

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

r8.05

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 INVESTMENT SCHEMES LISTED IN SCHEDULE 1
AND OTHERS ACCORDING TO THE SCHEDULE
Plaintiffs

AFFIDAVIT OF GEORGE KALIL

Date of document:
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11 November 2009
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I, **GEORGE KALIL** of Level 3, 96 Phillip Street, Parramatta, New South Wales make oath and say that:

1. I make this affidavit on my own behalf and except where I otherwise indicate, the matters deposed to in this affidavit are deposed to from my own personal knowledge of the facts.
2. Where I depose to matters from information or belief, I believe such matters to be true.
3. I am a director Axis Financial Advisers Pty Ltd and a qualified financial adviser.
4. I am also a director of Great Land Olives Limited (**GLO**).
5. I am a member of the executive of the Timbercorp Grower Group (**TGG**) and also a member of TGG Olive Committee Inc which is the former olive scheme sub-committee of the TGG.

The Timbercorp Olive Schemes

6. The Timbercorp olive schemes are conducted in two different areas – Boort and Boundary Bend, both in north-eastern Victoria. Boundary Bend Limited manages the groves at both locations.
7. The 2001 – 2004 schemes are located at Boort on land owned by Olivecorp Pty Ltd and the 2006-8 schemes at Boundary Bend mostly on land owned by BB Olives Pty Ltd and Almond



Land Pty Ltd and on a small area owned by Boundary Bend Ltd subsidiaries, Olivecorp Pty Ltd, Almond Land Pty Ltd and BB Olives Pty Ltd are related companies of Timbercorp Limited. The Boort property is very productive whereas the Boundary Bend property is immature requiring further capital investment and time to grow to full maturity where production is expected to outperform the Boort property.

8. I believe there are 3,074 Boort growers who have invested a total of \$144,647,592 in the Boort schemes, 41 growers who have invested \$15,683,156 in an unregistered scheme at Boort and 1,637 growers who have invested a total of \$99,491,393 in the Boundary Bend schemes.
9. The total amount invested in the Timbercorp olive Schemes is \$259,822,141.

Scheme Meetings

10. The TGG instructed Clarendon Lawyers on behalf of a member of each of the Timbercorp olive Schemes 2001 to 2004 and 2006 to 2008 (**Olive Schemes**) to file an interlocutory process in 7114 of 2009 in the Supreme Court of Victoria seeking the appointment of a temporary responsible entity to the Olive Schemes.
11. Pursuant to orders made by His Honour Mr Justice Robson on 21 July 2009, the liquidators of the Timbercorp companies caused Timbercorp Securities Limited (**TSL**) in its capacity as responsible entity of the Olive Schemes to call and hold a meeting of members of the schemes on 17 August 2009. TSL distributed with the notice of meeting resolutions requested by the TGG. Now produced and shown to me marked with the letters "GK-1" is a copy of the notice of meeting of the 2001 Scheme. The notices for the other Olive Schemes are substantially similar.
12. Resolution one of the meeting was an ordinary resolution that "the schemes should continue and not be wound up". The voting results prepared by the liquidator show the following results for the resolution:

SCHEME	VOTES FOR	VOTES AGAINST	% of Lots Voted
2001	89%	11%	28%
2002	98%	2%	24%
2003	95%	5%	30%
2004	100%	0%	63%
2006	97%	3%	40%
2007	99%	1%	42%



SCHEME	VOTES FOR	VOTES AGAINST	% of Lots Voted
2008	95%	4% (1% abstained)	29%

Now produced and shown to me marked with the letters “**GK-2**” is a copy of the voting results published by the liquidator.

13. I believe that the higher vote “against” in the 2001 Scheme can be explained by the fact that Timbercorp entities own 276 grovelots in this scheme equivalent to 7% of the total 3,919 grovelots shown on the Register of the 2001 Scheme at or about the time of the meeting.

Liquidator’s sale process

14. On or around August 2009 Korda Mentha issued a Confidential Information Memorandum for the sale or recapitalisation of the Olives Schemes.
15. On or about 28 August 2009 Mark Bland of Clarendon Lawyers requested this honourable court to relist the proceeding for the appointment of a temporary responsible entity to the Olive Schemes.
16. On 9 October 2009, Mr Bland sent an email to the relevant parties advising them that the application for a temporary responsible entity, which was listed for hearing on Monday 12 October 2009, would be adjourned in the interests of saving unnecessary legal costs, and that a bid would be made in relation to the 2001 to 2004 Olive Schemes (**Boort Schemes**) involving a new responsibility entity with the support of the TGG. Now produced and shown to me marked with the letters “**GK-3**” is a copy of Mark Bland’s email.

Original GLO Bid

17. Stuart Martyn and I prepared and submitted a bid to KordaMentha on Friday, 11 September 2009 to take over the Boort Schemes and to acquire the processing plant and other plant and equipment. The bid was on behalf of a then proposed company called Great Land Olives Limited (**GLO**). Now produced and shown to me marked with the letters “**GK-4**” is a copy of the bid (**GLO Bid**).
18. The GLO Bid included the appointment of a temporary responsible entity to the Boort Schemes because the majority of the growers wanted the schemes to continue.
19. On 16 September 2009, in a discussion between me and Mr Andrew Malarkey of KordaMentha, Mr Malarkey said that a weakness of the GLO Bid was that it did not include a proposal to purchase the land on which the grovelots are located, or a proposal to allow the growers to opt out of the schemes. Timbercorp Limited is a grower with a holding of 6.7% across the 2001 - 2004 Olive Schemes. I understood Mr Malarkey’s comments to indicate that the bid was not suitable to the Timbercorp investor entities and to the two Timbercorp landowning companies. Now produced and shown to me marked with the letters “**GK-5**” is a copy of the minutes of this meeting.

20. On 17 September 2009, I emailed Mr Malarkey with a proposal in relation to growers who did not wish to continue their involvement with the Olive Schemes. The proposal involved giving the growers the option to "opt out" of their scheme and take their entitlement under the apportionment process. The growers who were interested in continuing their involvement could consider the GLO equity participation offer. Now produced and shown to me marked with the letters "GK-6" is a copy of that email.
21. I had a telephone conversation with Mr Malarkey and Mr Andrew Ryan of KordaMentha on Friday 25 September 2009. I was advised that the crop sale agreement with Boundary Bend Limited which had funded the horticultural operations at the groves would expire on 30 September 2009 and that Boundary Bend Limited was not willing to extend this deadline. I was further informed that final offers would now be due on 2 October 2009 which would then be assessed and a preferred bidder nominated on 5 October 2009. Now produced and shown to me marked with the letters "GK-7" is a copy of the email chain before and after this conversation between myself, Malarkey and Ryan.

Revised Bid

22. On 2 October 2009, Stuart Martyn and I submitted a revised offer to purchase the Boort Schemes (**Revised GLO Bid**). Now produced and shown to me and marked with the letters "GK-8" is a copy of the GLO Revised Bid.
23. On 8 October 2009 I sent a letter to Malarkey and Ryan. This letter included:
- (a) the offer to immediately undertake the care and maintenance of the olive groves and urgent watering at my own expense (requesting consent from the KordaMentha to my occupation of the olive groves for that purpose) and to provide seed capital of \$1.5 million for maintenance of the groves during the capital raising period if the Revised GLO Bid was successful;
 - (b) the statement that the bid could proceed without a change of responsible entity of the schemes in which case GLO would acquire the assets and the purchase price paid by it would be apportioned between growers and creditors which would give growers the first right of refusal to continue in the schemes while compensating those growers that wished to opt out of the schemes; and
 - (c) the offer to provide an underwriter for the capital raising if that was considered by KordaMentha to be a necessary component of a successful bid.

Now produced and shown to me marked with the letters "GK-9" is a copy of this letter.

24. On 8 October 2009 I sent an email to Malarkey informing him that I would organise a \$1.5 million loan against my business practice which together with my earlier offer of \$1.5 million would provide up to \$3 million in short term funding of the schemes. Now produced and shown to me marked with the letters "GK-10" is a copy of this email.



25. On 9 October 2009 I received a letter from Malarkey. In this letter, Mr Malarkey raised the following concerns in relation to the Revised GLO Bid:

- (a) the short-term management of the olive groves prior to completion of the sale and recapitalisation process;
- (b) the compensation of growers that did not wish to continue their involvement in the scheme; and
- (c) the absence of an underwriter willing to underwrite the equity participation offer to Growers.

Now produced and shown to me and marked with the letters "GK-11" is a copy of the letter.

26. On 12 October 2009 I sent a letter to Mr Malarkey addressing the issues raised in his letter of 9 October 2009. These included:

- (a) a further offer to immediately undertake the care and maintenance of the olive groves until the capital was raised from growers in order to give the growers the opportunity to acquire the Grove; and
- (b) confirmation that the GLO Revised Bid was not predicated upon a change of responsible entity of the schemes; and
- (c) an explanation of what GLO proposed would happen with defaulting grovelots.

Now produced and shown to me and marked with the letters "GK-12" is a copy of this letter.

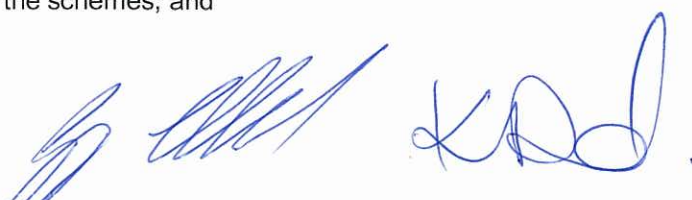
Liquidator's Decision

27. On 12 October 2009 I received an email from Mr Malarkey stating that KordaMentha had executed a sale and purchase deed with Boundary Bend Limited in respect of both the Boort and Boundary Bend olive assets and would not be pursuing our offer any further. Now produced and shown to me marked with the letters "GK-13" is a copy of the email.

28. On 13 October 2009 I sent an email to Mr Malarkey expressing my disappointment with KordaMentha's decision because under the Boundary Bend Limited proposal the Boort growers would receive virtually no value for the \$160 million they had contributed to the schemes. Now produced and shown to me marked with the letters "GK-14" is a copy of this email.

29. On 15 October 2009 I received a letter from Mr Malarkey outlining the reasons that the liquidators considered the Boundary Bend Limited offer superior to the GLO Revised Bid, including:

- (a) a limited amount of funding for the immediate care and maintenance of the olive groves;
- (b) a change of responsible entity which did not provide compensation to growers who did not wish to continue the schemes; and



- (c) that it was conditional on raising capital as there was no underwriter willing to underwrite the capital raising.

Now produced and shown to me and marked with the letters "GK-15" is a copy of the letter.

30. The letter from Mr Malarkey referred to in paragraph 29 above did not address the aspects of the Revised GLO Bid that were outlined in my email to Mr Malarkey dated 8 October 2009 referred to in paragraph 23 above.
31. I am informed by Stuart Martyn and verily believe that on 16 October 2009 he responded by email to Andrew Malarkey's letter. Now produced and shown to me marked with the letters "GK-16" is a copy of Stuart Martyn's email.

Boundary Bend Limited's crop sale agreement

32. Boundary Bend Limited has been managing the olive groves under a crop sale agreement.
33. On or about 28 September 2009 I attended a committee of inspection meeting for TSL. KordaMentha requested the meeting to approve expenditure of \$1,701,000 under the Crop Sale Agreement for the month of September 2009. KordaMentha produced a CSA Analysis of this expenditure based on information provided by Boundary Bend Limited. Now produced and shown to me marked with the letters "GK-17" is a copy of the CSA Analysis presented at the meeting.
34. On 29 September 2009 I sent an email to Andrew Ryan of KordaMentha stating my disagreement with the invoice and the CSA Analysis. I verily believe that there was much less work done by Boundary Bend Limited than was detailed in the CSA Analysis. Now produced and shown to me marked with the letters "GK-18" is a copy of this email.
35. The estimated expenses for the month of September 2009 are \$562,851, as indicated by the farm management budget emailed to me by the farm manager Tim Facey formerly employed by Boundary Bend Limited at Boort, substantially lower than the amount claimed by Boundary Bend Limited for September 2009. Now produced and shown to me marked with the letters "GK-19" is a copy of the budget.
36. On 7 October Andrew Malarkey from KordaMentha sent me an email confirming that he had sent to Boundary Bend Limited under the Crop Sale Agreement a request for details of the September expenditure. Under the terms of the Crop Sale Agreement, Boundary Bend Limited had 21 days to respond which expired on 21 October 2009. I have not been informed by Mr Malarkey whether Boundary Bend Limited has responded. Now produced and shown to me marked with the letters "GK-20" is a copy of the email I received.
37. On or about 7 October 2009 I was informed by Andrew Malarkey of Korda Mentha that at Boundary Bend Limited's request the crop sale agreement contains a provision that if Timbercorp Securities Limited were replaced as responsible entity of the Timbercorp olive schemes with a new responsible entity, an amount of \$3 million would be payable by the replacement responsible entity to Boundary Bend Limited within 5 days. Coincidentally a



similar provision was included in the crop sale agreement entered into by the liquidators of Timbercorp Securities Limited with Select Harvest Limited in relation to the Timbercorp almond schemes. I believe these poison pill arrangements were deliberately entered into to discourage a new responsible entity from taking over the schemes.

Boundary Bend Limited's bid

38. The Boundary Bend Limited bid accepted by the liquidators is for \$59,500,000. The bid includes the buy back of shares owned by a Timbercorp entity in Boundary Bend Limited. The shares amount to 19.4% of the issued shares of Boundary Bend Limited. At a meeting between the TGG Olive Committee Inc and Boundary Bend Limited on 13 October 2009, Mr Tim Jonas, a director of Boundary Bend Limited, stated that the company had a net asset value of \$30 million. This indicates that \$6 million may have been allocated to the purchase of these shares. On this basis, Boundary Bend Limited's price for the olive assets would reduce to \$53,500,000. I am unable to verify these numbers because I have not been given access to the sale document. However, I refer to paragraph 69 of the affidavit of Mark Anthony Korda filed in these proceedings, which at subparagraph (f) indicates that the shares are included in the sale. The allocation of the purchase price in the table in paragraph 81 of that affidavit does not indicate how much is allocated to the shares. I am informed by Mark Bland of Clarendon Lawyers and verily believe that in response to a request for clarification he has been advised by Bridgette Toy-Cronin of Arnold Bloch Leibler that the consideration for the purchase of the shares is included in the \$9.3 million allocated to "*Land, Tree and Other*" in the table in paragraph 81. Now produced and shown to me marked with the letters "GK-21" is the copy of the email received by Mr Bland.
39. Mr Robert McGavin who is a director of Boundary Bend Limited was present at the meetings of olive growers on 17 August 2009 referred to in paragraph 11 of this affidavit. He spoke at the meeting and outlined a proposal by Boundary Bend Limited to acquire the Timbercorp olive assets. One of the representations made by Mr McGavin at the meeting was that growers would be offered the chance to acquire 100% of the vehicle used to buy the Boort and Boundary Bend properties at the same price including transaction costs paid by Boundary Bend Limited for the olive assets. He also told the meeting that:
- "The equity participation offered to growers will be an entitlement based on existing project investment. If 100% of the entitlement is taken up the assets will be 100% owned by the existing growers."*
40. Now produced and shown to me and marked with the letters "GK-22" is a slide taken from the material presented by Mr McGavin at the meeting.
41. I attended the meeting between the TGG Olive Committee Inc and Boundary Bend Ltd referred to in paragraph 38. Mr Jonas told us that Boundary Bend Ltd had entered into an agreement with VicSuper Pty Ltd for the sale and lease back of water rights which would raise \$50 million towards their purchase price. Mr Jonas also indicated that Boundary Bend



Limited would seek to raise up to \$40 million from the existing growers by an equity offer. I asked him what proportion of underlying ownership the growers who invested in this capital raising would acquire in the underlying olive scheme assets. He refused to indicate the proportion.

42. Now produced and shown to me and marked with the letters "GK-23" and "GK-24" are copies of a media release and an open letter to all Timbercorp MIS olive growers and advisors issued by Boundary Bend Limited on 13 and 16 October 2009. In both of these the shares to be offered to growers are described as 100% of the shares to be issued. Nowhere do the documents indicate what proportion of the assets being acquired are represented by these shares.
43. If Boundary Bend Limited's proposal proceeds they will, in effect, acquire assets in which growers have invested nearly \$260,000,000 for a net \$3,500,000 after allowing for the value of Boundary Bend Limited share buy-back and the water rights disposal and there is no indication that the growers will receive an equitable share in the assets. In any event, the growers will have to pay for whatever shares they acquire.
44. The sale proceeds will be placed in a fund and there are likely to be proceedings with the BOSI syndicate of banks and with forestry growers to determine the entitlement to these proceeds based on deeds of covenant entered into by the BOSI Syndicate and the Commonwealth Bank in favour of the olive growers. I refer to the affidavit of Michael Fernon filed in this proceeding for the implications of this for growers.
45. Paragraph 114 of Mark Korda's affidavit indicates that part of the sale proceeds are to be allocated to the 2000 private offer growers. They are being given certain rights out of a constructed arrangement between OLPL and OML. This indicates that moneys which should be paid to growers in the registered schemes are being diverted to growers in the private scheme. This disadvantages registered scheme growers and creditors and, I believe, advantages Timbercorp itself because the private growers are indebted to Timbercorp entities and the moneys will likely be set off against these debts.

New GLO Proposal

46. GLO has now revised its proposal and wishes to put it to the liquidators. The new proposal (**GLO Proposal**) is as follows:
 - (a) GLO will purchase the Timbercorp olive assets, excluding Boundary Bend Limited shares (valued at up to \$6 million) and the olive assets on the Boundary Bend Limited property for \$60 million and seek court orders for growers to forego their right to apportionment in exchange for shares in GLO detailed in subparagraph (k) below;
 - (b) \$40 million of this will be allocated to the Boort olive assets and \$20 million to the Boundary Bend olive assets;
 - (c) of the \$40 million allocated to Boort:



- (i) \$26 million will be paid to release the CBA/forestry growers facility which will release the Boort olive assets from the CBA/Fenceport Pty Ltd encumbrance;
 - (ii) the liquidators costs in relation to the Timbercorp olive assets and the costs of the TGG;
 - (iii) the remaining amount will be apportioned between unsecured creditors and the Boort investors in proportions as determined by the liquidators;
- (d) the whole of the \$20 million attributed to the Boundary Bend olive assets will be paid to the BOSI syndicate and no amount will be available for the growers;
- (e) GLO is prepared today to enter into an unconditional contract to purchase the olive assets - it is willing to pay a deposit of \$6 million within 30 days of signing the contract and the balance of \$54 million within 5 months after payment of the deposit;
- (f) the contract should provide that GLO has access to the olive groves to carry out the olive operations - GLO will expend at least \$9 million in doing this;
- (g) GLO has obtained loan funding commitments of \$15 million from seed investors to cover the deposit and the operations during the 6 month period to settlement;
- (h) GLO will fund the \$54 million balance of purchase price by a capital raising from existing growers of \$60 million with \$15 million fully underwritten by Novus Capital Limited;
- (i) should the capital raising fall short of the full \$60 million then GLO is in a position to sell up to a maximum of \$41,873,000 of permanent water rights on a sale and lease back basis - as a comparison, the Boundary Bend Limited offer envisages that \$50 million in permanent water rights will be sold and leased back which includes 3,545 megalitres of their own water;
- (j) in addition, a working capital bank facility will be obtained for \$35 million to finance farm operations until the 2010 harvest proceeds are received – we have had discussions with a first tier bank and I am very confident that we will secure funding based on the assets being unencumbered;
- (k) each grower will be allocated a number of shares in GLO to which they are entitled, depending on which olive scheme they are a member of and the number of grovelots they own (**Base Share Entitlement**) - the total number of such shares issued is expected to equal 26,668,576 with a net tangible asset backing of approximately \$1.16 per share or \$30.9 million in total based on a going concern valuation;
- (l) this allocation will be in consideration of them agreeing to the cancellation of their “growers rights” including their right to participate in the apportionment of the olive scheme sale proceeds;



- (m) in addition, growers will be invited to subscribe for 2,500 shares per grovelot owned by them at a price of \$1 per share and thereby add to their investment in the assets of the schemes (**Further Share Entitlement**);
 - (n) the offer will be by way of a prospectus seeking to raise the sum of \$60 million – the \$60 million is the same cash amount that growers would have contributed in tax deductible payments in October 2009 for the 2009-2010 financial year had the schemes continued;
 - (o) GLO will establish a sale facility whereby the growers who do not wish to participate will be able to offer to sell their Base Share Entitlement in the prospectus capital raising to grower and other third party investors once the \$60 million capital raising target is achieved;
 - (p) the capital raising will be underwritten as to the first \$15 million;
 - (q) the underwriters will acquire a 30% free carried interest over the issued shares in GLO and the growers will acquire 70% of the issued shares of which 26% are the allocated shares under paragraph (k) above and 44% are the subscription shares referred to in paragraph (m) above; and
 - (r) if the capital raising fails to raise at least \$15 million, then the underwriters and their sub-underwriters will acquire the shortfall.
47. Now produced and shown to me and marked with the letters "GK-25" is a spreadsheet setting out the growers' Base Share Entitlements and Further Share Entitlements for each scheme.
48. The GLO Proposal is more beneficial to both creditors and growers in the Timbercorp olive related companies than the Boundary Bend Limited proposal for the following reasons:
- (a) the purchase price received by the liquidator may be up to \$6.5 million more because it excludes the purchase of the shares in Boundary Bend Limited owned by Timbercorp which can then be separately sold by the liquidator;
 - (b) the olive growers will not be involved in expensive and protracted litigation with the forestry growers and other unsecured creditors over the apportionment of the proceeds which will inevitably dissipate much of the olive sale proceeds – the affidavit of Michael Joseph Fernon filed in this proceeding deals further with this;
 - (c) the olive growers will not be entitled to lodge creditor claims for their MIS investments which would total almost \$260 million and therefore other Timbercorp creditors both secured and unsecured would receive a greater share of the available olive sale proceeds;
 - (d) all growers will acquire an aggregate guaranteed allocation of 26,668,576 shares in GLO estimated by me to be worth at least \$30.9 million on a going concern basis and



have the right to purchase a further 59,752,500 shares thereby giving them an aggregate 70% underlying interest in the olive assets;

- (e) GLO is a single purpose entity and its sole activity will be operating the former Timbercorp Olive Schemes – investors will not be involved in other operations as they will if they subscribe for shares in Boundary Bend Limited, which has \$30 million of external debt and only 520 hectares of olive groves and a bottling and distribution business;
- (f) growers who do not want to continue their investment can offer to sell their Base Entitlement Allocation in the GLO prospectus capital raising;
- (g) the purchase price of \$2,500 per grovelot is almost the same amount that the Boort Growers would have had to have paid this year in operating costs and is about \$900 per grovelot more than the Boundary Bend growers would have had to have paid, and there will be no requirement for any ongoing payments;
- (h) the restructured olive operations as envisaged in the GLO proposal are expected to be significantly more profitable to grower investors than the previous Timbercorp MIS schemes and they will have up to a 70% direct interest in the olive assets being acquired which is substantially more than the likely outcome to be propped by Boundary Bend Limited; and
- (i) the proposal will enable the growers to eliminate approx \$20 million in annual licence fees and rent, \$5 million in processing fees and \$5 million in responsible entity/management fees along with significant savings in farm management expenses – this enables growers to recoup 100% of their capital outlay to acquire the assets within 2 years of acquisition, being money they would have expended in any event in tax deductible payments over the two years, had the schemes continued.

SWORN by the said **GEORGE KALIL**
at Melbourne in the State of Victoria
this 11 day of November 2009

Before me:

KATE FELICITY DESMOND

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an Australian Legal Practitioner within the
meaning of the *Legal Profession Act 2004*