

IN THE FEDERAL COURT OF AUSTRALIA  
VICTORIA DISTRICT REGISTRY  
GENERAL DIVISION

No. VID 541 of 2009

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

AND

IN THE MATTER OF TIMBERCORP LIMITED (IN LIQUIDATION)  
ACN: 055 185 067

TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)  
ACN 092 311 469  
and OTHERS

Plaintiffs

WA CHIP & PULP CO. PTY LTD  
and OTHERS  
ACN 008 720 518

Defendants

AFFIDAVIT

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Filed on behalf of the Plaintiffs

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On 23 July 2009, I, **MARK ANTHONY KORDA**, of Level 24, 333 Collins Street, Melbourne, in the State of Victoria, Chartered Accountant, SAY ON OATH that:

- 1 I am the liquidator of the First Plaintiff, Timbercorp Securities Limited (**TSL**), and of the Second Plaintiff, Timbercorp Limited (**TL**), 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.

### **Purpose of Application**

- 3 This affidavit is made in support of an application for orders under section 568(8)(b) of the *Corporations Act 2001* (Cth) (**Act**). Each of the Defendants has made an application in writing to Ms Chesser and me under section 568(8)(a) of the Act requiring us to decide whether or not we will disclaim the property the subject of its application, within 28 days of the receipt of the relevant application by us (**the**



**Disclaimer Applications**). Now produced and shown to me marked **MAK-1** are copies of the Disclaimer Applications received by KordaMentha as at the date of making this affidavit.

4 In this application, Ms Chesser and I respectfully seek the following orders from the Court:

- (a) the time by which we are entitled to disclaim the property the subject of each of the Disclaimer Applications under section 568 of the Act be extended until 30 September 2009 or such other time as the Court deems appropriate; and
- (b) for such further or other orders as the Court deems fit.

### **General background**

5 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.

6 On 23 April 2009, we were appointed as voluntary administrators of TSL pursuant to section 436A of the Act. Various partners of KordaMentha Pty Ltd (ACN 100 169 391) and I were appointed as voluntary administrators of TL and 39 of its wholly owned subsidiaries (**Timbercorp Group**).

7 On 29 June 2009, the creditors of TSL and TL (and the Timbercorp Group) resolved to wind up the companies.

### **Timbercorp schemes**

8 TSL is currently the responsible entity for a number of forestry and horticultural schemes which are registered managed investment schemes under Part 5C of the Act. Section 601FC(1)(c) requires TSL, as responsible entity, to act in the best interests of the members of the schemes which it operates. The Act contemplates

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that there may be a conflict between members' interests and a responsible entity's interests (see section 601FC(1)(c)). In such a case, members' interests are to be preferred. The proper exercise of this duty depends upon the responsible entity (or if the responsible entity is in liquidation, the liquidators of the responsible entity) being able to ascertain the existence and nature of the members' interests (or rights). It has become apparent to Ms Chesser and me during the administration and subsequent liquidation of the Timbercorp Group, that the interests and rights of the members of the Schemes are not always clear or ascertainable. (I elaborate on this last point later in this affidavit.)

- 9 TSL is currently the responsible entity of 19 horticultural schemes and 11 active forestry schemes, which are registered schemes under the Act. (Previously, TL had been responsible entity for a number of the schemes: ASIC granted relief to TL to retire as responsible entity of the Timbercorp managed investments schemes and appoint its wholly owned subsidiary, TSL as the new responsible entity for those schemes.)
- 10 The members of the schemes are called "Growers" in the constitutions for the schemes. I refer to the registered schemes collectively as "**the Schemes**" throughout this affidavit. In addition, there are two other horticultural schemes and one forestry scheme administered by the Timbercorp Group which are not, and were not required to be, registered under Part 5C of the Act.
- 11 This application concerns a number of the forestry schemes and one of the horticultural schemes, namely the 2006 Avocado Project.
- 12 Each of the 30 Schemes is governed by a complex suite of documents. If those documents were copied to CD-ROM, they would need to be copied to several CD-ROMs.

#### **Applications to wind up olive and almond Schemes**

- 13 Of the 30 Schemes, seven schemes concern the growing of olives (**the Olive Schemes**) and seven schemes concern the growing of almonds (**the Almond Schemes**).
- 14 On 4 June 2009, proceedings were commenced in the Supreme Court of Victoria in which orders were sought for the Olive Schemes and the Almond Schemes to be wound up by the Court. The hearing of the substantive application in those



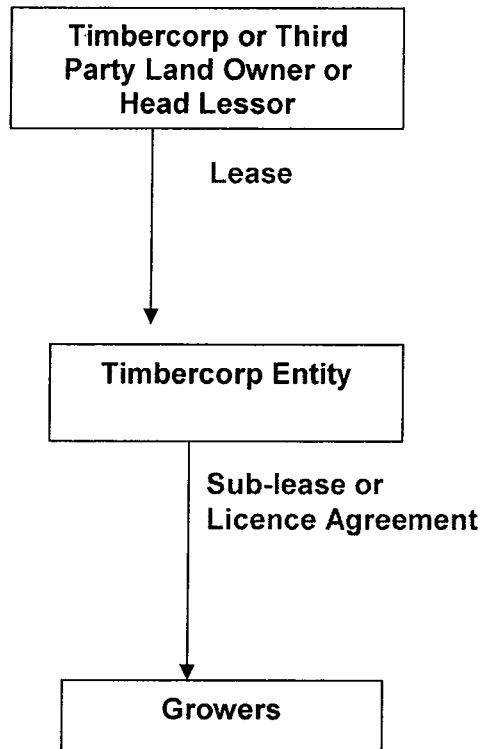
proceedings has taken four days. Thirty-four affidavits were filed on behalf of the Liquidators. Those affidavits, printed double-sided, fill approximately three lever-arch folders. The proceedings have been adjourned to a date to be fixed. Meetings of the Growers in the Almond Schemes and the Olive Schemes are scheduled to be held on 17 August 2009 and 31 July 2009 respectively. There are approximately 3,600 Growers in the Olives Schemes and 7,000 Growers in the Almonds Schemes.

- 15 As at the time of making this affidavit, no applications have been made by the Liquidators to wind up any of the other Timbercorp Schemes.

**Timbercorp's lease arrangements**

- 16 The land on which the horticulture crops and eucalypts are grown is either owned by a company in the Timbercorp Group, or by a third party owner. The land is subject to a chain of occupancy agreements including leases and sub-leases to various Timbercorp companies and sub-leases or licences to Growers in the relevant Scheme.
- 17 In particular, TSL and TL entered into a large number of leases and sub-leases with land owners and head lessors, in relation to the land on which the Schemes are conducted, as lessee or sub-lessee, respectively. TSL and TL then sub-leased particular land to Growers in the Schemes, or entered into a licence with the Growers in respect of the land, depending upon the documents governing the scheme in question.
- 18 The general structure of the leasehold arrangements can be depicted as follows. In most cases, the "Timbercorp entity" in the diagram is TSL or TL. In some cases, there are additional sub-leases between Timbercorp entities, prior to the Grower sub-lease or licence.

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- 19 As the diagram shows, some of the landlords are companies within the Timbercorp Group (**the Internal Landlords**). However, many of the landlords are persons or companies unrelated to any Timbercorp company (**the External Landlords**). I refer to the leases with Internal Landlords as "Internal Leases" and the lease with External Landlords as "External Leases".

#### **Complexity of the Timbercorp leasehold arrangements**

- 20 ABL, the lawyers advising the Liquidators in relation to the Schemes, have reviewed the majority of the documents for the Schemes contained on MAK-1 (in relation to particular issues).
- 21 I am informed by Jane Sheridan, a partner of ABL, that there are between one and approximately 140 head leases for each of the Schemes. One or more sub-leases have also been executed by TSL or TL in relation to each of the Schemes. Ms Sheridan has informed me that in the case of the forestry schemes, there are 198 Internal Leases and 386 External Leases.
- 22 Ms Sheridan has informed me that the lease documents vary, to a greater or lesser degree, between the Schemes, both by year and by crop. Certain clauses which

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were common to the later Schemes were not included in the earlier Schemes, and vice versa. Internal Leases may contain different terms to the External Leases.

- 23 The termination provisions for non-payment of rent by the "Timbercorp entity" to the owner or head lessee ("**Landlord**") allow for varying periods in which the Timbercorp entity can rectify a default, following service of a notice of default. Periods of between one and six months are specified.
- 24 Because the Disclaimer Applications concern a number of the Schemes, I set out below some of the terms of the relevant lease documents which pertain to each scheme.

### **1998 Eucalypt Project**

- 25 The 1998 Forestry project included land known as Minjiminjup. Now produced and shown to me marked **MAK-2** are the head sub-lease and a sub-lease for the Minjiminjup 98 Treefarm. The relevant extracts are as follows:

- 25.1 Head sub-lease between Bunnings Treefarms Pty Ltd (now known as WACAP Treefarms Pty Ltd) ("**Lessor**"); Timbercorp Eucalypts Limited (now known as Timbercorp Limited) ("**Lessee**"), and Permanent Trustee Company Limited ("**the Representative**")

#### **1.1 Sub-Lease**

*The Lessor leases to the Lessee the Leased Area of the term for the purpose of growing, tending and harvesting the Plantation Crop.*

#### **10.3 Termination by Lessor**

- (a) *Subject to clause 10.4, the Lessor may terminate this Sub-Lease with immediate effect if the Lessee fails to pay any instalment of Annual Rent or any other monetary sum payable under any Project Document by the due date for payment and such amount is not paid in full within six (6) months after the Lessor has served a written notice on the Lessee requesting payment.*

*If this Sub-Lease is terminated in respect of a Land Unit under this clause 10.3, the provisions of clauses 10.4(b)(2), (3) and (4) shall apply to that termination as if references in those clauses to Defaulting Land Units were references to the Land Unit(s) in respect of which there has been a termination under this clause 10.3(c).*

#### **10.8 Limited right of termination**

*Except as expressly provided in this Part, neither Party shall be entitled to terminate or rescind this Sub-Lease and the Lessor shall not be entitled to re-enter the Leased Area or forfeit this Lease, at any time prior to the expiration of the Term (as extended or renewed).*

**12.1 Ownership**

*Subject to clause 10.3, the Lessor acknowledges and agrees with the Lessee that the Plantation Crop will be and shall remain the property of the Lessee or any Grower for the period referred to in sub-clause 12.3.2.*

**12.2 Additional Rights**

*The Lessor hereby transfers and grants to the Lessee the following rights in addition to the other rights granted to the Lessee under the Sub-Lease:*

- (a) to establish, tend and manage the Plantation Crop and to cultivate and plant seedling trees as part of the Plantation Crop;*
- (b) to enter upon the Leased Area with or without vehicles and, to the exclusion of the Lessor and all other persons, to harvest the Plantation Crop and remove and sell the products derived from the Plantation Crop; and*
- (c) to exercise and enjoy such of the rights and power granted to the Lessee under this Lease as may be necessary to enable the Lessee to exercise the rights referred to in paragraphs (a) and (b) above.*

**12.3 Independent Proprietary Interest**

**12.3.1** *The rights and interests granted to the Lessee under clauses 12.1 and 12.2 constitute an independent and severable grant of a proprietary interest in the Leased Area by the Lessor to the Lessee.*

**12.3.2** *In the event that the Term or the leasehold interest of the Lessee under this Sub-Lease:*

- (a) ends; or*
- (b) is terminated (other than by effluxion of time or by the operation of Parts 2 or 10); or*
- (c) becomes void whether by reason of some act or default of the Lessor or of the trustee in bankruptcy, receiver, receiver and manager, controller, administrator or liquidator of the Lessor, or for any other reason whatsoever,*

*the rights and interests granted to the Lessee under clauses 12.1 and 12.2 shall, unless expressly surrendered by the Lessee, continue in full force and effect and may be exercised and enjoyed by the Lessee until the date on which the Term (as extended or renewed) would have ended by effluxion of time.*

**14.4 Dealings**

- (a) The Lessee may sub-lease or grant a licence to occupy the whole or any part of the Leased Area without having to obtain the consent of the Lessor but only on terms and conditions consistent with this Sub-Lease and with the agreements and arrangements referred to in clause 2.2.*
- (b) Subject to clause 14.4(c) neither Party may assign this Sub-lease without first obtaining the consent of the other Party (which consent shall not be unreasonably withheld) and arranging (at the assigning party's cost) for the assignee to enter into a deed of covenant with the other*



party in a form approved by the other party under which the assignee agrees to comply with and be bound by the provisions of the Sub-Lease as if the assignee were named in this Sub-Lease in the place of the assigning party.

- (c) *If for any reason whatsoever the Lessee ceases to be the Project Manager under the Agency Deed the Lessor will consent to the assignment of this Sub-Lease to any person fulfilling the position of Project Manager under the Agency Deed for the time being, subject to the proposed assignee assuming all the obligations of the Lessee under the Project Documents.*
- (d) *Notwithstanding anything to the contrary express or implied in this Sub-Lease, if the Lessee has failed to pay any instalment of Annual Rent or any other monetary sum payable by the Lessee under this Sub-Lease or under the Plantation Services Agreement and the Lessor has served notice on the Lessee requesting payment the Representative may, at its sole discretion, remedy such default by the Lessee and, upon doing so, and for so long as it continues to perform all duties and meet all liabilities of the Lessee under this sub-lease, assume all the rights of the Lessee under this sub-Lease provided that:*
  - (i) *the Representative will assume no personal liability for doing so but will do so only in its capacity as Representative under the Agency Deed;*
  - (ii) *the Representative is not bound to comply with the obligations contained in paragraphs 10.4(b) and 10.5(b) PROVIDED THAT:*
    - (A) *the Representative must reimburse the Lessor the direct and reasonable costs incurred by the Lessor in performing any works under sub clauses 10.4(b) and 10.5(b) in respect of any Land Unit or part of a Land Unit out of any proceeds that the relevant Grower is entitled to receive in respect of that Land Unit; and*
    - (B) *the Representative must provide the Lessor and the lessor under the Head Lease with reasonable access to the Surrendered Area,*
  - (iii) *a liability arising under this Sub-Lease can be enforced against the Representative only to the extent to which the Representative is entitled to be indemnified for the liability out of the property of the relevant Timbercorp Eucalypts Project under the Agency Deed; and*
  - (iv) *this limitation of the Representative's liability applies despite any other provision of the Sub-Lease and obligations of the Representative in anyway connected with any representation, warranty, conduct, omission, agreement or transaction related to the 1998 Timbercorp Eucalypts Project or this Sub-Lease provided that the Representative exercises its powers in good faith.*

- (e) *The Lessee is only entitled to assign this Sub-Lease under clause 14.4(b) or clause 14.4(c) if the assignee has entered into a deed of covenant with the Lessor in a form approved by the Lessor under which the assignee agrees to comply with and be bound by the provisions of the Wood Purchase Agreement as if the assignee were named in that agreement as Project Manager in the place of the Lessee.*

**25.2 Sub-lease between Timbercorp Eucalypts Ltd (now known as Timbercorp Limited) ("Project Manager"), Permanent Trustee Company Limited ("the Representative"); and the Growers**

**8.3 Trees are property of the relevant Grower**

*The parties acknowledge and agree that the Trees are and will remain the property of the relevant Grower until the end of the Term.*

**11.1 Termination for default**

- (a) *The relevant Grower may terminate this Sub-Lease in respect of the relevant Woodlots with immediate effect if the Project Manager commits a material breach of this Sub-Lease and fails to remedy the breach to make reasonable compensation in money within thirty (30) days after the relevant Grower or the Representative on behalf of the relevant Grower has served a written notice on the Project Manager requiring the Project Manager to remedy the breach.*
- (b) *The Project Manager may terminate this Sub-Lease in respect of the relevant woodlots with immediate effect if:*
- (i) *the relevant Grower fails to pay any instalment of annual rent by the due date for payment and such amount is not paid in full within 6 months after the Project Manager has served a written notice of the relevant Grower requesting payment; or*
  - (ii) *the relevant Grower commits a material breach of this Sub-Lease and fails to remedy the breach or make reasonable compensation in money within thirty (30) days after the Project Manager has served a written notice on the relevant Grower requiring the relevant Grower to remedy the breach.*

**11.6 Representative may assume rights duties and obligations of Project Manager**

*Notwithstanding anything to the contrary express or implied in this Sub-Lease, if for any reason whatsoever the Project Manager ceases to be the Project Manager of the 1998 Timbercorp Eucalypts Project, the Representative may (but is not obliged to) at its sole discretion, assume all the rights, subject to it assuming all duties, liabilities and obligations, of the Project Manager under this Sub-Lease until such time as a new project manager is appointed PROVIDED THAT:*

- (a) *the Representative will assume no personal liability for doing so but will do so only in its capacity as Representative under the Agency Deed;*

- (b) *a liability arising under the Sub-Lease can be enforced against the Representative only to the extent to which the Representative is entitled to be indemnified for the liability under the Agency Deed; and*
- (c) *this limitation of the Representative's liability applies despite any other provision of the Sub-Lease and extends to all liabilities and obligations of the Representative in any way connected with any representation, warranty, conduct, omission, agreement or transaction related to the relevant Project or this Sub-Lease provided that Representative exercises its power in good faith.*

### **13.1 Ownership**

*The Project Manager acknowledges and agrees with the relevant Grower that the Trees will be and shall remain the property of the relevant Grower for the period referred to in paragraph 13.3(b).*

### **13.2 Additional Rights**

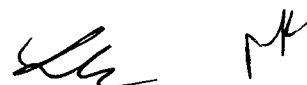
*The Project Manager hereby transfers and grants to the relevant Grower the following rights in addition to the other rights granted to the relevant Grower under the Sub-Lease:*

- (a) *to establish, tend and manage the Trees and to cultivate and plant seedling trees as part of the Trees;*
- (b) *to enter upon the relevant Woodlots with or without vehicles and, to the exclusion of the Project Manager and all other persons, to harvest the Trees and remove and sell the products derived from the Trees; and*
- (c) *to exercise and enjoy such of the rights and powers granted to the relevant Grower under this Lease as may be necessary to enable the relevant Grower to exercise the rights referred to in paragraphs (a) and (b) above.*

### **13.3 Independent Proprietary Interest**

- (a) *The rights and interests granted to the relevant Grower under clauses 13.1 and 13.2 constitute an independent and severable grant of a proprietary interest in the relevant Woodlots by the Project Manager to the relevant Grower.*
- (b) *In the event that the Term or the leasehold interest of the relevant Grower under this Sub-Lease:*
  - (i) *ends; or*
  - (ii) *is terminated (other than by effluxion of time or by the operation of Parts 4 or 11); or*
  - (iii) *becomes void whether by reason of some act or default of the Project Manager or of the trustee in bankruptcy, receiver, receiver and manager, controller, administrator or liquidator of the Project Manager, or for any other reason whatsoever,*

*the rights and interests granted to the relevant Grower under clauses 13.1 and 13.2 shall, unless expressly surrendered by the relevant Grower, continue in full force and effect and may be exercised and enjoyed by the relevant Grower until the date on which the Term would have ended by effluxion of time.*



- 26 For completeness, I note that upon the conversion of this scheme to a registered managed investment scheme in 2004, TSL became the responsible entity for this scheme and Permanent Trustee Company Limited ceased to act as Representative. Now produced and shown to me marked **MAK-3** is an indemnification deed and retirement notice in relation to the retirement of the Representative.

### 1999 Eucalypt Project

- 27 The 1999 Eucalypt project included land known as the Hardie land. Now produced and shown to me marked **MAK-4** are the lease, sub-lease and amendment to sub-lease for the Hardie land. The relevant extracts are as follows:

- 27.1 Lease between G.M. Hardie Pty Ltd ("**Lessor**") and Timbercorp Eucalypts Pty Ltd (now known as Timbercorp Pty Ltd) ("**Lessee**"):

#### 9.1 Non payment of Annual Rent

*The Owner may terminate this Lease with immediate effect if the Lessee is in arrears in respect of one quarterly instalment of Annual Rent and such arrears are not paid in full within 3 months after the Owner has served a written notice on the Lessee requesting payment.*

#### 11.1 Ownership

*The Owner acknowledges and agrees with the Lessee that for so long as this Lease has not been terminated for non-payment of Annual Rent under clause 9.1 and the Lessee continues to pay the instalments of Annual Rent, the Plantation Crop and any rights, benefits and credits derived from the Plantation Crop will be and will remain the property of the Lessee (or any other person or entity deriving title to the Plantation Crop through the Lessee) for the period referred to in clause 11.3.*

#### 11.2 Additional rights

*The Owner hereby transfers and grants to the Lessee the following rights in addition to the other rights granted to the Lessee under this Lease:*

- (a) *to establish, tend and manage the Plantation Crop;*
- (b) *to enter upon the Lease Area with or without vehicles and, to the exclusion of the Owner and all other persons, to harvest the Plantation Crop and remove and sell the products and any rights, benefits and credits derived from the Plantation Crop; and*
- (c) *to exercise and enjoy such of the rights and powers granted to the Lessee under this Lease as may be necessary to enable the Lessee to exercise the rights referred to in paragraph (a) and (b) above.*

#### 11.3 Independent proprietary interest

- (a) *The rights and interests granted to the Lessee under clauses 11.1 and 11.2 constitute an independent and severable grant of a proprietary interest in the Leased Area by the Owner to the Lessee.*

(b) *In the event that the Term or the leasehold interest of the Lessee under this Lease:*

- (i) *ends; or*
- (ii) *is terminated (other than by effluxion of time or other than by the operation of Parts 3, 8 or 9); or*
- (iii) *becomes void whether by reason of some act or default of the Owner or of the trustee in bankruptcy, receiver and manager, controller, administrator or liquidator of the Owner, or for any other reason whatsoever,*

*the rights and interests granted to the Lessee under clauses 11.1 and 11.2 shall, unless expressly surrendered by the Lessee, continue in full force and effect and may be exercised and enjoyed by the Lessee until the date on which the Term (as extended or renewed) would have ended by effluxion of time.*

#### **12.1 By the Owner**

(a) *The Owner may sell, transfer, assign, lease, licence, mortgage, charge or otherwise dispose of or part with possession of or encumber the whole or any part of the Leased Area or the Owner's interest in the Leased Area or agree to do the same PROVIDED THAT the Owner first arranges (as the Owner's cost) for the other party or parties to the transaction to enter into a deed of covenant with the Lessee under which such party or parties agree to comply with and be bound by the provisions of this Lease as if such party or parties were named in this Lease in place of the Owner.*

(b) *Encumbrances*

*The Owner agrees with the Lessee that the Owner will not create any encumbrances over the Leased Area or any part thereof ranking in priority to the interests of the Lessee under this Lease.*

#### **12.2 By the Lessee**

(a) *Grants of sub-lease or licence*

*The Lessee may sub-lease or grant to a licence to occupy the whole or any part of the Leased Area on such terms and conditions as the Lessee deems fit without having to obtain the consent of the Owner but no such sub-lease, licence or other dealing shall relieve the Lessee from any obligations under this Lease.*

(b) *Assignment or transfer*

*The Lessee may with the consent of the Owner (which consent must not be unreasonably withheld) assign or transfer this Lease upon the Lessee arranging (at the Lessee's cost) for the assignee to enter into a deed of covenant with the Owner under which the assignee agrees to comply with and be bound by the provisions of this Lease as if the assignee were named in this Lease in the place of the Lessee.*

(c) *Ceasing to be project manager*

*The Owner covenants and agrees that, notwithstanding anything to the contrary express or implied in this Lease, if for any reason whatsoever the Lessee ceased to be the project manager under the Project Deed constituting any of the Timbercorp Eucalypts Projects (as amended from time to time) ("the Project Deed") the Owner will consent to the assignment of this Lease to any person fulfilling the position of project manager under the Project Deed for the time being, subject to the*

*proposed assignee assuming all of the obligations of the Lessee under this Lease.*

27.2 Sub-lease Timbercorp Eucalypts Pty Ltd (now known as Timbercorp Pty Ltd) ("Project Manager") and each Several Grower ("the Grower"):

*"Term" means the term of this Sub-Lease as specified in Part 3 of the Schedule plus any extension thereof under clause 10.1.*

**8.3 Trees are property of the relevant Grower**

*The parties acknowledge and agree that the Trees are and will remain the property of the relevant Grower until the end of the Term.*

**13.1 Ownership**

*The Project Manager acknowledges and agrees with the relevant Grower that for so long as this Sub-Lease has not been terminated for non-payment of Annual Rent under clause 11.1(b) and the relevant Grower continues to pay the Annual Rent the Trees will be and shall remain the property of the relevant Grower for the period referred to in paragraph 13.3(b).*

**13.2 Additional Rights**

*The Project Manager hereby transfers and grants to the relevant Grower the following rights in addition to the other rights granted to the relevant Grower under this Sub-Lease:*

- (a) *to establish, tend and manage the Trees and to cultivate and plant seedling trees as part of the Trees;*
- (b) *to enter upon the relevant Woodlots with or without vehicles and, to the exclusion of the Project Manager and all other persons, to harvest the Trees and remove and sell the products derived from the Trees; and*
- (c) *to exercise and enjoy such of the rights and powers granted to the relevant Grower under this Lease as may be necessary to enable the relevant Grower to exercise the rights referred to in paragraphs (a) and (b) above.*

**13.3 Independent Proprietary Interest**

- (a) *The rights and interests granted to the relevant Grower under clauses 13.1 and 13.2 constitute an independent and severable grant of a proprietary interest in the relevant Woodlots by the Project Manager to the relevant Grower.*
- (b) *In the event that the Term or the leasehold interest of the relevant Grower under this Sub-Lease:*
  - (i) *ends; or*
  - (ii) *is terminated (other than by effluxion of time or by the operation of Parts 4 or 11); or*
  - (iii) *becomes void whether by reason of some act or default of the Project Manager or of the trustee in bankruptcy, receiver, receiver and manager, controller, administrator or liquidator of the Project Manager, or for any other reason whatsoever,*

*the rights and interests granted to the relevant Grower under clauses 13.1 and 13.2 shall, unless expressly surrendered by the Relevant Grower, continue in full*

*force and effect and may be exercised and enjoyed by the relevant Grower until the date on which the Term would have ended by effluxion of time.*

**PART 3: Term**

*The period commencing on 15 April 2000 (the "Commencement Date") and expiring on the earliest of:*

- (a) the date 12 years after the Commencement Date;*
- (b) the date harvesting of the Wood is completed; and*
- (c) the day immediately preceding the termination date of the Head Lease.*

28 For completeness I note that Timbercorp Limited was replaced as responsible entity of this scheme by TSL on after ASIC granted relief to TL to retire as responsible entity. The effective date was 23 March 2004.

**2000 Eucalypt Project**

29 The 2000 Eucalypt project included land known as the Hester 222 land. Now produced and shown to me marked **MAK-5** are the lease and sub-lease for the Hester 222 land. The relevant extracts are as follows:

29.1 Lease between Rodney John Winston Hester and Lorraine Grace Hester ("Lessor") and Timbercorp Limited ("Lessee"):

**9.1 Non payment of Annual Rent**

*The Owner may terminate this Lease with immediate effect if the Lessee is in arrears in respect of one quarterly instalment of Annual Rent and such arrears are not paid in full within 3 months after the Owner has served a written notice on the Lessee requesting payment.*

**9.3 Material breach**

*The Lessee may terminate this Lease with immediate effect if the Owner commits a material breach of this Lease and fails to remedy the breach or make reasonable compensation in money within one month after the Lessee has served a written notice on the Owner requiring the Owner to remedy the breach.*

**11.1 Ownership**

*The Owner acknowledges and agrees with the Lessee that for so long as this Lease has not been terminated for non-payment of Annual Rent under clause 9.1 and the Lessee continues to pay the instalments of Annual Rent, the Plantation Crop and any rights, benefits and credits derived from the Plantation Crop will be and will remain the property of the Lessee (or any other person or entity deriving title to the Plantation Crop through the Lessee) for the period referred to in clause 11.3.*

**11.2 Additional rights**

*The Owner hereby transfers and grants to the Lessee the following rights in addition to the other rights granted to the Lessee under this Lease:*

*dh MK*

- (a) to establish, tend and manage the Plantation Crop;
- (b) to enter upon the Lease Area with or without vehicles and, to the exclusion of the Owner and all other persons, to harvest the Plantation Crop and remove and sell the products and any rights, benefits and credits derived from the Plantation Crop; and
- (c) to exercise and enjoy such of the rights and powers granted to the Lessee under this Lease as may be necessary to enable the Lessee to exercise the rights referred to in paragraph (a) and (b) above.

### **11.3 Independent proprietary interest**

- (a) The rights and interests granted to the Lessee under clauses 11.1 and 11.2 constitute an independent and severable grant of a proprietary interest in the Leased Area by the Owner to the Lessee.
- (b) In the event that the Term or the leasehold interest of the Lessee under this Lease:
  - (i) ends; or
  - (ii) is terminated (other than by effluxion of time or other than by the operation of Parts 3, 8 or 9); or
  - (iii) becomes void whether by reason of some act or default of the Owner or of the trustee in bankruptcy, receiver and manager, controller, administrator or liquidator of the Owner, or for any other reason whatsoever,

*the rights and interests granted to the Lessee under clauses 11.1 and 11.2 shall, unless expressly surrendered by the Lessee, continue in full force and effect and may be exercised and enjoyed by the Lessee until the date on which the Term (as extended or renewed) would have ended by effluxion of time.*

### **12.1 By the Owner**

- (a) The Owner may sell, transfer, assign, lease, licence, mortgage, charge or otherwise dispose of or part with possession of or encumber the whole or any part of the Leased Area or the Owner's interest in the Leased Area or agree to do the same PROVIDED THAT the Owner first arranges (as the Owner's cost) for the other party or parties to the transaction to enter into a deed of covenant with the Lessee under which such party or parties agree to comply with and be bound by the provisions of this Lease as if such party or parties were named in this Lease in place of the Owner.
- (b) *Encumbrances*

*The Owner agrees with the Lessee that the Owner will not create any encumbrances over the Leased Area or any part thereof ranking in priority to the interests of the Lessee under this Lease.*

### **12.2 By the Lessee**

- (a) *Grants of sub-lease or licence*

*The Lessee may sub-lease or grant to a licence to occupy the whole or any part of the Leased Area on such terms and conditions as the Lessee deems fit without having to obtain the consent of the Owner but no such sub-lease, licence or other dealing shall relieve the Lessee from any obligations under this Lease.*

*DR MK*



(b) *Assignment or transfer*

*The Lessee may with the consent of the Owner (which consent must not be unreasonably withheld) assign or transfer this Lease upon the Lessee arranging (at the Lessee's cost) for the assignee to enter into a deed of covenant with the Owner under which the assignee agrees to comply with and be bound by the provisions of this Lease as if the assignee were named in this Lease in the place of the Lessee.*

(c) *Ceasing to be project manager*

*The Owner covenants and agrees that, notwithstanding anything to the contrary express or implied in this Lease, if for any reason whatsoever the Lessee ceased to be the project manager under the Project Deed constituting any of the Timbercorp Eucalypts Projects (as amended from time to time) ("the Project Deed") the Owner will consent to the assignment of this Lease to any person fulfilling the position of project manager under the Project Deed for the time being, subject to the proposed assignee assuming all of the obligations of the Lessee under this Lease.*

## 29.2 Sub-lease between Timbercorp Limited ("**the Project Manager**") and Each Several Grower ("**the Grower**"):

*"Term" means the term of this Sub-Lease as specified in Part 3 of the Schedule plus any extension thereof under clause 10.1.*

### 8.3 **Trees are property of the relevant Grower**

*The parties acknowledge and agree that the Trees are and will remain the property of the relevant Grower until the end of the Term.*

### 13.1 **Ownership**

*The Project Manager acknowledges and agrees with the relevant Grower that for so long as this Sub-Lease has not been terminated for non-payment of Annual Rent under clause 11.1(b) and the relevant Grower continues to pay the Annual Rent the Trees will be and shall remain the property of the relevant Grower for the period referred to in paragraph 13.3(b).*

### 13.2 **Additional Rights**

*The Project Manager hereby transfers and grants to the relevant Grower the following rights in addition to the other rights granted to the relevant Grower under this Sub-Lease:*

- (a) *to establish, tend and manage the Trees and to cultivate and plant seedling trees as part of the Trees;*
- (b) *to enter upon the relevant Woodlots with or without vehicles and, to the exclusion of the Project Manager and all other persons, to harvest the Trees and remove and sell the products derived from the Trees; and*
- (c) *to exercise and enjoy such of the rights and powers granted to the relevant Grower under this Lease as may be necessary to enable the relevant Grower to exercise the rights referred to in paragraphs (a) and (b) above.*

### 13.3 **Independent Proprietary Interest**

- (a) *The rights and interests granted to the relevant Grower under clauses 13.1 and 13.2 constitute an independent and severable grant of a*

*proprietary interest in the relevant Woodlots by the Project Manager to the relevant Grower.*

(b) *In the event that the Term or the leasehold interest of the relevant Grower under this Sub-Lease:*

(i) *ends; or*

(ii) *is terminated (other than by effluxion of time or by the operation of Parts 4 or 11); or*

(iii) *becomes void whether by reason of some act or default of the Project Manager or of the trustee in bankruptcy, receiver, receiver and manager, controller, administrator or liquidator of the Project Manager, or for any other reason whatsoever,*

*the rights and interests granted to the relevant Grower under clauses 13.1 and 13.2 shall, unless expressly surrendered by the Relevant Grower, continue in full force and effect and may be exercised and enjoyed by the relevant Grower until the date on which the Term would have ended by effluxion of time.*

### **PART 3: Term**

*In respect of a relevant Grower, means the period commencing on the Commencement Date and expiring on the earliest of:*

(a) *30 June 2014;*

(b) *the date harvesting of the Wood is completed; and*

(c) *the day immediately preceding the termination date of the Head Lease.*

30 For completeness I note that Timbercorp Limited was replaced as responsible entity of this scheme by TSL on after ASIC granted relief to TL to retire as responsible entity. The effective date was 23 March 2003.

### **2005 Forestry Project (Timberlots)**

31 The 2005 Eucalypts Timberlots project included land known as the Fishtrack land. Now produced and shown to me marked **MAK-6** are the sub-lease, carbon right, deed of grant of carbon rights and deed of sub-lease for the Fishtrack land. The relevant extracts are as follows:

31.1 Sub-lease between Kent Rochester and Michelle Lee Tysoe ("**Sub-lessor**") and Timbercorp Securities Limited ("**Sub-lessee**"):

#### **DEFINITIONS**

*Original Lease means the deed of lease made in 1996 between Neil Rochester as sub-lessor and TIMBERCORP LIMITED (ACN 005 185 067) (by its former name TIMBERCORP EUCALYPTS LIMITED) as sub-lessee and relating to the Leased Area.*

#### **12.1 Termination by Sub-Lessor**



The Sub-Lessor may terminate this Head Sub-Lease with immediate effect if:

- (a) the Sub-Lessee fails to pay any instalment of Annual Rent by the due date for payment and such amount is not paid in full within 2 months after the Sub-Lessor has served a written notice on the Sub-Lessee requesting payment; or
- (b) the Sub-Lessee commits a breach of this Head Sub-Lease and fails to remedy the breach or make reasonable compensation in money within 1 month after the Sub-Lessor has served a written notice on the Sub-Lessee requiring the Sub-Lessee to remedy the breach.

## **12.2 Termination by Sub-Lessee**

The Sub-Lessee may terminate this Head Sub-Lease with immediate effect if the Sub-Lessor commits a breach of this Head Sub-Lease and fails to remedy the breach or make reasonable compensation in money within one month after the Sub-Lessee has served a written notice on the Sub-Lessor requiring the Sub-Lessor to remedy the breach.

## **15.1 Sub-Lessee may Sub-Sub-Lease**

- (a) Subject to paragraph (b) by the Sub-Lessee may not without first obtaining the consent of the Sub-Lessor (which consent must not be unreasonably withheld) sub-sub-let or grant a licence to occupy the whole or any part of the Leased Area.
- (b) The Sub-Lessor hereby consents to the Sub-Lessee granting one or more sub-sub-leases in respect of the whole or any part of the Leased Area to any person whose application to become a grower under the Timbercorp Eucalypts Project 1996 prospectus or the Timbercorp Eucalypts Project 1997 is accepted and PROVIDED THAT such sub-sub-lease or licence:
  - (i) is on terms and conditions consistent with this Head Sub-Lease; and
  - (ii) does not relieve the Sub-Lessee from any obligations under this Head Sub-Lease.

## **15.2 Assignment or Transfer by Either Party**

Subject to clauses 15.1 and 15.3 neither party may assign, transfer or part with possession of this Head Sub-Lease without first obtaining the consent of the other party (which consent must not be unreasonably withheld) and arranging (at the assigning party's cost) for the assignee to enter into a deed of covenant with the other party in a form reasonably approved by the other party under which the assignee agrees to comply with and be bound by the provisions of this Head Sub-Lease as if the assignee were named in this Head Sub-Lease in the place of the assigning party.

## **31.2 Deed of grant carbon rights between Timbercorp Securities Limited and Kent Rochester and Michelle Lee Tysoe ("Grantees"):**

### **2.1 Plantation Crop**

The Grantees acknowledge and agree with Timbercorp that for so long as the Lease Agreements or any of them have not been terminated on the grounds of any default by Timbercorp under any of the Lease Agreements, and Timbercorp continues perform its obligations under the Lease Agreements, the Plantation Crop and any rights, benefits and credits derived from the Plantation Crop, including Carbon Credits will, subject to this Deed, be and will remain the property of Timbercorp (or any other person or entity deriving title to the Plantation Crop through Timbercorp) for the Term.

**2.2 Capacity of Timbercorp Securities**

*Timbercorp Securities enters into this Sub-Lease in its personal capacity.*

**2.3 Sub-Lease is not Scheme Property**

*This Sub-Lease does not form part of "scheme property", as defined in section 9 of the Corporations Act, of the Project.*

**31.3 Deed of sub-lease between Timbercorp Securities Limited ("Timbercorp Securities") and Each Several Grower ("the Grower"):**

**8.3 Trees are property of the relevant Grower**

*The parties acknowledge and agree that the Trees are and will remain the property of the relevant Grower until the end of the Term.*

**13.1 Ownership**

*Timbercorp Securities acknowledges and agrees with the relevant Grower the Trees will be and will remain the property of the relevant Grower for:*

- (a) *the Term; and*
- (b) *the period referred to in paragraph 13.3(b).*

**13.2 Additional Rights**

*Timbercorp Securities hereby transfers and grants to the relevant Grower the following rights in addition to the other rights granted to the relevant Grower under this Sub-Lease:*

- (a) *to establish, tend and manage the Trees and to cultivate and plant seedling trees as part of the Trees;*
- (b) *to enter upon the relevant Timberlots with or without vehicles and, to the exclusion of Timbercorp Securities and all other persons, to harvest the Trees and remove and sell the products derived from the Trees; and*
- (c) *to exercise and enjoy such of the rights and powers granted to the relevant Grower under this Sub-Lease as may be necessary to enable the relevant Grower to exercise the rights referred to in paragraphs 13.2(a) and (b) above.*

**13.3 Independent Proprietary Interest**

- (a) *The rights and interests granted to the relevant Grower under clauses 13.1 and 13.2 constitute an independent and severable grant of a proprietary interest in the relevant Timberlots by Timbercorp Securities to the relevant Grower.*
- (b) *In the event that the Term or the leasehold interest of the relevant Grower under this Sub-Lease:*
  - (i) *ends; or*
  - (ii) *is terminated (other than by effluxion of time or by the operation of clauses 4 to 11); or*
  - (iii) *becomes void whether by reason of some act or default of Timbercorp Securities or of the trustee in bankruptcy,*

*Se MK*

receiver, receiver and manager, controller, administrator or liquidator of Timbercorp Securities, or for any other reason whatsoever,

the rights and interests granted to the relevant Grower under clauses 13.1 and 13.2, unless expressly surrendered by the relevant Grower, continue in full force and effect and may be exercised and enjoyed by the relevant Grower until the date on which the Term would have ended by effluxion of time.

### **PART 3: Term**

In respect of a relevant Grower, means the period commencing on the Commencement Date and expiring on the earliest of:

- (a) 30 June 2019;
- (b) the date Harvesting is completed; and
- (c) the day immediately preceding the termination date of the Head Lease.

### **2007/2008 Forestry Project (Timberlots)**

32 The 2007/2008 Eucalypts Timberlots project included land known as the Zambonetti land. Now produced and shown to me marked **MAK-7** are the lease and agreement for sub-lease for the Zambonetti land. The relevant extracts are as follows:

32.1 Lease between Zambonetti parties ("**Lessor**") and Timbercorp Securities Limited ("**Lessee**"):

*Term means the term specified on the front cover of this Lease and, where the context permits, includes any extension or renewal of that term, but subject to any variation or termination of the Term in accordance with this Lease.*

#### **9.1 Non payment of Annual Rent**

*The Owner may terminate this Lease with immediate effect if the Lessee is in arrears in respect of one quarterly instalment of Annual Rent and such arrears are not paid in full within 3 months after the Owner has served a written notice on the Lessee requesting payment.*

#### **11.1 Ownership**

*Subject to clause 16, the Owner acknowledges and agrees with the Lessee that for so long as this Lease has not been terminated for non-payment of Annual Rent under clause 9.1 and the Lessee continues to pay the instalments of Annual Rent, the Plantation Crop and any rights, benefits and credits derived from the Plantation Crop will be and will remain the property of the Lessee (or any other person or entity deriving title to the Plantation Crop through the Lessee) for the period referred to in clause 11.3.*

#### **11.2 Additional rights**

*The Owner hereby transfers and grants to the Lessee the following rights in addition to the other rights granted to the Lessee under this Lease:*

- (a) to establish, tend and manage the Plantation Crop;

- (b) *to enter upon the Leased Area with or without vehicles and, to the exclusion of the Owner and all other persons, to harvest the Plantation Crop and remove and sell the products and any rights, benefits and credits derived from the Plantation Crop; and*
- (c) *to exercise and enjoy such of the rights and powers granted to the Lessee under this Lease as may be necessary to enable the Lessee to exercise the rights referred to in paragraphs (a) and (b) above.*

**11.3 Independent proprietary interest**

- (a) *The rights and interests granted to the Lessee under clauses 11.1 and 11.2 constitute an independent and severable grant of a proprietary interest in the Leased Area by the Owner to the Lessee.*
- (b) *In the event that the Term or the leasehold interest of the Lessee under this Lease:*
  - (i) *ends; or*
  - (ii) *is terminated (other than by effluxion of time or by the operation of clauses 3, 8 or 9); or*
  - (iii) *becomes void whether by reason of some act or default of the Owner or of the trustee in bankruptcy, receiver, receiver and manager, controller, administrator or liquidator of the Owner, or for any other reason whatsoever,*

*the rights and interests granted to the Lessee under clauses 11.1 and 11.2 shall, unless expressly surrendered by the Lessee, continue in full force and effect and may be exercised and enjoyed by the Lessee until the date on which the Term (as extended or renewed) would have ended by effluxion of time.*

**12.1 By the Owner**

- (a) *The Owner may sell, transfer, assign, lease, licence, mortgage, charge or otherwise dispose of or part with possession of or encumber the whole or any part of the Leased Area or the Owner's interest in the Leased Area or agree to do the same provided that the Owner first arranges (at the Owner's cost) for the other party or parties to the transaction to enter into a deed of covenant with the Lessee under which such party or parties agree to comply with and be bound by the provisions of this Lease as if such party or parties were named in this Lease in place of the Owner.*
- (b) *The Owner agrees with the Lessee that the Owner will not create any encumbrances over the Leased Area or any part thereof ranking in priority to the interests of the Lessee under this Lease.*

**12.2 By the Lessee**

- (a) *Grants of sub-lease or licence*

*Subject to clause 16 the Lessee may:*

- (i) *sub-lease or grant a licence to occupy the whole or any part of the Leased Area; or*
- (ii) *assign, transfer or deal with all or part of the Plantation Crop and all products, rights, benefits and credits derived from the Plantation Crop,*

*on such terms and conditions as the Lessee deems fit without having to obtain the consent of the Owner but no such sub-lease, licence or*

*other dealing shall relieve the Lessee from any obligations under this Lease.*

*(b) Assignment or transfer*

*Subject to clause 12.2(a) the Lessee may with the consent of the Owner (which consent must not be unreasonably withheld) assign or transfer this Lease upon the Lessee arranging (at the Lessee's cost) for the assignee to enter into a deed of covenant with the Owner under which the assignee agrees to comply with and be bound by the provisions of this Lease as if the assignee were named in this Lease in the place of the Lessee.*

*(c) Ceasing to be project manager*

*The Owner covenants and agrees that, notwithstanding anything to the contrary express or implied in this Lease, if for any reason whatsoever the Lessee ceases to be the responsible entity under the constitution of any of the Timbercorp eucalypts/timberlot/forestry interest projects (as amended from time to time) ("the Constitution") the Owner will consent to the assignment of this Lease to any person fulfilling the position of responsible entity under the Constitution for the time being, subject to the proposed assignee assuming all of the obligations of the Lessee under this Lease.*

32.2 Agreement for sub-lease between Timbercorp Securities Limited and the Grower:

**6.1 Term of Agreement**

- (a) This Agreement will commence on the Commencement Date.*
- (b) Subject to clauses 6.2 and 6.3, this Agreement will continue until the earlier of:*
  - (i) the grant of the Sub-Lease to the Grower; and*
  - (ii) termination of the Project.*

33 A sub-lease in accordance with the agreement to sub-lease between Timbercorp and Growers has not been entered into at this time.

**2006 Avocado Project**

34 Now produced and shown to me marked **Confidential Exhibit MAK-8** are documents for the 2006 Avocado Project namely a lease, water licence lease and deed of variation for Jasper Farms Holdings Pty Ltd ("**Jasper Farms**"). Jasper Farms is a defendant to the application.

35 The Growers in the 2006 Avocado Project have entered into licences with TSL, rather than sub-leases as is the case with the forestry schemes.

36 The relevant extracts from the lease documents for Jasper Farms are as follows:

36.1 Lease between Jasper Farms Holdings Pty Ltd ("**Lessor**") and Timbercorp Limited ("**Lessee**"):

**6.3 Property in Avocado Trees etc**

*The Lessor acknowledges and agrees with the Lessee that:*

- (a) *the Avocado Trees (including the Existing Avocado Orchard) and all rights, will be and will remain the property of the Lessee, (or any other person or entity deriving title to the Avocado Trees through the Lessee); and*
- (b) *the Avocado Crop and all rights will be and will remain the property of the Lessee, TSL or the Growers (or any other person or entity deriving title to the Avocado Crop through the Lessee, TSL or the Growers).*

**10.1 Non payment of Annual Rent**

*The Lessor may terminate this Lease with immediate effect if the Lessee is in arrears in respect of the one quarterly instalment of Annual Rent and such arrears are not paid in full within 60 days after the Lessor has served a written notice on the Lessee requesting payment.*

**10.2 Termination by Lessee breach**

*The Lessee may terminate this Lease with immediate effect:*

- (a) *if the Lessor commits a material breach of this Lease and fails to remedy the breach or make reasonable compensation in money within 60 days after the Lessee has served a written notice on the Lessor requiring the Lessor to remedy the breach;*
- (b) *the Lessee is entitled to terminate the Water Licence Lease;*
- (c) *the Lessor goes into liquidation, other than for the purposes of reconstruction or amalgamation, or a Receiver, Controller or Administrator is appointed in relation to the undertaking or any part of the undertaking of the Lessor.*

**10.7 Independent proprietary interest**

- (a) *In the event that the Term or the leasehold interest of the Lessee under this Lease:*
  - (i) *ends; or*
  - (ii) *is terminated (other than by effluxion of time or by the operation of clauses 2.1, 5 or 10); or*
  - (iii) *becomes void whether by reason of some act or default of the Lessor or of the trustee in bankruptcy, receiver, receiver and manager, controller, administrator or liquidator of the Lessor, or for any other reason whatsoever,*

*the rights and interests granted to the Lessee under this Lease shall, unless expressly surrendered by the Lessee, continue in full force and effect and may be exercised and enjoyed by the Lessee until the date on which the Term (as extended or renewed) would have ended by effluxion of time.*

**DEALINGS**



**11.1 By the Lessor**

- (a) *The Lessor may sell, transfer, assign, lease, licence, mortgage, charge or otherwise dispose of or part with possession of or encumber the whole or any part of the Leased Property or the Lessor's interest in the Leased Property or agree to do the same provided that the Lessor first arranges (at the Lessor's cost) for the other party or parties to the transaction to enter into a deed of covenant with the Lessee under which such party or parties agree to comply with and be bound by the provisions of this Lease as if such party or parties were named in this Lease in place of the Lessor.*
- (b) *The Lessor agrees with the Lessee that the Lessor will not create any Encumbrances over the Leased Property or any part thereof ranking in priority to the interests of the Lessee, TSL or the Growers who may sub-lease, licence or otherwise occupy the Leased Property from the Lessee in the future, under this Lease.*

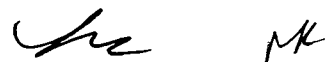
**11.2 Downstream Agreements**

- (a) *Subject to paragraph 2.1(b), the Lessor acknowledges and agrees that:*

- (i) *the Lessee may grant a Project Sub-Lease to TSL in its absolute discretion;*
- (ii) *TSL may enter into Occupancy Agreements in its absolute discretion, provided that those Occupancy Agreements which grant Growers the right to use the Land and/or the Water Allocations granted under this Lease and the Water Licence Lease, will include clauses as set out in O, amended as necessary to accommodate the requirements of the Project; and*
- (iii) *the Lessee or TSL may enter into any management agreement for the management of the Leased Property;*
- (iv) *the Lessee and TSL may grant sub-leases, licences or other occupancy rights to any other person over the Leased Property in their absolute discretion,*

*provided that any such agreements do not grant any greater than those which are granted to the Lessee under this Deed.*

- (b) *The Lessee is not required to obtain any further consent of the Lessor to enter into the Downstream Agreements, but where the Lessor's consent is required to be endorsed on any documents and ancillary documents effecting the Downstream Agreements the Lessor will execute such consents as soon as reasonably practicable.*
- (c) *If this Lease or the Water Licence Lease or both should terminate for any reason other than by agreement, pursuant to clause 3.4 or by expiration of the Term, the Lessor will grant to TSL, or any other responsible entity or manager of the Project a lease of the Leased Property and Water Licence Lease on the same terms as this Lease and the Water Licence Lease for the balance of the Term, as if TSL or the other responsible entity or manager of the Project were the Lessee, provided that,*
  - (i) *all arrears under this Lease are paid; and*
  - (ii) *all defaults under this Lease are made good; and*



- (iii) *in the reasonable opinion of the Lessor, the proposed lessee is responsible, respectable, and experienced in operating schemes such as the Project.*
- (d) *If any one or more of this Lease, the Water Licence Lease, or the leases referred to in paragraph 11.2(c) terminates for whatever reasons other than by agreement (the "Terminated Agreement"), the Lessor irrevocably authorises and consents to the granting or continuation (or both) by the Growers of a right to occupy or use that part of the Leased Property and Water Allocation granted under the Occupancy Agreements as if the Lessor were named as the licensor to that Occupancy Agreement from the termination of the Terminated Agreement, provided that such right to occupy and/or use shall be on substantially the same terms and conditions as the original right to occupy and/or use granted to Growers upon subscribing to the Project.*
- (e) *The Lessor agrees and acknowledges that:*
  - (i) *paragraph 11.2(d) is for the benefit of all the Growers in the Projects that are to be established; and*
  - (ii) *the Growers, or the responsible entity or project manager of a Project on behalf of the relevant Growers, may take action to enforce paragraph 11.2(d) independently of any other party taking action to enforce it.*
- (f) *For the avoidance of doubt, in consideration of the Lessee agreeing to enter into this Lease and the Water Licence Lease, the Lessor acknowledges that the rights of Growers at all times remain paramount and covenants in favour and for the benefit of all Growers from time to time that if for any reason other than by agreement, this Lease is terminated the Lessor will authorise, grant and/or allow the Growers a right of occupancy or use of that part of the Leased Property and the Water Allocations granted under the Occupancy Agreements on the same terms as the Occupancy Agreements and will otherwise comply with its obligations in this Lease and the Water Licence Lease in relation to the Project Sub-Leases and the Occupancy Agreements. The Lessor agrees that each of the Growers and TSL are persons who may take the benefit of this clause 11.2 pursuant to section 11(1) Property Law Act 1969 (WA).*
- (g) *In consideration of the Lessor agreeing to the matters described in paragraph 11.2(d) above, the Lessee covenants with the Lessor that if following the termination of this Lease or a lease referred to in paragraph (c), a Grower continues to pay licence fees to the Lessee or any other person, the Lessee must pay or procure the recipient of those licence fees to pay to the Lessor all licence fees so paid (on a GST exclusive basis) within 60 days after it or the recipient of the licence fees, as the case may be, receives the licence fees from the Grower;*
- (h) *To the extent that:*
  - (i) *the amount paid to the Lessor under the Occupancy Agreements with Growers is less than the combined rent which the Lessor would have otherwise received from Timbercorp under this Lease and the Water Licence Lease, the Lessee must pay to the Lessor the shortfall within 30 days after the Lessor gives the Lessee notice in writing requesting such payment to be made;*
  - (ii) *at any given time the amount paid by the Lessee to the Lessor under paragraph 11.2(g) is more than the combined rent which the Lessor would have otherwise received from Lessee under this Lease and the Water Licence Lease at that*



*time, the Lessor must refund the excess to the Lessee or as the Lessee directs within 5 Business Days.*

- (i) Paragraphs (c) - (h) survive the termination of this Lease.

### **11.3 Other Dealings by the Lessee**

#### **(a) Grants of sub-lease or licence**

*The Lessee may:*

- (i) *sub-lease or grant a licence to occupy the whole or any part of the Leased Property; or*
- (ii) *assign, transfer or deal with all or part of the Avocado Crop and all products, rights and credits derived from the Avocado Crop,*

*on such terms and conditions as the Lessee deems fit without having to obtain the consent of the Lessor but no such sub-lease, licence or other dealing shall relieve the Lessee from any obligations under this Lease.*

#### **(b) Assignment or transfer**

*Subject to clause 11.3(a) the Lessee may with the consent of the Lessor (which consent must not be unreasonably withheld) assign or transfer this Lease upon the Lessee arranging (at the Lessee's cost) for the assignee to enter into a deed of covenant with the Lessor under which the assignee agrees to comply with and be bound by the provisions of this Lease as if the assignee were named in this Lease in the place of the Lessee. However consent is not required whether the Lessee makes such assignment in relation to or as a consequence of a corporate restructure of the Lessee, or is a Related Body Corporate or Related Entity.*

#### **(c) Ceasing to be project manager etc**

*The Lessor covenants and agrees that, notwithstanding anything to the contrary express or implied in this Lease, if for any reason whatsoever the Lessee ceases to be the parent of the responsible entity of the Project, or a Related Body Corporate of the Lessee ceases to be the responsible entity or project manager of the Project under the Constitution or other Project agreements for the time being, subject to the proposed assignee assuming all of the obligations of the Lessee under this Lease.*

## **36.2 Water Licence Lease between Jasper Farms Holdings Pty Ltd ("Lessor") and Timbercorp Limited ("Lessee"):**

### **7.2 Consent to Downstream Agreements**

- (a) *The Lessor acknowledges and agrees that the Land Lease and this Lease have been acquired by the Lessee in order to establish and maintain the Busselton Project.*
- (b) *The Lessee is not required to obtain any further consent of the Lessor to enter into the Downstream Agreements, but where the Lessor's consent is required to be endorsed on any documents and ancillary documents effecting the Downstream Agreements the Lessor must promptly execute such consents.*

- (c) *Those Downstream Agreements which grant Growers the right to use the Water Allocations granted under this Lease and occupy the Land under the Land Lease, will include clauses as set out in ANNEXURE A, amended as necessary to accommodate the requirements of the Project.*
- (d) *If this Lease, the Land Lease or both should terminate for any reason other than by agreement or by expiration of the Term, the Lessor will grant to Timbercorp Securities, or any other responsible entity or manager of the Project a lease of the Land and the Water Allocation under the Water Licence Lease on the same terms as this Lease and the Land Lease for the balance of the relevant term or terms, as if Timbercorp Securities or the other responsible entity or manager of the Project were the Lessee, provided that:*
  - (i) *all arrears under this Lease are paid; and*
  - (ii) *all defaults under this Lease are made good; and*
  - (iii) *in the reasonable opinion of the Lessor, the proposed lessee is responsible, respectable, and experienced in operating schemes such as the Project.*
- (e) *If any one or more of this Lease, the Water Licence Lease, or the leases referred to in paragraph 7.2(d) terminates for whatever reason other than by agreement (the "Terminated Agreement"), the Lessor irrevocably authorises and consents to the granting or continuation (or both) by the Growers of a right to occupy or use that part of the Land and the Water Allocation granted under the Occupancy Agreements as if the Lessor were named as the licensor to that agreement from the termination of the Terminated Agreement, provided that such right to occupy and/or use shall be on substantially the same terms and conditions as the original right to occupy and/or use granted to Growers upon subscribing to the Project.*
- (f) *The Lessor agrees and acknowledges that:*
  - (i) *paragraph 7.2(d) is for the benefit of all the Growers in the Projects that are to be established; and*
  - (ii) *the Growers, or the responsible entity or project manager of a Project on behalf of the relevant Growers, may take action to enforce paragraph 7.2(d) independently of any other party taking action to enforce it.*
- (g) *For the avoidance of doubt, in consideration of the Lessee agreeing to enter into this Lease and the Land Lease, the Lessor acknowledges that the rights of Growers at all times remain paramount and covenants in favour and for the benefit of all Growers from time to time that if for any reason this Lease is terminated, other than by agreement, the Lessor will authorise, grant and/or allow the Growers a right of occupancy or use of that part of the Land and the Water Allocations granted under the Occupancy Agreements on the same terms as the Occupancy Agreements and will otherwise comply with its obligations in this Lease and the Land Lease in relation to the Project Sub-Leases and the Occupancy Agreements. The Lessor agrees that each of the Growers and Timbercorp Securities are persons who may take the benefit of this clause 7.2 pursuant to section 11(1) Property Act 1969 (WA).*
- (h) *Paragraphs 7.2(d)-7.2(g) survive the termination of this Lease.*

**10.1****Notice of Default by Lessee**


- (a) *If the Lessee is in default of any obligation under this Deed, the Lessor may give not less than 60 days notice of the Lessee, requiring the Lessee to rectify the default within the time specified in the notice.*
- (b) *If the Lessee does not remedy the default within the time specified in the notice the Lessor may remedy the default at the cost of the Lessee.*

#### **11.1 Default by Lessee**

*If the Lessee does not remedy the default as specified in the notice in clause 10.1(a) and the default has not been rectified under clause 10.1(b) the Lessor may terminate this Lease.*

#### **11.5 Termination by Agreement etc.**

- (a) Upon:
  - (i) *agreement by the Parties to the termination; or*
  - (ii) *on termination of the Land Lease; or*
  - (iii) *on termination of the Busselton Project; or*
  - (iv) *the reduction of water entitlements under the Water Licence by the Commission to a level below the reasonable water requirements of the Lessee for the Busselton Project and upon the Lessee giving notice to the Lessor to that effect,*

*this Lease will terminate.*

- (b) *If an event of default occur under clauses 14.1(a), (b), (d) or (f) of the Avocado Management Deed, the Lessee may, at its discretion, terminate this Lease.*
- (c) *If the Lessee is unable to obtain a favourable product ruling with respect to the project before 30 June 2006, then the Lessee may by notice in writing to the Lessor terminate this Lease.*
- (d) *If this Lease is terminated pursuant to this clause 11.5:*
  - (i) *all Parties will execute the necessary documents to effect the termination; and*
  - (ii) *the Lessee will cease using the Water Allocation rights from date of the agreement (in writing) of the Parties, or the termination of the Land Lease, whichever is applicable.*

#### **ITEM 1. Term**

*The period commencing on the date of approval of the Form E Application in clause 2.1(b) and expiring on the date of expiry of the term of the Water Licence (being 4 April 2015).*

37 Two other defendants, Ronald Simpson and Fay Simpson have entered into lease documents with Timbercorp Securities Limited. Now produced and shown to me



marked **MAK-9** are lease documents concerning the Simpsons. The relevant extracts from the lease documents for the Simpsons are as follows:

**37.1 Lease between Ronald Simpson and Fay Simpson ("Lessor") and Timbercorp Limited ("Lessee"):**

**3.1 Grant and Term of Lease**

*Subject to the terms of this Deed the Lessor grants to the Lessee a lease of the Goodwood West Property, the Capital Works and the Water Licences to use and occupy the Goodwood West Property, the Capital Works and the Water Licences in accordance with the terms and conditions of this Deed for a period commencing on the Commencement Date and terminating on expiry of the Initial Term and the First Further Term and Second Further Term, as the case may require.*

**3.6 Contemporaneous Leases**

*The Lessor and Lessee agree that this Lease is to be entered into by the Lessor and Lessee contemporaneously with the Contemporaneous Leases and is to be held on a collateral basis with the Contemporaneous Leases. A breach of the Contemporaneous Leases will be deemed to constitute a breach of this Lease and vice versa unless otherwise agreed. If one of the Contemporaneous Leases is terminated prior to its expiry then this Lease will also be terminated and vice versa unless the parties otherwise agree.*

**4.3 Acknowledgments by the Lessor**

*The Lessor acknowledges and agrees with the Lessee, that during Term of this Deed the Avocado Crop and all rights, benefits and credits derived from the Avocado Crop will be and will remain the property of the Lessee, TSL or the Growers (or any other person or entity deriving title to the Avocado Crop through the Lessee, TSL or the Growers).*

**11.2 Lessor consents to Lessee sub-letting & licencing**

(a) *The Lessor consents to:*

- (i) *the Lessee entering into deeds in relation to Project Sub-Leases with TSL in its absolute discretion;*
- (ii) *TSL entering into Occupancy Agreements or other Downstream Agreements in its absolute discretion; and*
- (iii) *the Lessee and TSL granting sub-leases, licences or other occupancy rights to any other persons over the Goodwood West Property, the Water Licences, the Capital Works or any part of them in their absolute discretion.*

*and the Lessee may enter into such arrangements without the need to further obtain the Lessor's prior written consent provided that any such Project Sub-Leases, Occupancy Agreements, Downstream Agreements, sub-leases, licences or other occupancy rights do not grant any greater rights than those which are granted to the Lessee under this Deed.*

(b) *Upon this Deed terminating for whatever reason, the Lessor irrevocably authorises and consents to the granting or continuation (or both) by the Growers of a right to occupy or use that part of the Goodwood West Property granted under the Occupancy Agreements.*

(c) *The Lessor agrees and acknowledges that:*

- (i) *paragraph 11.2(b) is for the benefit of all the Growers in Projects that are to be established; and*
- (ii) *the Growers, or the responsible entity or manager of a Project on behalf of the relevant Growers, may take action to enforce paragraph 11.2(b) independent of any other party taking action to enforce it.*
- (d) *For the avoidance of doubt, in consideration of the Lessee agreeing to enter into this Deed the Lessor acknowledges that the rights of Growers at all times remain paramount and covenants in favour and for the benefit of all Growers from time to time that if for any reason this Deed is terminated the Lessor will authorise, grant and/or allow the Growers a right of occupancy or use of that part of the Goodwood West Property granted under the Occupancy Agreements on the same terms as the Occupancy Agreements and will otherwise comply with its obligations in this Deed in relation to the Project Sub-Leases and the Occupancy Agreements. For the purposes of Section 55 of the Property Law Act 1975 (Qld) the Lessor agrees that the Growers are deemed the beneficiaries of the promises contained in this clause. This paragraph (d) survives the termination of the lease.*

#### **12.1 Default by Lessee**

- (a) *The Lessor and the Lessee agree that the following are events of default under this Deed:*
  - (i) *if the Lessee fails or neglects to make a payment within the time required under this Deed, including failing to pay the rent payable under this Deed by the due date, and such amount is not paid within 90 days after the Lessor has served a written notice on the Lessee requiring the Lessee to pay the amount; or*
  - (ii) *the Lessee commits or permits to occur any material breach or default in the due and punctual performance of any of its obligations under the Deed, and fails to remedy the breach or make reasonable compensation in money within 90 days after the Lessor has served a written notice on the Lessee requiring the Lessee to remedy the breach or make reasonable compensation in money, except where the Lessee:*
    - (A) *has within the period of 90 days after receipt of the written notice from the Lessor:*
      - (1) *advised the Lessor of a plan of remedial action to rectify any such default; and*
      - (2) *taken all reasonable steps to implement such plan of remedial action; and*
    - (B) *the Lessee implements the whole plan of remedial action as soon as reasonably practicable.*

#### **12.5 Lessor's rights subject to Growers' rights**

*The Lessor's rights under this clause 12 are subject to the rights granted by:*

- (a) *the Lessee or TSL to the Growers under the Occupancy Agreements in accordance with this Deed; and*
- (b) *the Lessor to the Growers under paragraph 11.2(b).*

**37.2 Sub-lease between Timbercorp Limited ("Lessor") and Timbercorp Securities Limited ("Lessee"):**

#### 4.2 Acknowledgement by Lessee

- (a) *The Lessee acknowledges that the Capital Works and Avocado Trees on, and the Water Licences for use on, the Goodwood West Orchard are, and will at all times remain the property of the Head Lessor, subject to any rules or regulations made by any Authority and any Lessee's Works that are to remain the property of the Lessor pursuant to the terms of this lease.*

#### 26 Head Lease

- (a) *The Lessee acknowledges that:*
- (i) *this Deed is a sublease of the Head Lease and the Lessee is fully cognisant of and aware of all the provisions of the Head Lease;*
  - (ii) *this Deed is dependent on the existence and continuance of the Head Lease.*
  - (iii) *this Deed may come to a premature end on termination of the Head Lease.*
- (b) *if the Head Lease is determined for any reason then this Deed may also be determined by the Lessor. The Lessor may give to the Lessee notice in writing of the date of determination of the Head Lease and the Lessee must pay all sums due to the Lessor up to the date of determination of the Head Lease and/or for any other period of holdings over.*

### 37.3 Goodwood West Licence Agreement between Timbercorp Securities Limited, Participant Grower and Timbercorp Limited:

#### 4.1 Term of Agreement

- (a) *This Agreement will commence on the Commencement Date.*
- (b) *Subject to **clause 6, 10.1 to 10.3** and **clause 10.5**, this Agreement will continue until the earlier of:*
- (i) *termination of the Participating Grower's Participating Interest in the Project;*
  - (ii) *9 years and 364 days after the Commencement Date; and*
  - (iii) *termination of the Project.*

#### 10.5 Effect of Termination

- (b) *Termination of this Agreement in respect of any number of all of the relevant Goodwood West Avolots or part of the relevant Goodwood West Avolots under this **clause 10** does not affect the rights or obligations of the parties in respect of any other Goodwood West Avolots or any other part of the reduced relevant Goodwood West Avolots.*
- (c) *If this Agreement is terminated under **clause 10.2** in relation to all of the Goodwood West Avolots of the Participant Grower, and the Participant Grower's Stapled Avolot Licence Agreements is terminated under **clause 10.2** of that agreement in relation to all of the Stapled Avolots of the Participant Grower, the Participant Grower loses all rights and interest as a participant in the Project.*





- (d) *The termination of this Agreement will terminate the rights and obligations of the parties under this Agreement except to the extent that those rights and obligations are expressed to survive termination.*

37.4 Goodwood West Subsequent Licence Agreement between Timbercorp Securities Limited, Participant Grower and Timbercorp Limited:

#### **4.1 Term of Agreement**

- (a) *This Agreement will commence on the Commencement Date.*
- (b) *Subject to **clause 6, 10.1, to 10.3** and **clause 10.5**, this Agreement will continue until the earlier of:*
- (i) *termination of the Participating Grower's Participating Interest in the Project;*
  - (ii) *9 years and 364 days after the Commencement Date;*
- and
- (iii) *termination of the Project*

#### **10.5 Effect of Termination**

- (b) *Termination of this Agreement in respect of any number of all of the relevant Goodwood West Avolots or part of the relevant Goodwood West Avolots under this **clause 10** does not affect the rights or obligations of the parties in respect of any other Goodwood West Avolots or any other part of the reduced relevant Goodwood West Avolots.*
- (c) *If this Agreement is terminated under **clause 10.2** in relation to all of the Goodwood West Avolots of the Participant Grower, and the Participant Grower's Subsequent Licence Agreements is terminated under **clause 10.2** of that agreement in relation to all of the Stapled Avolots of the Participant Grower, the Participant Grower loses all rights and interest as a participant in the Project.*

38 I note for completeness that the Simpsons have entered into a crop sale agreement with the Liquidators in relation to the avocado crop. Now produced and shown to me marked **Confidential Exhibit MAK-10** is a copy of the crop sale agreement.

39 It is not clear, as a result, whether the Growers' interests in the land or the trees the subject of each of the schemes will be adversely affected by the disclaimer of the head leases or head sub-leases, particularly given that Landlords may have consented to the terms of the various sub-lease. If the Liquidators ultimately decide that they wish to disclaim any of the Leases, they will seek further directions from the Court about doing so.

**Effect of insolvency of the Timbercorp companies on the lease arrangements**

- 40 Many (if not all) of the Scheme documents do not state with clarity, or are silent, as to the rights of the various parties on the occurrence of certain events.
- 41 Ms Sheridan has informed me that the effect of the insolvency of the Timbercorp entities appears to be, in relation to some of the External Leases, that the chain of occupancy agreements merge into one lease, such that the external landlord enters into a lease arrangement directly with the Growers for that Scheme.

#### **Secured creditors of Timbercorp**

- 42 The land subject to Internal Leases, that is the land owned by companies in the Timbercorp Group, is all encumbered. A number of financiers hold mortgages and charges over land, or the assets of Timbercorp companies. The land is situated in various Australian States and Territories.
- 43 I am also informed by my legal advisers that some of the security documents expressly recognise the "rights" of the "Growers" under documents relating to the Schemes. My legal advisers have informed me that it may not be possible for the Liquidators to ascertain with clarity the nature and extent of all Growers' rights under the Schemes.

#### **Failure by Timbercorp companies to pay rent**

- 44 As at 23 April 2009, being the date of our appointment as administrators of TSL and TL, TSL and/or TL had paid rent under various leases and sub-leases, in advance, for the period up to 30 June 2009. Because both companies were and remain hopelessly insolvent, no further funds were available from which they could pay rent in respect of periods after 30 June 2009.
- 45 Accordingly, on 15 June 2009, we wrote to all Landlords (in our capacity as administrators), requesting a standstill arrangement in relation to TSL and/or TL's rental obligations under the leases and sub-leases, for the period 1 July 2009 to 30 September 2009. Now produced and shown to me marked **MAK-11** is a copy of the pro forma request sent by the Timbercorp administrators. The letter of 15 June 2009 explained that the administrators did not personally adopt any of the leases and would not be personally liable for future rent.
- 46 Of the total number of Landlords (some of whom were landlord for multiple properties), consent was given to the standstill arrangement proposed by

Handwritten signature and initials, likely representing the administrators.

KordaMentha in relation to 39 leases/sub-leases. The vast majority either did not respond or refused to accept the proposed standstill arrangement.

47 On 2 July 2009, following our appointment as liquidators, we wrote again to the Landlords. Now produced and shown to me marked **MAK-12** is a copy of the pro forma letter sent by the Timbercorp liquidators.

48 The letter of 2 July 2009 stated that, as Timbercorp liquidators, we "*again advise that we will not and do not adopt or ratify*" any of the leases. The letter continued:

*"The Liquidators give you notice that, as and from 2 July 2009, the Liquidators will not use or occupy the property the subject of the Leases. The Liquidators will not enter onto the land or perform any of the obligations under the Leases."*

49 Since 2 July 2009, the Liquidators have not entered onto the land the subject of the Leases nor performed any of the obligations under the Leases.

#### **Expressions of interest in the forestry Schemes**

50 As we explained in the Report by Administrators dated 18 June 2009 and made under section 439A of the Act (**439A Report**), in the six months prior to the appointment of the Administrators, the Timbercorp Group had commenced a sale process for its forestry assets and business. Whilst there was significant interest from potential bidders, the Timbercorp Group did not execute a sale agreement. Now produced and shown to me marked **MAK-13** is an extract of the relevant pages of the 439A Report dated 18 June 2009.

51 Since our appointment as Administrators, we have reviewed each forestry scheme to determine its financial, commercial and legal viability. That review has continued since our appointment as liquidators.

52 As I indicated on 6 July 2009 when I gave evidence to this Court:

- (a) we have received a number of expressions of interest in relation to the forestry schemes;
- (b) we are considering commencing but have not yet commenced an expression of interest campaign, or negotiations with any party;

- (c) we are determining what are the assets in respect of which an expression of interest campaign can be conducted, in particular, whether we can include the land owned or leased by Timbercorp companies, plant and equipment owned by Timbercorp companies and trees owned by Growers or the rights to harvest those trees.

#### **Applications requiring the liquidators to decide whether to disclaim property**

- 53 Since sending the letter of 2 July 2009, KordaMentha has received the Disclaimer Applications. These require us, in our capacity as liquidators of TSL and TL, to decide whether we will disclaim certain property of TSL and TL. The Disclaimer Applications have been made (or in some cases, purportedly made) under s 568(8) of the Act. The latest date by which we are required to disclaim some of the TSL property, to avoid the possibility that we will not be able to disclaim if we decided to do so, is 4 August 2009.
- 54 Now produced and shown to me marked **MAK-14** is a table summarising each of the Disclaimer Applications and the date on which they were received. (The Disclaimer Applications received by KordaMentha are exhibited as MAK-1 to this affidavit.)
- 55 Of the Disclaimer Applications received:
- (a) 97 relate to leases or sub-leases for land in the forestry schemes;
  - (b) 2 relate to leases for land in the horticulture schemes;
  - (c) all but one is in the form required under the *Corporations Regulations*, or substantially in that form, however the Liquidators have informed that sub-lessor in question that we will accept the application as validly made.
- 56 Seventy-nine of the applications have been received from WA Plantation Resources Pty Ltd on behalf of WA Chip & Pulp Co. Pty Ltd and WACAP Treefarms Pty Ltd. Of the remainder, twenty-three have been received from Albany Legal acting on behalf of various lessors.
- 57 The three applications received in relation to horticulture scheme land have been made by the two landowners, namely Mr & Mrs Simpson, and Jasper Farms Holdings Pty Ltd.

#### **Notices of default**



58 At the time of making this affidavit, Landlords have served 221 notices of default or termination under various leases and sub-leases because of non-payment of rent (Notices of Default). The Notices of Default oblige TSL and/or TL to rectify the alleged defaults within either one, three or six months of the date of service of the notice, failing which the Landlords intend to terminate the applicable lease or sub-lease. The earliest date at which termination can take place under the Notices of Default is on or about 3 August 2009.

59 We anticipate that further disclaimer applications and notices of default will be served on the Liquidators in the future.

### Conclusion

60 The Liquidators wish to have additional time to decide whether or not to disclaim some or all of the leases/sub-leases as it is not presently possible, given the complexity of the Schemes, to ascertain whether we will be acting in the best interests of Growers if we do so. Whether Growers will be prejudiced by a lease or sub-lease being disclaimed by the Liquidators will depend upon a detailed examination of their rights, which may vary between each of the Schemes. I have been told by my legal advisers that the various occupancy agreements do not make it clear whether Growers have any enforceable independent proprietary rights in relation to the Schemes.

61 Growers may assert that if the Liquidators disclaim a lease, they will be adversely affected. As Liquidators of TSL, we are obliged to act in the best interests of Growers and if there is any conflict between Growers' interests and TSL's interests we must act in the interests of Growers (s 601FC (1)(c) of the Act).

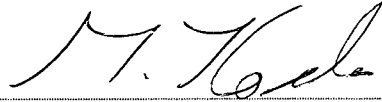
62 I note the following about the Timbercorp group liquidation:

- it is highly complex, involving a large number of companies and schemes;
- the structure of the managed investment schemes is complicated and the scheme documentation is voluminous, and, in some cases, of uncertain effect;
- there is no money — the Timbercorp companies are hopelessly insolvent;
- there are a vast number of legal (and/or equitable) interests affected; and

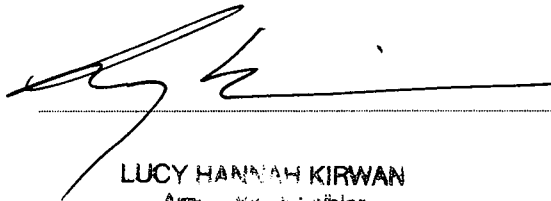


- there are many stakeholders to consider, including Growers, land owners, secured creditors, unsecured creditors, potential replacement responsible entities, contracting parties, e.g. for harvesting, processing.

**SWORN** by the abovenamed deponent at     )  
 Melbourne in the State of Victoria     )  
 this 23<sup>rd</sup> day of July 2009     )



Before me:



**LUCY HANNAH KIRWAN**

Armed Beach Solicitor

Level 21, 333 Collins Street

Melbourne 3000

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

IN THE FEDERAL COURT OF AUSTRALIA  
VICTORIA DISTRICT REGISTRY  
GENERAL DIVISION

No. VID 541 of 2009

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

AND

IN THE MATTER OF TIMBERCORP LIMITED (IN LIQUIDATION)  
ACN: 055 185 067

TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)  
ACN 092 311 469  
and OTHERS

Plaintiffs

WA CHIP & PULP CO. PTY LTD  
and OTHERS  
ACN 008 720 518

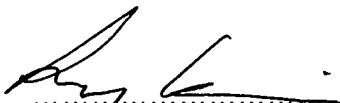
Defendants

**AFFIDAVIT - CERTIFICATE OF COMPLIANCE**

(Order 14, rule 5A)

I, **LUCY HANNAH KIRWAN**, certify to the Court that the affidavit of **MARK ANTHONY KORDA** sworn on 23 July 2009 filed on behalf of the Plaintiffs complies with Order 14, rule 2 of the Federal Court Rules.

Date: 23 July 2009



Lucy Hannah Kirwan  
A solicitor of Arnold Bloch Leibler  
Solicitor for the Plaintiffs

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Filed on behalf of the Plaintiffs

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