

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 MARK ANTHONY KORDA
(FENCEPORT RIGHTS RIGHTS PROCEEDING)**

Date of document: 18 September 2012
Filed on behalf of: Timbercorp Securities Ltd (in liquidation) (ACN 092 311 469) and
Olivecorp Management Limited (in liquidation) (ACN 089 542 343)

Prepared by:

ARNOLD BLOCH LEIBLER

Lawyers and Advisers
Level 21
333 Collins Street
MELBOURNE 3000

Solicitor's Code: 54
DX 38455 Melbourne
Tel: 9229 9999
Fax: 9229 9900
Ref: 01-1601361

(Jane Sheridan - jsheridan@abl.com.au)

I, **MARK ANTHONY KORDA** of Level 24, 333 Collins Street, Melbourne in the State of Victoria, Chartered Accountant, **MAKE OATH AND SAY** that:

1 I am:

- (a) with Leanne Kylie Chessser, the liquidator of Timbercorp Securities Limited (in liquidation) (ACN 092 311 469) (**TSL**); and
- (b) with Mark Francis Xavier Mentha, the liquidator of Olivecorp Management Limited (in liquidation) (ACN 089 542 343) (**OML**).

2 I am authorised by Ms Chessser and Mr Mentha to make this affidavit on their behalf. References in this affidavit to "we", "us", "our" or "ourselves" and "Liquidators" are



references to Ms Chesser and me when referring to TSL, and to Mr Mentha and me when referring to OML.

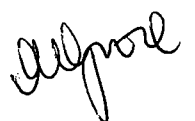
- 3 Except where I otherwise indicate, I make this affidavit from my own knowledge. Where I depose to matters from information and belief, I believe those matters to be true.

Personal background and experience

- 4 I am a chartered accountant and a partner of the firm KordaMentha Pty Ltd (ACN 100 169 391) (**KordaMentha**). I am a Registered Liquidator and an Official Liquidator of the Court. I am a member of the Insolvency Practitioners Association of Australia and a member of the Institute of Chartered Accountants. Before founding KordaMentha in 2002, I had a 24 year career with the firm Arthur Andersen, during which I held the positions of Director of Corporate Finance, Managing Partner Asia Pacific Corporate Recovery Services Practice and Managing Partner Australia Accounting and Audit Practice. I was also a Member of the Australian Executive Committee and Board of Partners. I have been practising in the area of corporate insolvency and financial reconstructions for over 20 years.

Voluntary Administration and Liquidation of TSL, OML and the Timbercorp Group

- 5 On 23 April 2009:
- (a) Ms Chesser and I were appointed as voluntary administrators of TSL; and
 - (b) Mr Mentha and I were appointed as voluntary administrators of OML.
- 6 Also on 23 April 2009, one or more of us, and two other KordaMentha partners, namely Craig Peter Shepard and Clifford Stuart Rocke, were appointed as voluntary administrators of the other companies in the Timbercorp group (together the **Timbercorp Group**). All of the appointments made on 23 April 2009 by those companies were pursuant to section 436A of the *Corporations Act 2001* (Cth) (**Act**).
- 7 On 29 June 2009, at the second meeting of creditors of all of the Timbercorp Group and a separate meeting of the creditors of TSL, the creditors resolved to wind up the Timbercorp Group and TSL respectively. From 29 June 2009, Ms Chesser and I have been the liquidators of TSL, and Mr Mentha and I have been the liquidators of OML.



Timbercorp Olive Projects

- 8 TSL is the responsible entity (**RE**) of four olive projects the subject of this proceeding (the **Fenceport Rights Proceeding**), which are registered managed investment schemes 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).
- 9 In addition, there is one olive scheme managed by OML the subject of the Fenceport Rights Proceeding, called the 2000 Timbercorp Olive Project (Private Offer) (Unregistered) (**2000 Private Olive Scheme**). The 2000 Private Olive Scheme 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.
- 10 I refer to the five olive projects referred to in paragraphs 8 and 9 above collectively as the **"Boort Olive Projects"**.
- 11 The members of the Fenceport Rights Projects are referred to in the governing documents as **"Growers"** and I adopt that terminology here. The purpose of the Boort Olive Projects was the cultivation of olives for commercial sale.

Background to and issues in dispute in the Fenceport Rights Proceeding

- 12 On 13 December 2011, I swore an affidavit in the Fenceport Rights Proceeding in my capacities as the director of the first plaintiff, Fenceport Proprietary Limited (ACN 139 604 121) (**Fenceport**), and a liquidator of the second plaintiff, Olivecorp Land Pty Ltd (in liquidation) (ACN 090 141 512) (**OLPL**) (my **First Affidavit**). The background to the Fenceport Rights Proceeding is set out in paragraphs 5 - 40 of my First Affidavit. Particularly, at paragraph 29, I state that:

"This proceeding has been commenced to determine:

(a) what rights Fenceport, OLPL and the Growers (if any) have to the Net Boort Proceeds;



(b) what the value is of any such rights of Fenceport, OLPL and the Growers; and

(c) how much (if any) of the Net Sale Proceeds each of Fenceport, OLPL and the Growers are entitled to.”

13 Similar apportionment proceedings were commenced in relation to the net sale proceeds relating to other Timbercorp projects. Those proceedings are:

(a) the “**Almond Land Rights Appeal Proceeding**”, being proceeding no S CI 2009 10688 in this Honourable Court, which relates to the 2002, 2005, 2006 and 2007 Timbercorp Almond Projects and the 2002 Timbercorp Almond Private Offer Project and in respect of which the judgment given by her Honour Justice Davies on 15 June 2011 is presently subject to appeal in the “**Almond Land Rights Appeal Proceeding**”, being Court of Appeal proceeding no S APCI 2011 0103;

(b) the “**BB Olives Rights Proceeding**”, being proceeding no S CI 2010 1354 in this Honourable Court, which relates to the 2006, 2007 and 2008 Timbercorp Olive Projects;

(c) the “**Solara Rights Proceeding**”, being proceeding no S CI 2011 6606 in this Honourable Court, which relates to the 2005 Timbercorp Citrus Project; and

(d) the “**Liparoo and Yungera Rights Proceeding**”, being proceeding no S CI 2011 6604 in this Honourable Court, which relates to the 2001, 2002, 2003, 2004 and 2005 Timbercorp Almond Projects and the 2002 Almond Private Offer Project,

(together with the Fenceport Rights Proceeding, the “**Apportionment Proceedings**”).

14 At paragraph 39 of my First Affidavit, I state that:

“... [T]he plaintiffs intend to ... enter into without prejudice negotiations with [the Defendant] Growers with a view to seeking a compromise of the dispute as to the parties’ entitlement to the Boort Net Proceeds.”

The Fenceport Rights Deed of Compromise

15 From approximately August 2011, I facilitated discussions between, on the one hand, members of the Timbercorp Growers Group, which has represented Growers in the



Timbercorp projects throughout the administration and liquidation of TSL, and on the other hand, the secured creditors claiming an interest in the Net Sale Proceeds, with a view to reaching a settlement of the Apportionment Proceedings.

- 16 Following settlement offers and negotiations, which continued throughout the first half of this year, each of the parties to the Fenceport Rights Proceeding and TSL entered into a Deed of Compromise of the Fenceport Olives Rights Proceeding on 25 July 2012 (**Fenceport Rights Deed of Compromise**). Now produced and shown to me and marked "**MAK-1**" is a true copy of the Fenceport Rights Deed of Compromise.
- 17 Although not a party to the Fenceport Rights Proceeding, TSL is a party to the Fenceport Rights Deed of Compromise.
- 18 Pursuant to clause 4 of the Fenceport Rights Deed of Compromise, TSL will receive, hold and distribute the "Boort Settlement Amount" (as that term is defined in clause 1.1 of the Fenceport Rights Deed of Compromise).
- 19 Further, pursuant to clause 9 of the Fenceport Rights Deed of Compromise, at the request of the "**Representative Growers**" (being the first to fifth defendants to the Fenceport Rights Proceeding), TSL was to perform certain administrative roles in connection with the Compromise and this Application, including:
 - (a) distributing the "First Notice to Participant Growers" and the "Second Notice to Participant Growers" to "Participant Growers" (as those terms are defined in the Fenceport Rights Deed of Compromise);
 - (b) establishing and operating a telephone hotline facility and email facility:
 - (i) to receive and, in accordance with instructions provided by the Representative Growers, address comments and questions from Growers in relation to the Fenceport Rights Deed of Compromise; and
 - (ii) receive any objections to the Compromise made by Growers;
 - (c) in respect of Growers who have raised comments, questions or made objections, recording with appropriate detail:
 - (i) the identity of those Growers;



- (ii) the comments and questions raised by those Growers and the responses provided to those Growers; and
 - (iii) any objections made by those Growers and any response provided in relation to those objections;
- (d) acting in accordance with a protocol agreed with the Representative Growers regarding:
 - (i) the comments and questions which:
 - (A) may be answered by TSL without further reference to the Representative Growers;
 - (B) will be required to be provided by TSL to the Representative Growers for the preparation of an appropriate response;
 - (ii) the objections:
 - (A) to which TSL may respond without further reference to the Representative Growers;
 - (B) which will be required to be provided by TSL to the Representative Growers for the preparation of an appropriate response; and
 - (iii) the confidentiality of communications between TSL, the Participant Growers and the Representative Growers in relation to comments, questions and any objections raised by any Participant Growers;
- (e) providing to the Representative Growers, on a timely basis, a record, with appropriate detail, of:
 - (i) all comments, questions and answers given by TSL in accordance with the protocol which do not require preparation of a response by the Representative Growers;
 - (ii) all comments and questions requiring preparation of a response from the Representative Growers;

- (iii) any objections by the Participant Growers to which TSL has provided a response in accordance with the agreed protocol; and
- (iv) any objections requiring the preparation of a response by the Representative Growers; and
- (f) providing on a timely basis to relevant Growers any responses to comments, questions or objections settled by the Representative Growers.

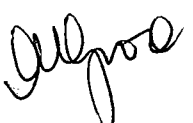
First Notice to Participant Growers and associated correspondence

20 Clause 6.1 of the Fenceport Rights Deed of Compromise provides that, as soon as practicable after execution of the deed, the Representative Growers would draft and seek the other parties' comments on the terms of the First Notice to Participant Growers. Pursuant to clause 6.1(c), the First Notice to Participant Growers was to, amongst other things:

- (a) provide information about the Fenceport Rights Proceeding;
- (b) explain that the interests of the Growers are represented in the Fenceport Rights Proceeding by the Representative Growers;
- (c) refer to the Fenceport Rights Deed of Compromise and its key features;
- (d) explain that the Representative Growers consider the compromise reached under the Fenceport Rights Deed of Compromise to be in the best interests of Growers; and
- (e) explain the various roles being undertaken by TSL at the request of, and on the instruction of, the Representative Growers in connection with this Application and pursuant to the Fenceport Rights Deed of Compromise.

21 I am informed by Jane Sheridan of Arnold Bloch Leibler (**ABL**), our solicitors, that throughout early August 2012, she and the lawyers for the Representative Growers settled the terms of:

- (a) a First Notice to Participant Growers in accordance with clause 6.1(c) of the Fenceport Rights Deed of Compromise;



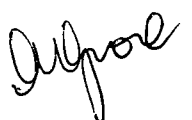
- (b) a set of frequently asked questions and answers in respect of the Fenceport Rights Deed of Compromise, as referred to in clause 6.1(c)(xvi) of the Fenceport Rights Deed of Compromise (**FAQs**);
 - (c) a short letter to Growers notifying Growers of the Fenceport Rights Deed of Compromise and the First Notice to Growers (referred to in more detail in paragraph 26 of this affidavit); and
 - (d) an advertisement to be published in *The Australian* newspaper in respect of the Fenceport Rights Deed of Compromise, in accordance with clause 6.2(b)(iii) of the Fenceport Rights Deed of Compromise (referred to in more detail in paragraph 27(a) of this affidavit).
- 22 I am further informed by Ms Sheridan that, in accordance with our instructions, she prepared:
- (a) a 'Direction to Pay' form, by which a Grower whose payment under the Fenceport Rights Deed of Compromise is subject to a competing claim can direct TSL to pay that Grower's payment under the Fenceport Rights Deed of Compromise to wholly or partly satisfy the competing claim; and
 - (b) a 'Bank Account Nomination Form', which a Grower can complete in order to direct TSL to make distributions under the Fenceport Rights Deed of Compromise to an account nominated by the Grower.
- 23 I refer to the documents listed in paragraphs 21(a), 21(b), 21(c) and 22 collectively as the **Grower Information Documents**. Now produced and shown to me and marked "**MAK-2**" is a bundle of documents comprising true copies of the Grower Information Documents.

Upload of Grower Information Documents to Webpages

- 24 I am informed by Jane Sheridan that on or about 13 August 2012:
- (a) ABL established a page on its website dedicated to the Apportionment Proceedings, and that the hyperlink to that page is:

< <http://www.abl.com.au/timbercorp/compromises.htm> >

(**ABL Compromises Webpage**);



- (b) an electronic copy of the Fenceport Rights Deed of Compromise was uploaded to the ABL Compromises Webpage; and
- (c) electronic copies of the Grower Information Documents were uploaded to the ABL Compromises Webpage.

25 I am informed by Antony Munro, a director of KordaMentha who has been assisting us in the liquidation of TSL and other Timbercorp companies and has been extensively involved in the Apportionment Proceedings, that on or about 13 August 2012:

- (a) KordaMentha established a page on its website dedicated to the Apportionment Proceedings, and that the hyperlink to that page is:

< <http://www.kordamentha.com/creditor-information/australia/51/14> >

(KordaMentha Compromises Webpage);

- (b) an electronic copy of the Fenceport Rights Deed of Compromise was uploaded to the KordaMentha Compromises Webpage; and
- (c) electronic copies of the Grower Information Documents were uploaded to the KordaMentha Compromises Webpage.

Informing Growers of the Grower Information Documents and the Hotline

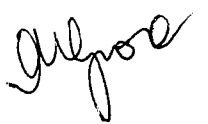
26 On 13 August 2012, we engaged a mailing house, Direct Mail Solutions, to send a short letter to Growers notifying them of:

- (a) the compromise the subject of the Fenceport Rights Deed of Compromise;
- (b) where they could obtain the Fenceport Rights Deed of Compromise and the Grower Information Documents; and
- (c) where inquiries about the compromise, the Fenceport Rights Deed of Compromise or the Grower Information Documents could be directed,

(Short Letter to Growers). Now produced and shown to me and marked "MAK-3" is a true copy of the Short Letter to Growers.



- 27 Pursuant to clause 6.2(b)(ii) of the Fenceport Rights Deed of Compromise, the Short Letter to Growers was sent both:
- (a) by email, to the personal and business (where known) email address(es) of Growers that had most recently been communicated to TSL; and also
 - (b) by post, to the last personal and business (where known) postal address(es) of Growers that had been communicated to TSL.
- 28 I am informed by Ishbel Jorgensen of the Timbercorp Grower Management Team (to which I refer in more detail in paragraph 31, below) that:
- (a) a total of 1,704 emails in respect of the Short Letter to Growers in relation to the Fenceport Rights Deed of Compromise were sent to Growers, comprised of:
 - (i) 1,006 emails to Growers' business email addresses; and
 - (ii) 698 emails to Growers' personal email addresses;
 - (b) of the 1,704 emails sent, 258 "bounced back" (that is, did not send to the relevant email address); and
 - (c) a total of 2,730 hard copies of the Short Letter to Growers in relation to the Fenceport Rights Deed of Compromise were sent to Growers, and 117 of those letters were returned to us:
- 29 On 10 August 2012 we instructed our staff to send a draft notice in relation to the Fenceport Rights Deed of Compromise to *The Australian* newspaper. On or about 11 August 2012, *The Australian* provided a proof of the notice, which we instructed our staff to approve for publication. On 14 August 2012, the notice was published in *The Australian* newspaper. That notice was titled "**Timbercorp Olive Projects**" and:
- (a) specified the Timbercorp Olive Projects relevant to the Fenceport Rights Proceeding (being the five olive projects referred to in paragraphs 8 and 9 above);
 - (b) stated that the parties had reached a compromise of the dispute the subject of the Fenceport Rights Proceeding; and



- (c) stated where the First Notice to Growers was available and to where Growers could direct any inquiries or comments.

Now produced to me and marked "MAK-4" is a true copy of the notice published in *The Australian* newspaper on 14 August 2012 in relation to the Fenceport Rights Deed of Compromise.

Inquiry Hotline and Grower Email Facility

- 30 Since our appointment as administrators, we have caused TSL to maintain a telephone hotline facility and email facility through which Growers could ask questions and update personal information relating to their holdings as Growers. The telephone number for that hotline is (03) 8615-1200 (**Hotline**) and the email address is < investorqueries@timbercorp.com.au > (**Grower Email Facility**).
- 31 The Timbercorp Grower Management Team, under our ultimate supervision, manage the Hotline and Grower Email Facility. There are currently five members of the Timbercorp Grower Management Team and the team reports to Ishbel Jorgensen, General Manager Operations, Timbercorp Limited (in liquidation) (ACN 055 185 067). The Hotline and Grower Email Facility are monitored from 8:30 am to 5:30 pm each business day.
- 32 As the members of the Timbercorp Grower Management Team were familiar with the Growers and the database maintained by Timbercorp in relation to Growers, we considered it appropriate that we use the Hotline and Grower Email Facility as the telephone hotline facility and email facility required under the Fenceport Rights Deed of Compromise.
- 33 In August 2012, we agreed a protocol with the lawyers for the Representative Growers which sets out how the Timbercorp Grower Management Team should respond to comments, questions and objections made by Growers to the Hotline and Grower Email Facility (**Agreed Protocol**) and the form of a report that would be prepared by the Timbercorp Grower Management Team to record details of the comments, questions and objections and responses given to such communications (**Communications Report**). In accordance with clause 9(d) of the Fenceport Rights Deed of Compromise, the Agreed Protocol sets out:
- (a) how calls and emails should be recorded;



- (b) how comments and questions should be answered;
- (c) how to respond to comments and objections; and
- (d) how to refer comments, questions and objections to Clarendon Lawyers, the solicitors for the Representative Growers.

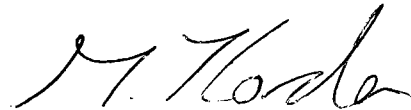
Now produced and shown to me and marked "**MAK-5**" is a true copy of the Agreed Protocol and the Communications Report.

- 34 I am informed by Antony Munro that on 9 August 2012, he, Leanne Chesser, Ishbel Jorgensen, Jane Sheridan and Jing Chang of ABL and Celia Armstrong of Clarendon Lawyers met with the Timbercorp Grower Management Team and explained to them the general nature and background of the Fenceport Rights Deed of Compromise, the Grower Information Documents, the Agreed Protocol and the Communications Report.
- 35 The Hotline and Grower Email Facility commenced receiving comments, questions and objections from Growers in relation to the compromise the subject of Fenceport Rights Deed of Compromise on 14 August 2012 and continues to receive such communications.
- 36 I am informed by Mr Munro that, in accordance with the Agreed Protocol, as a telephone call is received on the Hotline or an email is sent to the Grower Email Facility, the Timbercorp Grower Management Team document, in the Communications Report for that day, that telephone call or email and the response to that telephone call or email by the Timbercorp Grower Management Team. The Timbercorp Grower Management Team also indicate in the Communications Report whether the telephone call or email requires a response or further action on behalf of the Representative Growers (**Escalated Queries and Comments**).
- 37 The completed Communications Report for each day is provided by Mr Munro to Clarendon Lawyers following the relevant day. Now produced and shown to me and marked "**Confidential MAK-6**" is a compact disc containing true copies of the Communications Reports for each day from 14 August 2012 to 17 September 2012. I ask for an order that exhibit **Confidential MAK-6** be marked confidential and kept in a sealed envelope and not be available for inspection, subject to further order, as it

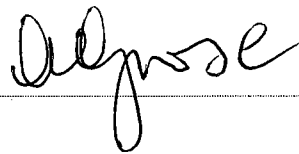


contains personal private information of Growers that call the Hotline or send an email to the Grower Email Facility.

SWORN at Melbourne)
in the State of Victoria)
by **MARK ANTHONY KORDA**)
this 18th day of September 2012)



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