

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

**LIST B**

No of 2009

**IN THE MATTER OF TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)  
ACN 092 311 469**

**TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION) (ACN 092311469)  
IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE  
MANAGED INVESTMENTS SCHEMES LISTED IN SCHEDULE 1 AND IN ITS OWN  
CAPACITY AND ORS ACCORDING TO THE SCHEDULE**

First Plaintiff

**AFFIDAVIT OF MARK ANTHONY KORDA**

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Date of document: 19 November 2009  
Filed on behalf of: the Plaintiffs

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- 1 I am the liquidator of the First Plaintiff, Timbercorp Securities Limited (TSL) and the Second Plaintiff, Timbercorp Limited (**Timbercorp**), with Leanne Kylie Chesser.
  - 2 Except where I otherwise indicate, I make this affidavit from my own knowledge. Where I depose to matters from information or belief, I believe those matters to be true. I am authorised by Ms Chesser to make this affidavit on her behalf. References in this affidavit to "we", "us", "our" or "ourselves" are references to Ms Chesser and me.

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- 3 Matters discussed in paragraphs 33 - 37 of this affidavit are confidential, commercially sensitive or without prejudice. Accordingly, we respectfully request that those paragraphs of this affidavit remain confidential to the parties and to the Court.

### **General background**

- 4 I am a chartered accountant and a partner of the firm 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 20 years.
- 5 On 23 April 2009, we were appointed as voluntary administrators of Timbercorp and TSL. Also on 23 April 2009, the respective directors of thirty nine (39) of Timbercorp's wholly owned subsidiaries (together **Timbercorp Group Companies**) appointed us and three other KordaMentha partners, namely Mark Francis Xavier Mentha, Craig Peter Shepard and Clifford Stuart Rocke, as administrators of those companies. All of the appointments were made pursuant to section 436A of the *Corporations Act 2001 (Cth)* (**the Act**).
- 6 On 29 June 2009, at a meeting of the creditors of Timbercorp and the Timbercorp Group Companies and a separate meeting of the creditors of TSL, the creditors resolved to wind up the Timbercorp Group Companies, including Timbercorp and TSL. We are therefore now the liquidators of TSL and Timbercorp.

### **Timbercorp schemes**

- 7 TSL is currently the responsible entity of 11 forestry schemes which are registered managed investment schemes under Part 5C of the Act. In addition, there is one forestry scheme administered by the Timbercorp Group Companies which is not, and was not required to be, registered under Part 5C of the Act. I refer to these together as the "**Forestry Schemes**".

- 8 Each of the Forestry Schemes is governed by a complex suite of documents including a constitution and sub-leases. The members of the Forestry Schemes are referred to in the documents as "**Growers**" and I adopt that terminology here.
- 9 The purpose of the Forestry Schemes was the cultivation of Eucalyptus trees for commercial wood production. The Growers sublease from Timbercorp or TSL allotments of land, known in the Forestry Schemes variously as "Woodlots" (1 hectare) or Timberlots" (1/2 of a hectare) (**Lots**). The land is owned either freehold by a Timbercorp Group Company or is leased to Timbercorp or TSL by a third party landowner.

### **Previous Court Proceedings**

- 10 The Forestry Schemes have the been subject of a number of previous Court Proceedings.
- 11 I have sworn affidavits in three proceedings which are relevant to the matters raised in this application. Now produced and shown to me and marked **MAK-1, MAK-2, MAK-3 and MAK-4** respectively, are:
- (a) a true copy of my affidavit filed in Supreme Court proceeding 9299 of 2009 dated 29 September 2009 (less exhibits);
  - (b) a true copy of my affidavit filed in Supreme Court proceeding 8870 of 2009 dated 9 October 2009 (less exhibits);
  - (c) a true copy of my affidavit filed in Supreme Court proceeding 8870 of 2009 dated 19 October 2009 (less exhibits);
  - (d) a true copy of my affidavit filed in Supreme Court proceeding 9998 of 2009 dated 10 November 2009 (less exhibits).
- 12 Clarendons Lawyers have been involved in a number of proceedings concerning the Forestry Schemes. Clarendons Lawyers are the solicitors on the record for the Timbercorp Growers' Group and the Timbercorp Growers' Reference Group (**Growers' Groups**) in a number of other proceedings relating to the liquidation of the Timbercorp Group of Companies. In particular, in relation to the Forestry Schemes, Clarendons and Counsel retained by them have appeared in :
- (a) Proceeding 8870 of 2009;

- (b) Proceeding 9299 of 2009 of the Supreme Court of Victoria;
  - (c) Proceeding VID 595 of 2009 in the Federal Court (from 18 August 2009); and
  - (d) Proceeding VID 541 of 2009 in the Federal Court.
- 13 Clarendons do not represent all Growers. The Timbercorp Growers' Group was formed by financial planners who had advised clients to invest in the Timbercorp schemes. The Timbercorp Growers' Reference Group was formed by a party interested in the Forestry Assets. The membership of the Timbercorp Growers' Group has not been disclosed to me or publicly. The membership of the Timbercorp Growers' Reference Group was briefly made available publicly. It was not made available to me directly and has since ceased to be made publicly available
- 14 Throughout the liquidation and sale or recapitalisation process of the Forestry Assets, we have communicated with the key stakeholders including the Growers' Groups. Our staff maintain a website at [www.kordamentha.com.au](http://www.kordamentha.com.au) with press releases, documents and court proceedings which is updated frequently. Our solicitors, Arnold Bloch Leibler, also maintain a website of all the Timbercorp Court proceedings that they have carriage of at [www.abl.com.au](http://www.abl.com.au).
- 15 Richard Forbes, another partner of KordaMentha and I, have been in regular contact with Clarendons and with the Growers' Groups to inform them of progress throughout the sale and recapitalisation process for the Timbercorp forestry assets.

### **Purpose of Application**

- 16 This affidavit is made in support of an application for a direction under section 511 of the Act that we are justified in procuring Timbercorp and TSL to make the payment in clause 4.4(a) of the settlement deed with Plantation Land Limited (PLL) SJ Ostwald Pty Limited (**SJ Ostwald**), the Timbercorp Growers' Group and the Timbercorp Growers' Reference Group (**Growers' Groups**) (**Settlement Deed**). I will explain the background to the Settlement Deed later in my affidavit.

### **PLL Leases**

- 17 PLL and Timbercorp or TSL are party to a number of leases (**PLL Leases**). Trees forming part of four Forestry Schemes are growing on the land subject to the PLL Leases (**PLL Land**). The four relevant Forestry Schemes are:

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- (a) 1999 Timbercorp Eucalypts Project (ARSN 085 827 872);
- (b) 2000 Timbercorp Eucalypts Project (ARSN 091 172 093);
- (c) 2001 Timbercorp Eucalypts Project (ARSN 094 392 000); and,
- (d) 2002 Timbercorp Eucalypts Project (ARSN 098 233 571);

**(Relevant Forestry Schemes)**

- 18 The PLL Land comprises approximately 8,000 hectares, or 8% of the Land upon which the Forestry Schemes are conducted.
- 19 On 24 August 2009, PLL purported to terminate the PLL Leases for non-payment of rent by Timbercorp and TSL.

**The Proceedings**

- 20 Timbercorp commenced the proceeding 8870 of 2009 on 11 September 2009 and proceeding 9519 of 2009 on 14 September 2009 against PLL (**PLL Proceedings**) seeking orders to the effect that the PLL Leases be reinstated or alternatively, to seek relief from forfeiture (among other relief).
- 21 SJ Ostwald brought another proceeding against PLL on 1 October 2009 (9365 of 2009) (**Grower Proceeding**). This proceeding sought orders to the effect of relief from forfeiture of the plaintiff's individual grower sub lease. I refer to the PLL Proceedings and the Grower Proceeding collectively as the "**Proceedings**". Now produced and shown to me and marked **MAK-5**, **MAK-6** and **MAK-7** respectively are true copies of the amended statements of claim filed in the two PLL Proceedings and the Grower Proceeding.
- 22 On 2 October 2009, the Honourable Justice Judd made orders in the PLL Proceedings and the Grower proceeding that the PLL Proceedings and the Grower Proceeding be heard together, and that evidence and submissions in one proceeding, be evidence in another. Now produced and shown to me and marked **MAK-8** is a true copy of the Honourable Justice Judd's orders in the PLL Proceedings and the Grower Proceedings, dated 2 October 2009.
- 23 The PLL Proceeding and the Grower Proceeding were listed for trial, before the Honourable Justice Judd, on 27 and 28 October 2009.

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- 24 On 27 October 2009, the parties informed the Court that they had agreed terms of settlement in principle. The Proceedings were adjourned to enable the settlement reached in principle to be documented. Counsel for Timbercorp and TSL indicated to the Court that the liquidators might return to the Court to seek Court approval of the compromise.

### **Sale Process**


- 25 The sale process for Timbercorp's forestry assets is set out in detail in paragraphs 10-17 and 27-30 of my affidavit filed in Supreme Court Proceeding 9299 of 2009 (**MAK-1**).
- 26 On 29 September 2009, the Liquidators obtained orders in Supreme Court Proceeding 9299 of 2009, before the Honourable Justice Pagone, that it was reasonable and appropriate for the Liquidators to enter into and perform the Sale and Purchase Deed for the sale of the Timbercorp forestry assets to Australian Bluegum Plantations Pty Limited (**Purchaser**) (**SPD**). Now produced and shown to me and marked **MAK-9** and **MAK-10** respectively are the Liquidators' originating process in that proceeding and Justice Pagone's orders of 29 September 2009. The SPD was executed on 30 September 2009. The SPD settled on 2 November 2009.
- 27 The terms of the SPD provide that the Timbercorp vendors can transfer to the Purchaser those leases (including the PLL Leases) for a period after the settlement of the SPD. Any leases in respect of which Timbercorp or TSL can not procure an assignment before the end of the period will not be assigned to the Purchaser and the purchase price under the SPD will be reduced accordingly.
- 28 The SPD requires that the Timbercorp vendors and the Purchaser use reasonable endeavours to procure the assignment of the Leased Land.
- 29 The PLL Leases all contain a provision that PLL may not unreasonably withhold its consent to the assignment of the PLL Leases.

### **Surrender of Sub Leases and Proprietary Interest in the Trees**

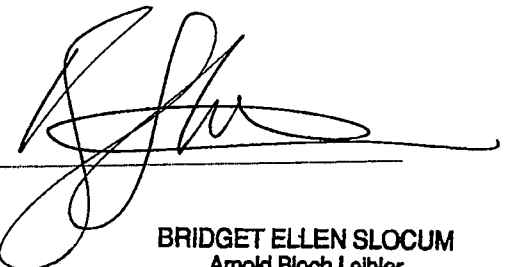
- 30 It was a condition precedent of the SPD that:
- (a) the Growers' subleases be surrendered; and,
  - (b) the securities over the Forestry Assets be released.

- 31 In paragraphs 20-26 of my affidavit in Supreme Court Proceeding 9299 of 2009 (**MAK-1**) I set out the process by which the Growers' interests under the sub leases will be surrendered. At paragraphs 32-40 of my affidavit in Supreme Court Proceeding 9299 of 2009 (**MAK-1**) and paragraphs 96-106 of my affidavit filed in Supreme Court Proceeding 9998 of 2009 (**MAK-4**) I set out the process by which the securities over the Forestry Assets were released.
- 32 On 29 October 2009, the Deed of Surrender of the Growers' rights under the forestry sub leases which was contemplated in paragraph 26 of my affidavit filed in Supreme Court Proceeding 9299 (**MAK-1**) (**Surrender Deed**) was executed. The surrender of each Grower sublease is effective upon assignment of the relevant head lease to the Purchaser under the SPD. Now produced and shown to me and marked "**MAK-11**" is a true copy of the Surrender Deed.

SWORN at )  
in the State of Victoria )  
by **MARK ANTHONY KORDA** this 19th )  
day of November 2009 )



Before me:



**BRIDGET ELLEN SLOCUM**  
Arnold Bloch Leibler  
Level 21, 333 Collins Street  
Melbourne 3000  
An Australian Legal Practitioner within the  
meaning of the Legal Profession Act 2004



## **SCHEDULE OF PARTIES**

**TIMBERCORP SECURITIES LIMITED**  
**(IN LIQUIDATION) ACN 092 311 469**  
**IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE MANAGED INVESTMENT**  
**SCHEMES LISTED IN SCHEDULE 1 AND IN ITS OWN CAPACITY**  
First Plaintiff

**TIMBERCORP LIMITED**  
**(IN LIQUIDATION) ACN 055 185 067**  
Second Plaintiff

**MARK ANTHONY KORDA**  
Third Plaintiff

**LEANNE KYLIE CHESSER**  
Fourth Plaintiff