at 8.43 pm the Colonial Responsible Entity's lawyers received by email from Mirvac's lawyers, a copy of Mirvac's Replacement Bidder's Statement in respect of its takeover bid for all the units in the

Colonial Funds. The precise date on which the final version of the Replacement Bidder's Statement was received is not clear because further amended versions were provided. If the correct date is 20 September, the Replacement Bidder's Statement would (without ASIC's consent under its Class Order 00/344) be available for dispatch on Friday 4 October.

[9] On Friday 20 September 2002 at 6.22 pm, the Colonial Responsible Entity's lawyers received a letter from ASIC advising that ASIC consent had been sought to the early dispatch of Mirvac's Replacement Bidder's Statement and asking for submissions on the application by 4 pm Monday 23 September. ASIC also sent the letter to lawyers acting for Commonwealth Property Office Fund (**Commonwealth**) and Gandel Retail Trust (**Gandel**).

[10] On Monday 23 September 2002 at about 12.00 noon, the Colonial Responsible Entity's lawyers sent submissions to ASIC in response to ASIC's letter of 20 September 2002. Lawyers for Commonwealth and Gandel also made submissions to ASIC.

[11] After reviewing those submissions and before the time of the application, ASIC granted consent to the early dispatch of the Replacement Bidder's Statements on 23 September 2002.

[12] Meetings of the Colonial Funds unitholders (**Meetings**) were due to be held on Monday 30 September¹. At the Meetings, the unitholders were to vote on a proposal to merge the Colonial Funds with Commonwealth and Gandel (**Merger Proposal**). The closing date for receipt of proxies was Friday 27 September for mail and hand deliveries and 9.00 am on Saturday 28 September for lodgment by fax.

[13] At 4.47 pm on 23 September, the Colonial Responsible Entity made this application to the Panel. The application sought interim orders to restrain dispatch of the Replacement Bidder's Statement until 6.00 pm on Tuesday 24 September 2002 to allow the Colonial Responsible Entity time to make a further application in relation to some of the matters that were in dispute between the parties. If an application were made in that time, the Colonial Responsible Entity sought to further restrain dispatch until the matters were resolved. The Colonial Responsible Entity sought to restrain dispatch for a short period until it had been able to make formal application in relation to the constitutional issue (or had decided not to make such an application).

[14] Mirvac had made two applications in relation to the Merger Proposal on 30 August 2002 and 2 September 2002. Further background information on the circumstances surrounding this application can be found in the Panel's published reasons in relation to Mirvac's two applications.

Discussion

[15] The primary issue for the Panel was what information about the Mirvac bid it considered should be before the Colonial Funds unitholders prior to their being required to vote at the Meetings and whether or not to restrain Mirvac from dispatching its Replacement Bidder's Statement to Colonial Funds unitholders. Subsidiary issues included what degree of finality of the dispute was it reasonable for Colonial Funds unitholders to expect prior to the Meetings and how much time should unitholders reasonably expect to consider the information prior to the Meetings.

Postponing the Colonial Funds Meetings

[16] The Panel discussed whether to require the Colonial unitholders' Meetings to be adjourned any further so as to allow the issues still in contention to be resolved and to allow accurate information on the final resolution of the issues to be provided to the unitholders before they had to decide between the alternative proposals.

[17] The unitholders' Meetings had already been adjourned from 3 September until Monday 30 September. If the meeting was to be adjourned for 1 month or more in total, then s 252K of the Corporations Act (**Act**) required that new notice must be given to the unitholders. This means that the last possible date for the Meetings to be held under the current notices of meeting was Wednesday 2 October.

[18] The Colonial Responsible Entity informed the Panel that there were no suitable venues available in Sydney to accommodate the large number of Colonial unitholders on Tuesday 1 October or Wednesday 2 October.

[19] If a new notice of meeting were given, the Colonial Responsible Entity advised that it would require a further period of approximately 5 weeks until the unitholders' meeting could be held (including drafting, printing and 21 days notice²).

The Enhancements

[20] On 29 August 2002 and subsequently, Commonwealth and Gandel announced certain enhancements to the consideration being offered to Colonial unitholders under the Merger Proposal (**Enhancements**). The Colonial Responsible Entity informed the Panel that there was no guarantee that the Enhancements would be available if the unitholders' meeting was delayed any further. The Panel considered that it would be a commercial decision for Commonwealth and Gandel whether or not to affirm the Enhancements.

Timing Issues

[21] The following times and dates are relevant in the Panel's decision:

- a. ASIC granted the relief for Mirvac to dispatch its Replacement Bidder's Statement early, at the end of Monday 23 September;
- b. ASIC had advised parties on Friday 20 September that it understood that on Monday 23 September Mirvac would be seeking consent for early dispatch of its Replacement Bidders Statement. ASIC sought submissions on that issue by 4.00 on Monday 23 September. ASIC advised that it expected any party who considered the document should not be dispatched to Colonial Unitholders would apply to the Panel before 4.00 pm on Monday 23 September to restrain dispatch of the Replacement Bidders Statement;
- c. Prior to ASIC's decision, Mirvac was entitled to dispatch its Replacement Bidder's Statement around Monday 7 October (the exact date depends on when the consolidated bidder's statement was received by Colonial - the precise date was not clear from the submissions);
- d. The ASIC relief allowed Mirvac to dispatch the Replacement Bidder's Statement that evening and Mirvac expected that the Replacement Bidder's Statement would be delivered to many of the Colonial Funds unitholders on Tuesday 24 September or Wednesday 25 September;
- e. The Meetings were due to be held on Monday 30 September;
- f. The last date proxies could be received by mail or hand delivery was Friday 27 September (although it was possible to lodge them by fax until 9.00 am on Saturday 28 September).

[22] The Panel considered that the ASIC adjusted Mirvac timetable would allow the Colonial Funds unitholders to have the Replacement Bidder's Statement in time to read and consider it before having to lodge proxies for the Monday Meetings.

Restraining the Mirvac Bidder's Statement

[23] The Panel was not willing to restrain the dispatch of the Replacement Bidder's Statement. It considered that doing so, without also postponing the Meetings, would materially limit the information that the Colonial Funds unitholders would receive on the rival Mirvac proposal that was material to their decision as to how to vote at the Meetings.

[24] The Panel was concerned that restraining dispatch of Mirvac's Replacement Bidder's Statement until the Colonial Responsible Entity had drafted its full application, parties had had a reasonable time to make submissions and rebuttals, and then the Panel had had time to consider them, would effectively negate any shortening of time granted by ASIC and eliminate any effective time for the Colonial Funds unitholders to consider Mirvac Replacement Bidder's Statement and offer prior to having to make their proxy decisions.

[25] The Panel considered that it would be better for Colonial Funds unitholders to receive a bidder's statement that was arguably defective (but which on the basis of the issues brought to the Panel's attention could be rectified by further disclosure or withdrawn) than either no bidder's statement at all, or a bidder's statement that was free from defects but received too late for the unitholders to properly consider before the Meetings.

[26] The Panel considered the Colonial Responsible Entity's concern that the Replacement Bidder's Statement may contain misleading information. The Panel decided that if this were the case, the Replacement Bidder's Statement could be rectified through further disclosure to the unitholders, by Mirvac or the Colonial, Commonwealth or Gandel Responsible Entities. The Panel considered that there was still time for this to be done prior to the Meetings by announcements to ASX and on the company websites and by newspaper advertisements. If necessary, the Replacement Bidder's Statement could be withdrawn by Mirvac voluntarily or by Panel order. The Panel weighed this against the harm of denying the Colonial Funds unitholders the opportunity to consider the Replacement Bidder's Statement with reasonable time prior to having to make any decision on the Merger Proposal.

[27] The Panel considered that no evidence had been brought before it to show that the Replacement Bidder's Statement contained information which would actively mislead Colonial unitholders in their decision making. Of the issues raised, all had been effectively canvassed in public and were capable of being raised again by the parties prior to the time at which Colonial unitholders would have to make decisions about voting by proxy or at the Meetings. Therefore the Panel considered that it was unlikely that allowing the Replacement Bidder's Statement to be dispatched would cause material harm. Any harm was capable of remedy, or had already been immunised against and the potential harm of delay was material.

Supplementary Information to Unitholders Prior to the Meetings

[28] The Panel considered that it would be entirely feasible for both the Colonial Responsible Entity and Mirvac to provide further supplementary information to Colonial Funds unitholders prior to their proxy or Meeting decision dates, either by letter posted on Tuesday, or by announcement to ASX and on the company websites. The Panel noted that the Colonial Responsible Entity had repeatedly, and very properly, advised Colonial Funds unitholders to watch the ASX website and the Colonial Funds website in the days leading up to the Meetings because of the fluid position regarding information.

Constitutional issue

The Colonial Responsible Entity's Assertion about the Constitutional Issue.

[29] Mirvac advised that it had legal advice that the consideration being offered under its takeover bid is valid under the constitution of Mirvac Property Trust. The Colonial Responsible Entity has disputed this, but the onus is on the Colonial Responsible Entity to make their case.

[30] The Panel noted that there are a number of ways of dealing with the possible constitutional issue, however the Panel has declined to deal with this issue unless a further application is made in that regard.

Disclosure

[31] The Panel noted that if the Colonial Responsible Entity was of the opinion that the Replacement Bidder's Statement was misleading, then the Colonial Responsible Entity should publish corrective information or raise specific concerns in a separate application to the Panel.

Further disclosure

[32] The Panel requested the parties to ensure that the unitholders are provided with sufficient information, in time to make proper use of it prior to the unitholders' meeting, concerning the issues still in contention.

Order

[33] The Panel decided not to make the interim orders sought by the Colonial Responsible Entity.

[34] The Panel consented to the parties being represented by their commercial solicitors.

1 The Meetings were originally scheduled to be held on 3 September. The Meetings had been previously postponed until 10 September and then until 30 September.

2 Under s 252F of the Act (s 249H of the Act does not apply to listed managed investment schemes).