

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

LIST D  
S CI 2011 6777

BETWEEN

**FENCEPORT PROPRIETARY LIMITED (ACN 139 604 121)  
& ORS (according to the attached Schedule)**

Plaintiffs

and

**CON MOSHOPOLOUS  
& ORS (according to the attached Schedule)**

Defendants

**AFFIDAVIT OF JANE CHALMERS SHERIDAN**

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Date of document: 19 September 2012  
Filed on behalf of: the Plaintiffs

Prepared by:

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I, **JANE CHALMERS SHERIDAN**, of Level 21, 333 Collins Street, Melbourne, in the state of Victoria, Solicitor, **MAKE OATH AND SAY** that:

1 I am a partner of Arnold Bloch Leibler (**ABL**), the solicitors for the Plaintiffs to this proceeding, being:

- (a) the first plaintiff, Fenceport Proprietary Limited (**Fenceport**);
- (b) the second plaintiff, Olivecorp Land Pty Ltd (in liquidation) (ACN 090 141 512) (**OLPL**);
- (c) the third plaintiff, Mark Anthony Korda, who is the sole director and secretary of Fenceport, and, with the fourth plaintiff, a liquidator of OLPL; and
- (d) the fourth plaintiff, Mark Francis Xavier Mentha, who, with the third plaintiff, is a liquidator of OLPL.



2 I have the care and conduct of this proceeding (**Fenceport Rights Proceeding**) on behalf of the Plaintiffs.

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

4 I refer to the following affidavits filed on behalf of the Plaintiffs in the Fenceport Rights Proceeding:

- (a) the affidavit of Mr Korda sworn on 13 December 2011 (**First Korda Affidavit**);
- (b) my affidavit of 27 August 2012 (**My First Affidavit**).

In the First Korda Affidavit and My First Affidavit, Mr Korda and I respectively define a number of terms, and I adopt those definitions in this affidavit.

#### **Exhibits to this affidavit**

5 There are a large number of documents referred to in this affidavit, some of which are large in size and some of which are confidential. Given the size and number of documents, I have arranged for electronic copies of each of the documents to be placed on one of three compact discs (as marked below) and given an individual document number and titled on the relevant compact disc (e.g., "1. Order of the Supreme Court of Victoria in SCI 9998 of 2009 dated 12 November 2009"). When referring to each document for the first time in this affidavit, I also refer in bold font in brackets to the relevant compact disc (by reference to the exhibit number assigned to each compact disc, as set out below) and the document number. Now produced and shown to me are the following three compact discs:

- (a) compact disc marked "**JCS-3**", containing true electronic copies of each of the project documents referred to in paragraph 23 below (documents 1 to 8 on exhibit **JCS-3**);
- (b) compact disc marked "**JCS-4**", containing true copies of the documents referred to in paragraphs 6, 10, 13, 14, 15, 17, 24, 29, 38, 39, 41, 43, 61, 62, 65, 66, 68, 69, 72, 93, 94, 95, 96, 97 and 98 below (documents 1 to 37 on exhibit **JCS-4**); and

(c) a confidential compact disc, marked "**Confidential JCS-5**", containing true copies of the Boort SPD and the Boort Water SPD referred to and defined in paragraph 37(a) below (documents 1 and 2 on **Confidential JCS-5**).

6 **Confidential JCS-5** is marked as a confidential exhibit as it contains sale contracts (that is, the Boort SPD and the Boort Water SPD) the subject of a confidentiality order made by the Honourable Justice Croft on 12 November 2009 in Supreme Court of Victoria proceeding no 9998 of 2009 (**Olive Sale Order**) (**exhibit JCS-4, document 1**).

### Introduction

7 Mr Korda, Mr Mentha, and Leanne Kylie Chesser of KordaMentha are the liquidators of a number of companies in the Timbercorp Group of Companies. Relevantly:

- (a) Mr Korda and Ms Chesser are the liquidators of Timbercorp Securities Limited (in liquidation) (ACN 092 311 469) (**TSL**); and
- (b) Mr Korda and Mr Mentha, in addition to their roles as the liquidators of OLPL, are the liquidators of Olivecorp Management Limited (in liquidation) (ACN 089 542 343) (**OML**) and Olivecorp Processing Facility Pty Ltd (In Liquidation) (ACN 098 581 081) (**Olivecorp Processing**).

8 In this affidavit, I refer to OLPL, TSL, Olivecorp Processing and OML together as the "**Olive Companies**".

9 References in this affidavit to the "**Liquidators**" are references to Mr Korda and Ms Chesser when referring to TSL, and to Mr Korda and Mr Mentha when referring to OML, Olivecorp Processing and/or OLPL.

10 Fenceport commenced the Fenceport Rights Proceeding on 13 December 2011 by filing an originating motion, summons and the First Korda Affidavit with the Supreme Court of Victoria (**exhibit JCS-4, documents 2, 3 and 4**).

11 The Fenceport Rights Proceeding concerns the net proceeds arising from the sale of the land and related assets on which the following Timbercorp olive projects were operated:

- (a) 2001 Timbercorp Olive Project (ARSN 094 383 082) (**2001 Olive Project**);



- (b) 2002 Timbercorp Olive Project (ARSN 098 233 455) (**2002 Olive Project**);
- (c) 2003 Timbercorp Olive Project (ARSN 104 648 473) (**2003 Olive Project**);
- (d) 2004 Timbercorp Olive Project (ARSN 108 744 378) (**2004 Olive Project**);  
and
- (e) the 2000 Timbercorp Olive Project (Private Offer) (Unregistered) (**2000 Private Offer Project**),

(together the **Boort Olive Projects** and each a **Boort Olive Project**).

- 12 The purpose of the Fenceport Rights Proceeding is to determine how those net sale proceeds are to be apportioned between:
  - (a) Fenceport;
  - (b) the grower investors in the Boort Olive Projects (the **Growers**); and
  - (c) any other interested parties claiming an interest in the net sale proceeds.
- 13 Pursuant to paragraph 2 of the order in the Fenceport Rights Proceeding made on 16 December 2011 (**Fenceport Order**) (**exhibit JCS-4, document 5**), a representative has been appointed by the Court in accordance with rule 16.01(2) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) (the **Rules**) in respect of each of the Boort Olive Projects to represent the interests of the Growers in that Boort Olive Project in the Fenceport Rights Proceeding (**Representative Growers**).
- 14 Pursuant to paragraph 6 of the Fenceport Order, on 20 December 2011 the Plaintiffs filed an amended originating motion in the Fenceport Rights Proceeding (**exhibit JCS-4, document 6**).
- 15 On 25 July 2012, a deed of compromise was executed by the parties to the Fenceport Olive Rights Proceeding (including the Representative Growers) to effect a compromise of the proceeding subject to certain conditions, including approval of the compromise by the Court in accordance with rule 16.01 of the Rules (the **Fenceport Rights Deed of Compromise**) (**exhibit JCS-4, document 7**).

### Purpose of this affidavit

- 16 This affidavit is made in support of the Plaintiffs' summons filed on 27 August 2012 by which, in accordance with rule 16.01(4) of the Rules, an application is made to this Honourable Court for approval of the compromise embodied in the Fenceport Rights Deed of Compromise.
- 17 Pursuant to clause 8 of the Fenceport Rights Deed of Compromise, the parties have agreed that, if the condition precedent in clause 3.1 of the deed is not satisfied by 31 December 2012, then the deed ceases to have any effect and, in that event (*inter alia*), the deed, any documents prepared or circulated pursuant to the deed, and any other documents prepared or circulated in anticipation of, or for the purpose of, the application the subject of the Plaintiffs' summons filed on 27 August 2012 (including, among other things, this affidavit) may not be referred to or tendered in evidence in the Fenceport Rights Proceeding, or the related proceedings to which I refer below.

### The Boort Olives Projects

- 18 Each of the Boort Olive Projects was governed by a suite of project documents including a constitution (except in the case of the 2000 Private Offer Project), and licence and joint venture agreements or sub-leases (**exhibit JCS-3, documents 1 to 8**). The members of the Boort Olive Projects are referred to in the project documents as "**Growers**" and, as noted above, I adopt that terminology in this affidavit.
- 19 The purpose of the Boort Olive Schemes was the cultivation of olives for the production of olive oil for commercial sale. The Boort Olive Schemes were operated on land in Boort, in the Mallee Region of Victoria (**Boort Land**).
- 20 At the time of the Liquidators' appointment to the Timbercorp Group of Companies on 29 June 2009, the Boort Land was owned by the second plaintiff, OLPL.
- 21 Timbercorp Securities Limited (in liquidation) (ACN 092 311 469) (**TSL**), of which Mr Korda and Ms Chesser are liquidators, is the responsible entity (**RE**) of four of the five Boort Olive Projects, which are registered managed investment schemes (**MIS**) under Part 5C of the Act. Those registered projects are the:
- (a) 2001 Olive Project (ARSN 094 383 082);
  - (b) 2002 Olive Project (ARSN 098 233 455);



- (c) 2003 Olive Project (ARSN 104 648 473); and
  - (d) 2004 Olive Project (ARSN 108 744 378).
- 22 In addition, there is one olive scheme managed by Olivecorp Management Limited (in liquidation) (ACN 089 542 343) (**OML**), of which Mr Korda and Mr Mentha are the liquidators, being the 2000 Private Offer Project. The 2000 Private Offer Project was only offered to sophisticated or professional investors. As such, it was not required to be (and accordingly was not) registered under Part 5C of the Act.
- 23 The project documents for the Boort Olive Projects included a series of lease and license agreements which were executed by OLPL and certain Timbercorp Group entities in respect of the Boort Land, namely:
- (a) a lease from OLPL to OML in respect of the 2000 Private Offer Project (**exhibit JCS-3, document 1**);
  - (b) a sub-lease from OML to OLPL in respect of the 2000 Private Offer Project (**exhibit JCS-3, document 2**);
  - (c) a licence and joint venture agreement between OLPL and the Growers in the 2000 Private Offer Project (**exhibit JCS-3, document 3**);
  - (d) a lease from OLPL to TSL in respect of the 2001 Olive Project and the 2002 Olive Project (**exhibit JCS-3, document 4**);
  - (e) a sub-lease from TSL to OLPL in respect of the 2001 Olive Project and the 2002 Olive Project (**exhibit JCS-3, document 5**);
  - (f) a licence and joint venture agreement between OLPL and each Participant Grower in the 2001 Olive Project and the 2002 Olive Project (**exhibit JCS-3, document 6**);
  - (g) a lease from OLPL to TSL in respect of the 2003 Olive Project and the 2004 Olive Project (**exhibit JCS-3, document 7**); and
  - (h) a sub-lease from TSL to each Participant Grower in the 2003 Olive Project and the 2004 Olive Project (**exhibit JCS-3, document 8**).



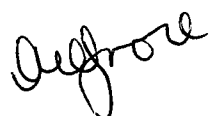
24 I refer to paragraph 54 of the affidavit of Mr Korda sworn on 3 March 2010 in proceeding S CI 2009 10699 in this Honourable Court (**3 March 2010 Korda Affidavit**) (**exhibit JCS-4, document 8**). In that paragraph, Mr Korda states that, from and upon their appointment as liquidators of the Timbercorp Group of Companies on 29 June 2009, the Liquidators undertook extensive investigations into the financial position of the Timbercorp Group of Companies, including:

- (a) examining the flow of funds through the various Timbercorp Group of Companies and the use of intercompany accounts;
- (b) assessing the process for receipt and distribution of harvest proceeds to the Timbercorp Group of Companies and Growers;
- (c) preparation of corporate and operational cash flows to understand the monthly commitments of the Timbercorp Group of Companies;
- (d) assessing each Timbercorp Project to understand the underlying viability of the Scheme from both a Grower and Timbercorp Group perspective; and
- (e) analysing the Grower loan arrears.

25 I refer to paragraph 54 of the 3 March 2010 Korda Affidavit, in which Mr Korda states that the Liquidators' preliminary investigations indicated that the Timbercorp Group of Companies had combined liabilities of \$661 million owing to secured lenders, \$250 million owing in other loans and debts, \$14 million owing to unsecured creditors and \$5 million owing in respect of employee entitlements (including redundancy payments).

26 Also in the context of that application, Mr Korda deposed at paragraph 58 that, as at 4 June 2009:

- (a) the quantum and timing of harvest
- (b) the quantum and timing of harvest proceeds of a number of the Schemes was uncertain;
- (c) the majority of head leases of the land which was utilised in relation to the Schemes (including the Boort Olive Schemes) (many of which were with the Timbercorp Group and some of which were with third party landowners) were only paid until 30 June 2009;



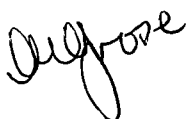
- (d) due to direct and joint venture ownership in a number of Schemes, the Timbercorp Group was required to contribute to ongoing Scheme costs and the Timbercorp Group did not have the financial capacity to meet these ongoing obligations;
- (e) Timbercorp had historically borne a portion of the management costs of many of the Schemes pending receipt of harvest proceeds or payment by Growers of management fees in arrears, but Timbercorp was not in a position to do so in the future; and
- (f) Timbercorp Finance Limited (**TFL**), a Timbercorp subsidiary, had historically provided finance to certain Growers, to enable them to pay their ongoing Scheme obligations, and TFL was no longer in a position to continue to finance Growers

**Direction Justified to Apply to Wind Up Timbercorp Projects (including the Boort Olive Projects)**

- 27 On 4 June 2009, Mr Korda and Ms Chesser (in their capacity as the administrators of TSL) filed an originating process in this Honourable Court seeking a direction that the Liquidators were justified in applying to wind up various Timbercorp schemes, including the Boort Olive Projects. That proceeding was numbered SCI 7114 of 2009.
- 28 The Liquidators explained to the Court in that application that TSL, the responsible entity, was hopelessly insolvent and they did not have the money required to continue maintaining the Boort Olive Projects.
- 29 In the context of that proceeding, Mr Korda swore affidavits on 9 July 2009 specifically in respect of the 2001 Olive Project (**2001 Olive Affidavit**) (**exhibit JCS-4, document 9**), the 2002 Olive Project (**2002 Olive Affidavit**) (**exhibit JCS-4, document 10**), the 2003 Olive Project (**2003 Olive Affidavit**) (**exhibit JCS-4, document 11**) and the 2004 Olive Project (**2004 Olive Affidavit**) (**exhibit JCS-4, document 12**).
- 30 In the 2001 Olive Affidavit, Mr Korda deposes at paragraph 8.8 that the 2001 Olive Project was insolvent because:



- (a) There was an estimated "Cumulative Scheme Cashflow - Before CAPEX" deficit of approximately \$809,000 to the end of September 2009 (**2001 Olive Shortfall**); and
  - (b) TSL did not have the capacity to fund the 2001 Olive Shortfall as there was no entitlement to demand payment from Growers before 31 October 2009 and TSL did not have the capacity itself to meet the Shortfall.
- 31 In the 2002 Olive Affidavit, Mr Korda deposes at paragraph 8.8 that the 2002 Olive Project was insolvent because:
- (a) There was an estimated "Cumulative Scheme Cashflow - Before CAPEX" deficit in total of approximately \$719,000 to the end of September 2009 (**2002 Olive Shortfall**); and
  - (b) TSL did not have the capacity to fund the 2002 Olive Shortfall as there was no entitlement to demand payment from Growers before 31 October 2009 and TSL did not have the capacity itself to meet the Shortfall.
- 32 In the 2003 Olive Affidavit, Mr Korda deposes at paragraph 8.8 that the 2003 Olive Project was insolvent because:
- (a) There was an estimated "Cumulative Scheme Cashflow - Before CAPEX" deficit of \$883,000 to the end of September 2009; and
  - (b) TSL did not have the capacity to fund the capital expenditure of \$28,000 identified as necessary to the end of 2009.
- 33 In the 2004 Olive Affidavit, Mr Korda deposes at paragraph 8.8 that the 2004 Olive Project was insolvent because:
- (a) There was an estimated "Cumulative Scheme Cashflow - Before CAPEX" deficit of \$217,000 to the end of September 2009; and
  - (b) TSL did not have the capacity to fund the capital expenditure of \$7,000 identified as necessary to the end of 2009.
- 34 On 4 June 2009, at the first directions hearing of the originating process referred to in paragraph 27 above, Clarendon Lawyers (**Clarendons**) appeared for a Grower, Chris Garnaut, to oppose the directions sought by the Liquidators.



- 35 On 10 June 2009 and 14 June 2009, when the matter was further heard, Counsel appeared on behalf of the then newly formed unincorporated association of Timbercorp Growers established by Chris Garnaut, named the Timbercorp Growers Group (**TGG**). Chris Garnaut is the chairman of the TGG.
- 36 On 17 June 2009, Justice Robson gave the direction that the Liquidators were justified in procuring TSL to apply to wind up the Boort Olive Projects.

### **Olive Sale Application**

- 37 On 10 November 2009, the Liquidators of TSL and OML filed an originating process with this Honourable Court to commence proceeding number 9998 of 2009 (the **Olive Sale Application**). In the Olive Sale Application, the Liquidators sought orders that, *inter alia*:
- (a) they were justified in entering into two sale and purchase deeds associated with the Boort Olive Projects (one to sell the land, trees, cropping rights, plant and equipment (the **Boort SPD**) (**Confidential JCS-5, document 1**) and the other to sell the permanent water rights at Boort (the **Boort Water SPD**) (**Confidential JCS-5, document 2**);
  - (b) they were justified in entering into two other sale and purchase deeds for assets of three other Timbercorp Olive MIS (the assets each of the Boort SPD, Boort Water SPD and the two additional sale and purchase deeds are together referred to as the **Olive Assets**); and
  - (c) in order to facilitate sale of the Olive Assets pursuant to the Boort SPD and the Boort Water SPD, they were justified in disclaiming the project documents associated with the Boort Olive Projects.
- 38 In support of the originating process in the Olive Sale Application, Mr Korda filed an affidavit on 10 November 2009 setting out a number of relevant facts relating to those sales (**Olive Sale Affidavit**) (**exhibit JCS-4, document 13**).
- 39 In paragraphs 7-12, 15, 19 and 97-106 of the Olive Sale Affidavit, Mr Korda sets out a number of facts relevant to the sale of the Olive Assets. The key points from those paragraphs are as follows -



- (a) Prior to the commencement of the Olive Sale Application, the liquidators of certain Timbercorp entities entered in a sale and purchase deed to sell forestry assets (**Forestry Assets**) owned by certain companies in the Timbercorp Group (**Forestry Sale**).
- (b) The Commonwealth Bank of Australia (**CBA**) held securities over both the Forestry Assets and the Olive Assets (**CBA Securities**). It was a condition precedent to the sale and purchase deed for the Forestry Sale that the CBA Securities over the Forestry Assets be released. However, the CBA would not release the security over the Forestry Assets unless all of the CBA Securities were repaid. On the date of the settlement of the Forestry Sale, OLPL and Olivecorp Processing (**Olive Borrowers**) were indebted to the CBA for an amount of approximately \$54 million (**CBA Olive Indebtedness**).
- (c) On 29 September 2009, the Liquidators of TSL filed an application for directions in respect of the sale and purchase deed for the Forestry Sale (proceeding no 9299 of 2009 in this Honourable Court) supported by an affidavit of Mr Korda of that date explaining the CBA's requirement that the Olive and Forestry facilities be repaid before it would release the CBA Securities and apportion the sale proceeds of the Forestry Sale (**exhibit JCS-4, document 14**).
- (d) The purchaser under the Forestry sale and purchase deed allocated \$124 million net of costs to the realisation of the CBA Securities. This left a shortfall of approximately \$26 million.
- (e) On 6 October 2009, Justice Pagone gave a direction allowing the Liquidators of TSL to procure TSL to pay the CBA from the sale proceeds. This meant that the Liquidators could apply funds allocated by the purchaser to the purchase of the Forestry trees (an asset of the Growers) to release the CBA securities. The transcript of the hearing on 30 September 2009 is included on **exhibit JCS-4 as document 15** and the order of Justice Pagone authenticated on 6 October 2009 in proceeding no 9299 of 2009 is included on **exhibit JCS-4 as document 11**.
- (f) To effect this, pursuant to the Fenceport trust deed (**exhibit JCS-4, document 17**) the funds that would have been payable to Growers went to Fenceport to be held on trust on behalf of TSL as responsible entity of the

Forestry Schemes pending agreement or, if no agreement was reached, determination as to the apportionment between the Growers in the various Forestry Schemes.

- (g) Fenceport then advanced \$26 million to the Olive Borrowers (**Advance**) to enable the full repayment of the CBA Olive Indebtedness and the discharge of all CBA Securities. The Advance was made pursuant to a loan agreement between the Olive Borrowers, TSL, OML and Fenceport (**Loan Agreement**) (**exhibit JCS-4, document 18**).
  - (h) In consideration of Fenceport providing the Advance to the Olive Borrowers, each of the Olive Companies agreed to grant to Fenceport certain securities over the same property that was secured by the CBA Securities in relation to the relevant Olive Assets (**New Securities**). The details of the New Securities are set out in schedule 3 to the Loan Agreement.
  - (i) The New Securities secured the Advance made under the Loan Agreement. The final repayment date under the Loan Agreement was the date on which the Olive Companies received the amount of money from the sale of the Olive Assets that the Supreme Court of Victoria ordered or approved for distribution to the Olive Companies for application towards the repayment of the Advance.
  - (j) To the extent that the sale price for the whole of the relevant Olive Assets was less than the Advance, Fenceport agreed to release the relevant Olive Assets from the New Securities after receiving a declaration from each Olive Borrower stating that the settlement amount was the best price reasonably obtainable for the relevant Olive Assets in the circumstances.
- 40 On 12 November 2009, Justice Croft made the Olive Sale Order in the Olive Sale Application (**exhibit JCS-4, document 1**) including that:
- (a) the Liquidators were justified in entering into the Boort SPD and the Boort Water SPD; and
  - (b) upon completion of the Boort SPD and the Boort Water SPD, the net proceeds of sale after payment of particular costs referable to the preservation and realisation of the assets the subject of those SPDs (**Net Boort Proceeds**) were to be held on trust by OLPL, pending hearing and determination by the



Court of a proceeding to determine which person(s) have any rights to all or part of the Net Boort Proceeds.

### Completion of the Boort SPD and the Boort Water SPD

- 41 On 11 January 2010, I received an email from Corrs Chambers Westgarth (acting for the vendors under the Boort SPD and the Boort Water SPD) confirming that those deeds had completed on 11 January 2010 (**exhibit JCS-4, document 19**).
- 42 The sale price obtained under the Boort SPD and the Boort Water SPD was sufficient to repay the Advance in full.
- 43 Accordingly, by a deed dated 11 January 2010 (**Deed of Release of Security**) (**exhibit JCS-4, document 20**), each of the New Securities was released pursuant to paragraph 9 of the Orders. The parties to the Deed of Release of Security are each of the Olive Borrowers, OML and Fenceport.
- 44 Under clause 4.1 of the Deed of Release of Security, it is provided that:

*"In so far as Fenceport has rights against [the Olive Borrowers and OML] ... prior to the release and transfer pursuant to this document, neither the release or transfer nor any action taken to effect, or as a result of that transfer or release, will prejudice Fenceport for the purposes of any proceeding in relation to the entitlement of any part of the proceeds of sale (as determined by the Supreme Court of Victoria or another court of competent jurisdiction) and, in particular but without limitation, nothing in this document will prejudice Fenceport's entitlement to be repaid the Advance or any other amount owing to it under the Loan Agreement."*

- 45 I am informed by Antony Munro of KordaMentha, as at 18 September 2012, the balance of the proceeds of sale of the Boort SPD and the Boort Water SPD are held on trust by OLPL in the following proportions and in the following accounts:

(a)

Account name	Olivecorp Land Pty Ltd (In Liquidation)
Bank	Westpac
BSB	033-002
Account number	29-0647
Amount	\$3,709.727.21



(b)

Account name	THE LIQUIDATORS OLIVECORP LAND PTY LTD
Bank	BankWest
Deal number	1024278
Amount	\$37,468,225.42

(c)

Account name	Olivecorp Land Pty Ltd (In Liquidation) Sale Deposit Account
Bank	Macquarie
BSB	183-334
Account number	3017-58876
Amount	\$6,835.36

46 I am also informed by Mr Munro that costs of the Liquidators in preserving and realising the Olive Assets pursuant to the Boort SPD and the Boort Water SPD have not yet been deducted from those proceeds.

### **Parties to the Fenceport Rights Proceeding**

#### *Fenceport - The First Plaintiff*

47 Fenceport is the plaintiff in the Fenceport Rights Proceedings. Its claims to the Net Boort Proceeds arises out of its positions as the lender under the Loan Agreement.

#### *OLPL and its Liquidators - The Second, Third and Fourth Plaintiffs*

48 As stated in paragraph 40(b), OLPL was ordered to hold the Net Boort Proceeds on trust. In that capacity, OLPL and its liquidators are parties to the Fenceport Rights Proceeding as 'stakeholders' of the Net Boort Proceeds.

#### *Representative Growers*

49 I am informed by Mr Munro that the number of Growers that hold investments in each of the Boort Olive Projects is:

- (a) 42 in the 2000 Private Olive Scheme;
- (b) 770 Growers in the 2001 Olive Scheme;
- (c) 606 Growers in the 2002 Olive Scheme;



(d) 532 Growers in the 2003 Olive Scheme; and

(e) 95 Growers in the 2004 Olive Scheme.

50 Some Growers hold investments in multiple Boort Olive Projects, such that the total number of Growers in all of the Boort Schemes is less than the total number of Growers set out in paragraph 49 above. Even so, there are several hundred Growers that hold investments in the Boort Schemes, and as such may have an interest in this proceeding.

51 Due to the number of Growers holding investments in each of the Boort Olive Projects, and the commonality of interests held amongst Growers in each of the Boort Olive Projects, Fenceport sought an order at the hearing in relation to the Fenceport Rights Proceeding on 16 December 2011 that representatives of Growers be appointed pursuant to rule 16.01(2)(c) of the Rules.

52 Pursuant to paragraph 2 of the Fenceport Order (**exhibit JCS-4, document 5**), the Representative Growers were appointed as follows:

(a) Con Moshopolous was appointed as representative of the Growers in the 2000 Private Offer Project;

(b) Pauline Emma Hammer was appointed as representative of the Growers in the 2001 Olive Project;

(c) David Sydney Butterfield was appointed as representative of the Growers in the 2002 Olive Project;

(d) Graham Goldenberg was appointed as representative of the Growers in the 2003 Olive Project; and

(e) Shun King Li was appointed as representative of the Growers in the 2004 Olive Project.

53 Pursuant to paragraph 2 of the Fenceport Order, the Representative Growers were joined as the first, second, third, fourth and fifth defendants in the Fenceport Rights Proceeding pursuant to rule 9.02 and/or rule 9.06(b) of the Rules.

### Issues for determination in the Fenceport Rights Proceeding

54 As noted in paragraph 12 above, the purpose of the Fenceport Rights Proceeding is to resolve the dispute as to how the Net Boort Proceeds are to be apportioned between:

- (a) Fenceport;
- (b) the Growers; and
- (c) other interested parties claiming an interest in them.

55 No party in the Fenceport Rights Proceeding has filed submissions in the proceeding to date as the proceeding has not progressed beyond the directions hearing on 16 December 2011. Accordingly, it is not possible yet to identify with complete certainty the disputed issues to be determined at any trial of the Boort Olive Rights Proceeding.

56 I believe that, based on the matters referred to in the following paragraphs, and based also upon:

- (a) the issues raised for determination in proceeding no 2009 10699 in this Honourable Court (the **Almond Land Rights Proceeding**) and the Honourable Justice Davies' judgment in that proceeding (see further paragraphs 60 to 66 below); and
- (b) the position adopted by the appellant representative growers in the Almond Land Rights Appeal Proceeding in their notice of appeal filed in that proceeding,

the following are likely to be the key issues addressed at any trial of the Fenceport Rights Proceeding:

- (c) what rights Fenceport, OLPL and the Growers (if any) have to the Net Boort Proceeds (the **Rights Issue**);
- (d) what the value is of any such rights of Fenceport, OLPL and the Growers respectively (the **Valuation Issue**); and





- (e) how much (if any) of the Net Boort Proceeds Fenceport, OLPL and the Growers are entitled to receive.

### **The Rights Issue**

57 In respect of the Rights Issue, having regard to the matters referred to at paragraphs 56(a) and 56(b) above, I believe that the relevant matters which will arise for consideration in determining the entitlements of the parties to the Net Boort Proceeds are as follows:

- (a) the nature and extent of the rights (if any) of, on the one hand, Fenceport and, on the other hand, the Growers, in respect of the Olive Assets the subject of the Boort SPD and the Boort Water SPD; and
- (b) the extent to which such rights gave rise to an entitlement to any part of the proceeds of the sale of the assets.

### **The Valuation Issue**

58 In respect of the Valuation Issue, having regard to the matters referred to at paragraphs 56(a) and 56(b) above, I believe that the relevant matters which will arise for consideration are as follows:

- (a) to the extent that the Growers held rights (whether proprietary or contractual in nature) which entitle them to make a claim against the Net Boort Proceeds, for the purpose of valuing those rights:
  - (i) what is the appropriate valuation methodology to adopt;
  - (ii) whether the Growers' case is analogous to a loss of opportunity claim; and
  - (iii) to what extent the Boort Olive Projects the subject of the Fenceport Rights Proceeding were viable such that they would run their full term under the relevant constituent documents or otherwise;
- (b) what was the value of the Growers' rights (if any); and

- (c) how, having regard to the foregoing, the proceeds available for distribution from the Net Boort Proceeds are to be apportioned between Fenceport, the Growers and other interested parties.

### **Entitlements (if any) to the Net Boort Proceeds of Fenceport, OLPL and the Growers**

- 59 The determination of the entitlements (if any) of Fenceport, OLPL and the Growers to the Net Boort Proceeds will turn on the resolution by this Honourable Court of the matters bearing on the Rights Issue and the Valuation Issue as referred to in the preceding paragraphs.

### **Judgment of the Honourable Justice Davies in the Almond Land Rights Proceeding**

- 60 Similar issues to those that I believe will be the subject of the Fenceport Rights Proceeding were raised for determination in the Almond Land Rights Proceeding (which concerned a conditional sale and purchase deed entered into on 18 September 2009 in respect of the assets of certain Timbercorp Almond Projects).
- 61 The background facts and purpose of the Almond Land Rights Proceeding closely resemble those of the Fenceport Rights Proceeding. A summary of the factual background to the Almond Land Rights Proceeding, as agreed between the parties to the proceeding, is set out in section B of the agreed summary for the Court of Appeal dated 12 December 2011 filed by the parties in accordance with Practice Statement CA 2 of 1995 in the Almond Land Rights Appeal Proceeding (**exhibit JCS-4, document 21**).
- 62 At the commencement of the Almond Land Rights Proceeding, on 22 December 2009, Justice Davies made orders appointing representative growers in that proceeding in the same form as paragraphs 2 and 3 of the Fenceport Order (**exhibit JCS-4, document 22**).
- 63 There were a large number of complex facts and issues in dispute in the Almond Land Rights Proceeding in connection with managed investment schemes for the cultivation of almonds for commercial sale. As noted below, many of these issues concerned matters within specialised fields of knowledge in respect of which expert opinion was provided to the Court. In advance of the trial of the proceeding, the issues were addressed by the parties by way of:
- (a) contentions and reply contentions of in excess of 300 pages;

- (b) lay evidence from 10 witnesses in the form of 14 affidavits; and
- (c) expert evidence from 5 witnesses in the form of 13 affidavits and six joint expert reports.

64 The expert evidence spanned the following fields of expertise:

- (a) the appropriate revenue and cost inputs necessary to model the value of the relevant growers' rights (including, among other things, almond prices, almond yields, operating expenditure, inflation, responsible entity fees, licence/rental fees, capital expenditure, water requirements and the cost of temporary and permanent water), together with the adoption of the appropriate discount rate to adopt in the valuation exercise;
- (b) water allocation, availability and cost;
- (c) estimated future operating costs and almond yields; and
- (d) the valuation of the rights of the relevant growers and secured lenders in connection with the relevant managed investment schemes.

65 The hearing of the Almond Land Rights Proceeding itself took place over 12 sitting days in February and March 2011. At the trial, evidence was given by four lay witnesses and four expert witnesses. Justice Davies delivered her 69 page reasons for judgment in the Almond Land Rights Proceeding on 15 June 2011 (**Justice Davies' Judgment**) (**exhibit JCS-4, document 23**). Her Honour found that the Growers were unsuccessful in their claims against the fund of net sale proceeds the subject of that proceeding and that secured lenders in that proceeding were entitled to the entire amount of those net sale proceeds. Justice Davies' Judgment is reported at (2011) 84 ACSR 341.

66 By orders made by Justice Davies in the Almond Land Rights Proceeding on 27 June 2011 (**exhibit JCS-4, document 24**), the net sale proceeds the subject of that proceeding were to be distributed to the secured lenders, subject to certain ancillary orders.

## **Appeal of the Judgment of the Honourable Justice Davies in the Almond Land Rights Proceeding**

67 Having regard to the specific issues which I believe will arise for determination in the Fenceport Rights Proceeding (as set out in paragraphs 56 to 59 above), I consider that the key findings made in Justice Davies' Judgment are those set out below (including in brackets the relevant paragraph in Justice Davies' Judgment):

### *In respect of the Rights Issue*

- (a) to share in the relevant fund, growers needed to establish rights of a proprietary nature in, and with respect to, the almond assets that were converted into the fund constituted by the net sale proceeds (paragraph 30);
- (b) for licence-based projects, the growers acquired rights of a contractual nature only and did not obtain a proprietary interest in the almond assets (paragraph 48) – so growers in those projects had no right to share in the fund;
- (c) for lease-based projects, the growers held rights of a proprietary nature in the land, trees and capital works (but of a contractual nature in the water licences) – so growers in those projects had a right to share in the fund if and to the extent their proprietary rights were valuable on extinction (paragraphs 73 and 79);

### *In respect of the Valuation Issue:*

- (d) if the (lease-based) projects in which growers held proprietary rights were not viable at the time those rights were extinguished by the Court (either in their existing form or, on the balance of probabilities, upon restructure including the replacement of the responsible entity), then no measure of value could be attributed to those rights (paragraphs 82 and 95);
- (e) since there was no possibility other than a theoretical possibility that the projects would have continued if the growers' rights had not been extinguished, no value could be attributed to the growers' rights (paragraph 137); and

*In respect of the respective entitlements of the parties to the relevant net sale proceeds:*

- (f) on the basis of Justice Davies' findings in respect of the Rights Issue and the Valuation Issue (as those issues arose in the Almond Land Rights Proceeding), the securities held by ANZ and BOSI (the secured creditors) over the assets sold to the purchaser entitled these parties to receive the entire amount of the net sale proceeds as the amounts secured were greater than the net sale proceeds held in trust as at the date of judgment and the growers have not been successful in establishing their entitlement (paragraph 167).

### **Appeal of Justice Davies' Judgment**

68 The Growers in the Almond Land Rights Proceeding have appealed Justice Davies' orders. Almond Land Pty Ltd (in liquidation) (one of the companies in the Timbercorp Group) and its two liquidators, Mr Korda and Ms Chesser, are the third to fifth respondents to the Almond Land Rights Appeal Proceeding. I have the care and conduct of the Almond Land Rights Appeal Proceeding together with Matthew Lees, another partner of ABL. By paragraph 1 of the order made by Associate Justice Landsdowne on 29 September 2011 in the Almond Land Rights Appeal Proceeding (**exhibit JCS-4, document 25**), the third, fourth and fifth respondents were excused from taking any steps in the appeal, including court appearances, but may do so.

69 The following documents have been filed with the Court of Appeal in the Almond Land Rights Appeal Proceeding:

- (a) the appellants' (Growers') notice of appeal dated 11 July 2011 (**exhibit JCS-4, document 26**);
- (b) the notice of contention of the first and second respondents dated 23 November 2011 (**exhibit JCS-4, document 27**);
- (c) the agreed summary for the Court of Appeal dated 12 December 2011 filed by the parties in accordance with Practice Statement CA 2 of 1995 (**exhibit JCS-4, document 21**);
- (d) the appellants' outline of submissions dated 28 February 2012 (**exhibit JCS-4, document 28**);

- (e) the first and second respondents' (ANZ's and BOSI's) joint outline of submissions dated 13 March 2012 (**exhibit JCS-4, document 29**); and
- (f) the appellants' reply submissions dated 20 March 2012 (**exhibit JCS-4, document 30**).

70 In the Almond Land Rights Appeal Proceeding, the appellant representative growers:

- (a) advance seven grounds of appeal in respect of the Justice Davies' Judgment; and
- (b) seek, among other things, orders that:
  - (i) ANZ and BOSI (the first and second respondents) reconstitute the fund comprising of the net sale proceeds the subject of the Almond Land Rights Proceeding with the amounts paid to them in accordance with the orders made by Justice Davies on 27 June 2011 (referred to in paragraph 66 above); and
  - (ii) the proceeding be remitted to Justice Davies for further hearing and determination in accordance with the reasons of the Court of Appeal.

71 The joint position of the ANZ and BOSI in the Almond Land Rights Appeal Proceeding is, in summary, that they:

- (a) reject each of the appellant representative growers' grounds of appeal; and
- (b) contend that Justice Davies' conclusion that the growers were not entitled to share in the relevant net sale proceeds should be affirmed, but on the additional or alternative ground that, in respect of the interests of the Growers in the 2005 Almond Project, 2006 Almond Project and 2007 Almond Project:
  - (i) Justice Davies correctly held that the growers had no proprietary interest in the water licences;
  - (ii) Justice Davies ought to have held that the growers in those projects had no proprietary interest in the almond trees or the capital works (but rights of a contractual nature only); and

(iii) Justice Davies ought to have held that the growers' leasehold interests in the land and any entitlement under the leases to use or enjoy the almond trees or the capital works:

(A) were in the nature of encumbrances; and

(B) did not form any part of the subject matter of the sale under the relevant sale and purchase deed.

72 As far as I am aware, a hearing date for the appeal is yet to be fixed. I believe however, that, in accordance with paragraph 6 of the orders made by Registrar Pedley of the Court of Appeal in the Almond Land Rights Appeal Proceeding on 17 April 2012 (**exhibit JCS-4, document 31**), the appeal is now in the list of appeals for hearing. I am informed by Clint Hinchin of Allens Linklaters (**Allens**), the solicitors for the first and second respondents to the Almond Land Rights Appeal Proceeding (ANZ and BOSI), that he understands and believes from inquiries that he has made to the Court of Appeal Registry that the Almond Land Rights Appeal Proceeding will not be heard until 2013.

**Relevance of the Almond Land Rights Proceeding to Fenceport's application for approval of the Fenceport Rights Deed of Compromise**

73 As noted in paragraphs paragraphs 56 to 59 above, I believe the key issues likely to be addressed in the Fenceport Rights Proceeding will be the same or substantially similar to the matters determined by her Honour Justice Davies in the Almond Land Rights Proceeding, and which are now the subject of appeal.

74 Further, the constituent documents for the almond projects the subject of the Almond Land Rights Proceeding are broadly similar in content and form to the corresponding documents for the Boort Olive Projects the subject of the Fenceport Rights Proceeding. In this regard, I note that:

- (a) the Growers in the 2000 Private Offer Project, the 2001 Olive Project and the 2002 Olive Project are subject to licence agreements rather than sub-leases (see paragraph 23(a) to 23(f) above); and
- (b) the Growers in the 2003 Olive Project and the 2004 Olive Project are subject to sub-leases with TSL (see paragraph 23(g) to 23(h) above).

75 As such:

- (a) the constituent documents for the 2000 Private Offer Project, the 2001 Olive Project and the 2002 Olive Project bear a greater resemblance to the constituent documents for the licence based projects the subject of the Almond Land Rights Proceeding (namely the 2001 Almond Project, the 2002 Almond Project, the 2002 Private Offer Project and the 2003 Almond Project); and
- (b) the constituent documents for the 2003 Olive Project and the 2004 Olive Project bear a greater resemblance to the constituent documents for the sub-lease based project the subject of the Almond Land Rights Proceeding (namely the 2005 Almond Project).

#### **Application of Justice Davies' Judgment in respect of the Rights Issue**

76 As noted at paragraphs 69(b) and 71(b) above, aspects of the Justice Davies' Judgment are the subject of a joint notice of contention served by ANZ and BOSI. If, however, the Court were to apply, without modification, the findings from the Justice Davies' Judgment to determine the rights of the parties in the Fenceport Rights Proceeding, then, in relation to the Rights Issue, the likely findings would be as follows -

- (a) To share in the Net Boort Proceeds, Growers would need to establish rights of a proprietary nature in and with respect to the Olive Assets that were converted into the fund constituted by the Net Boort Proceeds (see paragraph 30 of Justice Davies' Judgment).
- (b) Growers in the Boort Olive Projects subject to licence and joint venture agreements, being the 2000 Private Offer Project, the 2001 Olive Project and the 2002 Olive Project (as noted at paragraph 23(a) to 23(f) above), will be found to have acquired rights of a contractual nature only and, therefore, found not to have obtained a proprietary interest in the Net Boort Proceeds (see paragraph 48 of Justice Davies' Judgment).
- (c) Growers in the Boort Olive Projects subject to sub-leases, being the 2003 Olive Project and 2004 Olive Project (as noted in paragraph 23(g) to 23(h) above), will be found to have held rights of a proprietary nature in the land, trees and capital works (but of a contractual nature in the water licences) (see



paragraphs 73 and 79 of Justice Davies' Judgment). On this basis, such Growers will be found to hold a right to share in the Net Boort Proceeds if and to the extent their proprietary rights were valuable on extinction.

### **Application of Justice Davies' Judgment in respect of the Valuation Issue**

- 77 In relation to the Valuation Issue, even if it were assumed (contrary to the findings in Justice Davies' Judgment) that the Growers in each of the Boort Olive Projects had a right to share in the Net Boort Proceeds to the extent that they held rights (whether contractual or proprietary) which were valuable on extinction pursuant to the Olive Sale Order (**exhibit JCS-4, document 1**), the following matters of which I am aware support the proposition that any such rights held by the Growers in the Boort Olive Projects were valueless in any case.
- 78 In the Justice Davies' Judgment, a number of relevant findings were made in the context of the Valuation Issue in respect of the almond projects the subject of the Almond Land Rights Proceeding. It is apparent from those findings that her Honour approached the Valuation Issue insofar as it applied in the Almond Land Rights Proceeding by addressing two principal questions:
- (a) first, were the relevant projects viable under the existing structures; and
  - (b) secondly, were the projects viable if restructured?
- 79 In relation to the viability of the Boort Olive Projects under the existing structures, applying the reasoning adopted by the Honourable Justice Davies in paragraphs 84 - 87 of Justice Davies' Judgment in the context of the evidence of the Liquidators which I summarised in paragraphs 24 - 26, 28 and 30 - 33 above, the following factors demonstrate that any such rights held by Growers in the Boort Olive Projects were valueless in any case:
- (a) The Timbercorp Group of Companies had no capacity to fund the capital expenditure for which it was responsible and that it had no capacity to absorb any funding shortfall (see paragraphs 31 - 34, above).
  - (b) All of the Boort Olive Projects required significant cash contributions above the fees that the Growers were contractually obliged to pay in order to meet operating requirements in relation to the management and harvesting of the 2010 crop of the Boort Olive Projects. The lack of immediate funds meant that

the continued operations could not be funded (see paragraphs 31 - 34, above).

(c) The Boort Olive Projects were insolvent (see paragraphs 31 - 34, above).

80 In relation to the viability of the Boort Olive Projects in the event that it were restructured, based on paragraph 95 of Justice Davies' Judgment in the Almond Land Rights Proceeding, the Representative Growers would be required to establish on the balance of probabilities that the extinguishment of their rights lost them the opportunity to have the project restructured and continued to full term. In other words (and also as noted in paragraph 95 of the Justice Davies' Judgment), the Representative Growers would require an evidentiary basis from which the Court could evaluate the likelihood of a "restructure counterfactual" eventuating had the Growers' rights not been extinguished.

81 Having regard to the matters referred to in the Justice Davies' Judgment at paragraphs 96 to 136 thereof, and depending on the basis of any counterfactual case advanced by the Representative Growers, the Court is likely to have regard to the following matters in considering whether there was a chance for restructure of the Boort Olive Projects:

- (a) legal issues concerning, among other things, the change of responsible entity for the Boort Olive Projects and constitutional and contractual amendments;
- (b) factual issues concerning, among other things, the market for hire of responsible entities and the terms of any consent given by a possible replacement responsible entity;
- (c) the likelihood of any replacement responsible entity taking over as responsible entity of the Boort Olive Projects, based on the probability of the projects continuing to term in light of (among other things):
  - (i) the immediate cash needs of the project as against its expected future revenue;
  - (ii) the solvency position of other relevant companies in the Timbercorp group;
  - (iii) the need for constitutional and contractual changes;



- (iv) the need to find a consenting responsible entity; and
- (v) the possibility of conditions being imposed to any consent given by a responsible entity to assume that role in respect of the project.

82 Based on the matters to which I refer in paragraphs 79 to 81 above, it is likely that, if it were assumed (contrary to the findings in Justice Davies' Judgment) that the Growers in each of the Boort Olive Projects had a right to share in the Net Boort Proceeds to the extent that they held rights (whether contractual or proprietary) which were valuable on extinction pursuant to paragraphs 1 and 2 of the Olive Sale Order, any such rights held by the Growers were valueless in any case because the Boort Olive Projects were not viable at the time that the Growers' rights were extinguished.

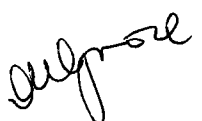
83 In all the circumstances, if the key findings in the Justice Davies' Judgment are applied consistently in the present Fenceport Rights Proceeding, the Growers in this proceeding are likely to be found to have no entitlement to the Net Boort Proceeds.

#### **The Fenceport Rights Deed of Compromise**

84 On 24 February 2012, Allens, on behalf of ANZ and with the authorisation of the secured creditors in each of the following proceedings (including Fenceport in respect of the Fenceport Rights Proceeding), made a without prejudice settlement proposal to Clarendon Lawyers, on behalf of the Representative Growers, for the compromise of proceeding no S CI 2011 6004 in this Honourable Court (the **Liparoo and Yungera Rights Proceeding**). That proposal noted, among other things, that the secured creditors in each of the following proceedings proposed a global resolution of all of the proceedings on the basis that there would be a compromise of:

- (a) the Fenceport Rights Proceeding;
- (b) the Liparoo and Yungera Rights Proceeding;
- (c) the Almond Land Rights Appeal Proceeding;
- (d) proceeding no S CI 2010 1354 in this Honourable Court; and
- (e) proceeding no S CI 2011 6606 in this Honourable Court

(together, the **Timbercorp Apportionment Proceedings**).



- 85 This settlement proposal (insofar as it applied to the Fenceport Rights Proceeding) was then the subject of negotiation between my firm and Clarendon Lawyers until 25 July 2012, on which day the Fenceport Rights Deed of Compromise was executed by or on behalf of each of the parties to the Fenceport Rights Proceeding and also on behalf of TSL (**exhibit JCS-4, document 7**).
- 86 Also on 25 July 2012, deeds of compromise for each of the other Timbercorp Apportionment Proceedings were executed by or on behalf of each of the relevant parties and on behalf of TSL. I refer in the balance of this affidavit to the deeds of compromise for each of the Timbercorp Apportionment Proceedings as, collectively, the **Deeds of Compromise**.
- 87 I outline in paragraphs 88 to 91 below, in general terms, the key features of the Fenceport Rights Deed of Compromise. Where, in these paragraphs, I refer to clause numbers, I am referring to the relevant clause number in the Fenceport Rights Deed of Compromise. Reference should be made to the relevant clauses of the Fenceport Rights Deed of Compromise for the specific provisions in question.
- 88 By clause 2, subject to the condition precedent set out in clause 3 being satisfied, the parties agree to the compromise the Fenceport Rights Proceeding by:
- (a) the making of the payments in accordance with clause 4; and
  - (b) the giving of releases in accordance with clause 5
- (the **Fenceport Compromise**).
- 89 By clause 3, it is a condition precedent to the Fenceport Compromise that, on or before 31 December 2012:
- (a) the Court approve the Fenceport Compromise in accordance with rule 16.01(4) of the Rules; and
  - (b) the Court approve the compromise the subject of each of the other Deeds of Compromise.
- 90 By clause 4, as soon as practicable after the condition precedent in clause 3 is satisfied, the following payments will be made by the Liquidators of OLPL from the Net Boort Proceeds:



- (a) to TSL to be held on trust for Growers for distribution to, or on behalf of, Growers in accordance with their entitlements (as addressed further in sub-paragraphs (e) to (j) below) \$1,815,000 or approximately 5% of the gross sale proceeds of the subject assets (**Boort Settlement Amount**), to be apportioned between Growers in the Boort Olive Projects based on a rateable distribution in accordance with the number of lots held by those Growers in each of the Boort Olive Projects
- (b) Fenceport will be repaid the amount owed to it from the Net Boort Proceeds;
- (c) the balance of the Net Boort Proceeds (if any) will be paid to OLPL;
- (d) for Growers in the Boort Olive Projects, the Boort Settlement Amount will be divided between Growers in the Boort Olive Projects on a pro-rated basis according to the number of lots held by each such Grower in the Boort Olive Projects on 11 January 2010 (being the date on which Growers' rights in the Boort Olive Projects were extinguished by the Court). The amount payable per lot located on the Boort Land will be \$163.81 (**Boort Settlement Entitlement**).
- (e) in respect of each Grower who is not recorded in the books and records of:
  - (i) Timbercorp Finance Pty Limited (in liquidation) (**TFL**) as owing amounts under an outstanding loan from TFL in connection with their investment in the Almond Projects (**TFL Indebtedness**); or
  - (ii) TSL as owing amounts to TSL (**Timbercorp Indebtedness**),

TSL will pay its Boort Settlement Entitlement as soon as practicable to or at the direction of that Grower;
- (f) subject to sub-paragraph (g) to (j) below, any Grower who is recorded in the books and records of:
  - (i) TFL as having TFL Indebtedness:
  - (ii) TSL as having Timbercorp Indebtedness,



will be able (should they choose) to direct that their Boort Settlement Entitlement is paid, in whole or in part, to TFL or TSL to pay, to the extent possible, its TFL Indebtedness or Timbercorp Indebtedness (as applicable);

- (g) in respect of any Grower who has TFL Indebtedness and has directed TSL to pay its TFL Indebtedness, to the extent possible, out of its Boort Settlement Entitlement, TSL will, as soon as practicable, use the Grower's Boort Settlement Entitlement to pay, to the extent possible, the TFL Indebtedness as soon as practicable and remit the balance of the Grower's Boort Settlement Entitlement (as the case may be) (if any) to the Grower (or, if directed by the Grower, to TSL in payment of any Timbercorp Indebtedness);
- (h) in respect of any Grower who has TFL Indebtedness and has not directed TSL to pay any part of its Boort Settlement Entitlement to TFL, TSL will hold that Grower's Boort Settlement Entitlement on trust pending agreement between TFL and the Grower or court order as to whom it should be paid;
- (i) in respect of any Grower who has TFL Indebtedness and has directed TSL to use its Boort Settlement Entitlement (as the case may be) to pay only part of the Grower's TFL Indebtedness, TSL will, as soon as practicable, pay to TFL that part of the Grower's TFL Indebtedness and retain the balance of the Grower's Boort Settlement Entitlement (if any) on trust pending agreement between TFL and the Grower or court order as to whom it should be paid; and
- (j) a Grower who has both TFL Indebtedness and Timbercorp Indebtedness may not direct TSL to pay all or part of their Timbercorp Indebtedness out of its Boort Settlement Entitlement before there is an agreement in writing between TFL and the Grower, or a court order, about the manner in which the entitlement is to be disbursed.

91 By clause 5, upon satisfaction of the condition precedent in clause 3 and the making of the payments in clause 4, each party will release all other parties from any further claim in relation to their entitlement to the Net Boort Proceeds or the allocation and disbursement of the Net Boort Proceeds.

### **Communications with ASIC**

92 I set out below the communications between Allens and ASIC in relation to the Deeds of Compromise. All correspondence from Allens to ASIC to which I refer was sent on



behalf, and with the authority, of all the parties to each of the Timbercorp Apportionment Proceedings (including the plaintiffs to the Fenceport Rights Proceeding) and also TSL.

93 By letter from Allens to ASIC dated 26 July 2012, to which I was copied (**exhibit JCS-4, document 32**):

(a) ASIC was informed of:

- (i) the background to the Timbercorp Apportionment Proceedings;
- (ii) the recently executed Deeds of Compromise;
- (iii) the proposed process of notification of the respective compromises to Growers in each of the Timbercorp managed investment schemes; and
- (iv) the proposed applications to be made to the Supreme Court, in accordance with rule 16.01(4) of the Rules, for approval of each compromise the subject of the Deeds of Compromise (together, the **Approval Applications**),

(b) confirmation was sought from ASIC as to:

- (i) whether ASIC wished to sight the Deeds of Compromise;
- (ii) what level of involvement, if any, ASIC wished to have in the process of notification of the respective compromises to Growers in each of the relevant Timbercorp managed investment schemes;
- (iii) what level of involvement, if any, ASIC wished to have in overseeing the process by which the representative growers in each of the Timbercorp Apportionment Proceedings address any comments, questions or objections raised by Growers in relation to the compromises, the Approval Applications or the individual circumstances of Growers;
- (iv) whether ASIC wished to participate in any directions hearing relating to the Approval Applications; and

- (v) whether ASIC wished to participate at the hearing of the Approval Applications to report to the Court on the above mentioned processes or in relation to any other matters concerning the compromises.

94 By letter dated 10 August 2012 from ASIC to Allens in response to Allens' letter dated 26 July 2012 (**exhibit JCS-4, document 33**), Ms Corinne MacKenzie of ASIC informed the parties to the Timbercorp Apportionment Proceedings and also TSL that (among other things):

- (a) ASIC wished to be provided with a copy of each of the Deeds of Compromise;
- (b) ASIC did not wish to participate in or oversee the prospective processes involved in the Approval Applications; and
- (c) ASIC requested to be updated on key stages of the notification process, Timbercorp Apportionment Proceedings, directions hearings and Approval Applications.

95 By letter from Allens to ASIC dated 15 August 2012, to which I was copied, Allens provided ASIC with copies of each of the Deeds of Compromise (**exhibit JCS-4, document 34**):

96 By letter from Allens to ASIC dated 20 August 2012, to which I was copied (**exhibit JCS-4, document 35**), Allens:

- (a) confirmed to ASIC that the key stages of the notification process required under the Deeds of Compromise had been completed; and
- (b) in respect of each of the Deeds of Compromise, provided ASIC with copies of:
  - (i) the First Notice to Participant Growers (as defined in clause 6.1(b) of each of the Deeds of Compromise) informing Growers of the execution of the Deed of Compromise in respect of each of the Timbercorp Apportionment Proceedings (as required by clause 6.2(b)(i));
  - (ii) the short letters sent to Growers by post and email to their last known postal and email addresses bringing to their attention that the First Notice to Participant Growers had been uploaded to various websites and the location of those websites (as required by clause 6.2(b)(ii)); and



- (iii) the advertisements published in 'The Australian' newspaper on 14 August 2012 (as required by clause 6.2(b)(iii)).

97 By letter from Allens to ASIC dated 29 August 2012, to which I was copied (**exhibit JCS-4, document 36**), Allens:

- (g) notified ASIC of the application made by BOSI to the Supreme Court of Victoria Court of Appeal by summons dated 16 August 2012 for an order referring the Almond Land Rights Appeal Proceeding to the trial division of the Supreme Court;
- (h) provided ASIC with a copy the (unauthenticated) orders made by their Honours Justices Osborne and Buchanan on 24 August 2012 referring the Almond Land Rights Appeal Proceeding to the trial division of the Supreme Court;
- (i) confirmed that Approval Applications had been issued in the Supreme Court in respect of each of the Timbercorp Apportionment Proceedings and were returnable before the Honourable Justice Judd for directions on 31 August 2012; and
- (j) provided copies of the sealed summons and supporting affidavit filed with the Court in respect of each of the Approval Applications.

98 By letter from Allens to ASIC dated 6 September 2012, to which I was copied (**exhibit JCS-4, document 37**), Allens:

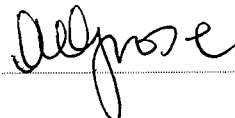
- (a) confirmed that a directions hearing was held before Justice Judd on 31 August 2012 in respect of each of the Approval Applications; and
- (b) provided ASIC with copies and a summary of the authenticated orders made by Justice Judd at this directions hearing.

**SWORN** at Melbourne  
in the State of Victoria  
by **JANE CHALMERS SHERIDAN**  
this 19<sup>th</sup> day of September 2012

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Before me:



**MEAGAN LOUISE GROSE**  
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**

**FENCEPORT PROPRIETARY LIMITED (ACN 139 604 121)**

First Plaintiff

and

**OLIVECORP LAND PTY LTD (IN LIQUIDATION) (ACN 090 141 512)**

Second Plaintiff

and

**MARK ANTHONY KORDA**

**(in his capacity as liquidator of Olivecorp Land Pty Ltd (in liquidation))**

Third Plaintiff

and

**MARK FRANCIS XAVIER MENTHA**

**(in his capacity as liquidator of Olivecorp Land Pty Ltd (in liquidation))**

Fourth Plaintiff

and

**CON MOSHOPOLOUS**

**(in his capacity as a Grower in the 2000 Timbercorp Olive Project (Private Offer)  
(Unregistered))**

First Defendant

and

**PAULINE EMMA HAMMER**

**(in her capacity as a Grower in the 2001 Timbercorp Olive Project (ARSN 094 383 082))**

Second Defendant

and

**DAVID SYDNEY BUTTERFIELD**

**(in his capacity as a Grower in the 2002 Timbercorp Olive Project (ARSN 098 233 455))**

Third Defendant

and

**GRAHAM GOLDENBERG**

**(in his capacity as a Grower in the 2003 Timbercorp Olive Project (ARSN 104 648 473))**

Fourth Defendant

and

**SHUN KING LI**

**(in his capacity as a Grower in the 2004 Timbercorp Olive Project (ARSN 108 744 378))**

Fifth Defendant