

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

SCI 2010 398

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

**TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)
ACN 092 311 469 IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE
2005 TIMBERCORP CITRUS PROJECT (ARSN 114 091 299)
AND ORS**

Plaintiffs

**AFFIDAVIT OF MARK ANTHONY KORDA IN SUPPORT OF
APPLICATION FOR DIRECTION REGARDING SALE OF CITRUS ASSETS (TPIF)**

Date of document: 8 February 2010
Filed on behalf of: the Plaintiffs

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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, with Leanne Kylie Chesser, the liquidator of the First Plaintiff, Timbercorp Securities Limited (in liquidation) (**TSL**).
- 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" and "Liquidators" are references to Ms Chesser and me.



Personal background and experience

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

Voluntary Administration of Timbercorp Group

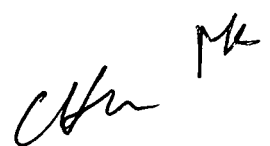
- 4 On 23 April 2009, we were appointed as voluntary administrators of TSL. Also on 23 April 2009, we, and three other KordaMentha partners, namely Mark Francis Xavier Mentha, Craig Peter Shepard and Clifford Stuart Rocke, were appointed as voluntary administrators of the other Timbercorp group companies (together **Timbercorp Group**). All of the appointments were made by those companies pursuant to section 436A of the *Corporations Act 2001 (Cth)* (**the Act**).

Liquidation

- 5 On 29 June 2009, at the second meeting of the creditors of all the Timbercorp Group and a separate meeting of the creditors of TSL, the creditors resolved to wind up the Timbercorp Group and TSL respectively. From 29 June 2009 we have been the liquidators of TSL.

2005 Citrus Scheme

- 6 TSL is currently the responsible entity (**RE**) of the 2005 Timbercorp Citrus Project, a registered managed investment scheme (**MIS**) under Part 5C of the Act (**2005 Citrus Scheme**). TSL is also the RE of the 2004 Timbercorp Citrus Project, however this application is not concerned with that project.
- 7 TSL is hopelessly insolvent and is unable to continue managing the 2005 Citrus Scheme.



- 8 The members of the 2005 Citrus Scheme are referred to in the governing documents as "**Growers**" and I adopt that terminology here. The purpose of the 2005 Citrus Scheme is the cultivation of citrus trees and the harvesting and processing of citrus for commercial sale.

Purpose of this Application

- 9 The purpose of this application is to seek a direction pursuant to section 511 of the Act that we are justified in terminating the Growers' interests in the 2005 Citrus Scheme by surrendering or terminating each relevant Grower licence upon completion of an agreement to sell the property currently licensed to the Growers.

Citrus Schemes

- 10 The 2005 Citrus Scheme is operated on land owned by Timbercorp Primary Industry Infrastructure Fund (**TPIF**), (a property trust listed on the ASX) through its wholly-owned sub-trust, Timbercorp Orchard Trust#2 (**TOT#2**) and by Align Funds Management Limited (ACN 105 684 231) in its capacity as RE of the Timbercorp Orchard Trust (ARSN 106 557 297) (Receivers and Managers Appointed) (**TOT**). TPIF's primary business is to act as an independent owner of the properties leased to the Timbercorp Group for use in connection with the Timbercorp MIS.
- 11 This application concerns only one of the two properties on which the 2005 Citrus Scheme is conducted. It is known as Solora South and is owned by OIM#2 Pty Limited (Receivers and Managers Appointed) (**OIM#2**) as trustee of TOT#2 (**Solora property**). The other property on which the 2005 Citrus Scheme is conducted is known as Kangara (**Kangara property**). The Kangara property is the subject of a separate sale process being conducted by Paul Kirk and Stephen Longley in their capacity as receivers and managers of the assets of TOT, appointed by Permanent Nominees (Aust.) Limited as chargee. Once a sale and purchase agreement is entered into in respect of the Kangara property, we will seek orders that we are justified in surrendering or terminating the Growers' licences in respect of the Kangara property on completion of that sale and purchase agreement.

Receivers and Sale Process

- 12 On 16 September 2009, Australia and New Zealand Banking Group Limited (**ANZ**) appointed David Laurence McEvoy and Paul William Kirk of PricewaterhouseCoopers (**Receivers**) as receivers and managers of OIM#2, as trustee of TOT#2. I have read



the affidavit of David Laurence McEvoy sworn on 25 January 2010 and filed in this proceeding (**McEvoy Affidavit**). A copy of the Receivers' notice of appointment is exhibited to the McEvoy Affidavit, marked DLM-4.

- 13 As described in paragraphs 15 - 32 of the McEvoy Affidavit, the Receivers have conducted a sale process of the Solora property (**Receivers' Sale Process**) and have entered into a sale and purchase agreement (**Sale Contract**) with Agriproperty Pty Ltd (ACN 140 954 874) (**Agriproperty**), guaranteed by CostaExchange Limited (ACN 002 687 961) (**Costa**). Pursuant to clause 5 of the Special Conditions to the Sale Contract, the Growers' licences for the Solora property will be surrendered or terminated by TSL on settlement. We are empowered to do so, but will not exercise those powers without a direction from the Court.

TPIF Land

- 14 As explained above, OIM#2 (as trustee for TOT#2) is the registered proprietor of the Solora property. OIM#2 (as trustee for TOT#2) leases the Solora property to Timbercorp Limited (ACN 055 185 167) (in liquidation) (**TL**). TL sub-leases the Solora property to TSL. TSL then grants a licence to each Grower to use the property for the cultivation of citrus trees and the harvesting and processing of citrus (**Grower Licence**). These leasing and licensing arrangements are governed by a suite of documents, which are described in paragraph 10 of the McEvoy Affidavit and exhibited as DLM-1, DLM-2 and DLM-3.
- 15 The leasing arrangements are also illustrated in a structure diagram. Now produced and shown to me marked "**MAK-1**" is the structure diagram for the 2005 Citrus Scheme.

TPIF Citrus Sale Transaction

- 16 We have not conducted a review of the Receivers' Sale Process. We assume that the Receivers have complied with their obligations in general. Clause 3.1 of the Solora Grower Rights Deed (see below at paragraphs 21 - 22) contains a confirmation from the Receivers to us that the Receivers have complied with their obligations under s 420A of the Act.
- 17 I have been provided with copies of the Sale Contract on a confidential basis. The Sale Contract contains a number of conditions precedent, including:

- (a) the Court directing that the Liquidators of TSL are justified in procuring TSL, in its capacity as RE of the 2005 Citrus Scheme, to extinguish all of the rights of Growers in respect of the Solora property the subject of the Sale Contract, including the Grower Licences by no later than 3 March 2010; and
- (b) the Court making orders determining the rights of all and any persons to all or any part of the net proceeds of the sale under the Sale Contract, or ordering that those net proceeds be held on trust until the rights of those persons are determined by a further order of the Court.

18 I am informed by the Receivers that these conditions precedent are necessary because Agriproperty requires clear title to the Solora Property. To grant clear title, and so that the Receivers can assure Agriproperty that the Growers do not have a continuing claim, the Growers' rights must be extinguished upon completion of the Sale Contract.

19 The Liquidators and TSL are not parties to the Sale Contract.

20 I am told by Nick Courtney, an Associate Director of KordaMentha, the following:

- (a) on 11 December 2009 Nick Courtney had a telephone discussion with Stewart McCallum of PriceWaterhouseCoopers;
- (b) Stewart McCallum told Nick Courtney that Agriproperty was the preferred bidder;
- (c) Stewart McCallum sent Nick Courtney an e-mail attaching Agriproperty's offer. That offer included clause 2.3.7 which said the offer was dependent on "Growers' rights in connection with the Solora South property ... are terminated, surrendered or extinguished at settlement". Now produced and shown to me marked as confidential exhibit **MAK-2** is the e-mail from Stewart McCallum to Nick Courtney of 11 December 2009. I seek that this exhibit remain confidential. If the agreement with Agriproperty does not reach settlement it may prejudice any subsequent realisation.

21 We agreed to seek Court approval for the release of Grower rights because it was apparent that the Sale Process would not proceed without it and that the assets have been realised following a robust sale process and are at risk of wasting. We had entered into agreements with the manager of the 2005 Citrus Scheme operated on



the Solora property to ensure the ongoing maintenance of the citrus orchards. Those agreements were due to expire on 30 November 2009. We then extended the agreements to 31 December 2009 in the anticipation that the Sale Contract would be executed between these dates (the Sale Contract was executed on 18 December 2009). In light of the ongoing management costs of the citrus orchards and the potential for waste (which is described in paragraphs 36-38 of the McEvoy Affidavit), we believed the most appropriate course of action was to allow the Receivers' Sale Process to complete and for the rights of the Growers and other interested parties to the net proceeds of sale to be determined at a later date by the Court.

- 22 Between 17 December 2009 and 15 January 2010 we negotiated the terms of a deed recording our agreement to obtain Court approval for the release of the Growers' rights with the Receivers. The terms were recorded in a deed entitled the "**Solora Grower Rights Deed**". Execution of the Solora Grower Rights Deed was completed on 25 January 2010. The Solora Grower Rights Deed is exhibited to the McEvoy Affidavit, marked DLM-13. It was a term of the Solora Grower Rights Deed that we would file this application by 4 pm on 29 January 2010.

Power to Extinguish Grower Rights

- 23 TSL is RE for a number of MIS, including MIS for the cultivation of eucalypts (**Forestry Schemes**), almonds (**Almond Schemes**) and olives (**Olive Schemes**). Since shortly after the commencement of the voluntary administration of TSL and the Timbercorp Group companies we developed a strategy for, and then managed, an orderly realisation or recapitalisation of the Forestry Schemes, Almond Schemes and Olive Schemes. This process has resulted in an informal winding up of those schemes whereby the Court has made orders that we are justified in procuring TSL to amend the constitutions of each scheme to give TSL the power to terminate or surrender the Growers' licences or sub-leases to land on which the schemes are operated. We only terminate or surrender the licences or sub-leases once the Court has directed we are justified in entering into the sale agreement and the sale agreement has completed. I set out the history of the applications for the Forestry Schemes, Almond Schemes and Olive Schemes in more detail at paragraphs 41-57 in my affidavit sworn 10 November 2009 and filed in Supreme Court proceeding SCI 2009 9998 regarding the sale of olive assets (**Olives Affidavit**). Now produced and shown to me and marked "**MAK-3**" is my Olives Affidavit (without exhibits).

- 24 It is apparent from this history that on three occasions we have sought and obtained approval from the Court to amend the scheme constitutions so as to give TSL the power to terminate or surrender the Growers' licences or sub-leases to land on which the schemes are operated. As a result, following the making of each of the sets of orders, we believed that similarly amending the Constitutions to other Projects following similar sale processes would be uncontroversial.
- 25 On 24 November 2009, our lawyers appeared on behalf of TL and TSL before Judd J in the matter of *Timbercorp Ltd & Anor v Plantation Land Limited* (unreported). This application concerned leases in the Forestry Schemes. During the course of that hearing, our lawyer briefly outlined the history of the informal winding up of the Timbercorp MIS and stated our intention to amend the constitution of the 2005 Citrus Scheme to terminate Grower rights, unless some objection was raised. Michael Fernon of Clarendon Lawyers, who act for a number of Growers and who have appeared at many of the hearings regarding the Timbercorp MIS, was at the bar table. No objection was raised then or subsequently. Now produced and shown to me and marked "MAK-4" is the transcript for the hearing on 24 November 2009. The discussion I refer to appears at pages 23-24 of the transcript.
- 26 The Australian Securities and Investment Commission did not attend the hearing on 24 November 2009.
- 27 On 14 December 2009, our lawyers wrote to Andrew Tregear of ASIC informing him of our intention to amend the 2005 Citrus Scheme constitution. A copy of this letter was also sent to Clarendon Lawyers and Maurice Blackburn as both firms act for Growers and have previously appeared in applications relating to the Timbercorp MIS. Now produced and shown to me and marked "MAK-5" is the letter of 14 December 2009 to Andrew Tregear and the e-mail copying that letter to Clarendon Lawyers and Maurice Blackburn.
- 28 We did not receive any reply to the letter from Clarendon Lawyers or Maurice Blackburn. On 18 December 2009, Andrew Tregear replied stating that ASIC was unable to comment. Now produced and shown to me and marked "MAK-6" is Andrew Tregear's reply of 18 December 2009.
- 29 On 28 January 2010, we amended the 2005 Citrus Scheme constitution to make explicit the RE's power to surrender or terminate the Grower Licences. Now produced and shown to me and marked "MAK-7" is the 2005 Citrus Scheme

constitution and the deed amending the 2005 Citrus Scheme constitution. We will not exercise this power to surrender the sub-leases or licence agreements until the Sale Contract is completed to ensure that the Growers receive consideration for the surrender of their rights.

Grower dissatisfaction

- 30 Now produced and shown to me and marked “**MAK-8**” is a letter from Arnold Bloch Leibler to Gadens Lawyers dated 22 December 2009.
- 31 Now produced and shown to me and marked “**MAK-9**” is an email from Kerree Bezencon dated 1 February 2010 which was sent to financial advisers.
- 32 Now produced and shown to me and marked “**MAK-10**” is a letter received by Arnold Bloch Leibler on 5 February 2010 at 12.53 pm from Tom May of herbertgeer, acting for the Growers’ Committee in this proceeding.

Conclusion


33 In summary:

- (a) The 2005 Citrus Scheme the subject of this application is conducted on land owned by the TPIF sub-trust TOT#2;
- (b) The Receivers have been appointed as receivers and managers of the charged assets of TOT#2;
- (c) The citrus orchards growing on the land owned by the TPIF sub-trust are at risk of wasting;
- (d) The Timbercorp Group is hopelessly insolvent and cannot maintain the citrus orchards growing on the land owned by the TPIF sub-trust;
- (e) The Receivers have conducted a robust sale process (as described in the McEvoy Affidavit) and tested the market;
- (f) The Sale Contract is the result of the Receivers’ test of the market;
- (g) The net proceeds of sale under the Sale Contract will be held on trust pending the Court’s determination of the entitlements of interested parties, including Growers; and

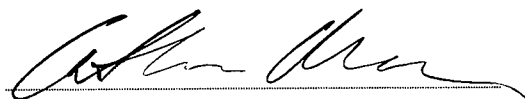
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- (h) It is appropriate to extinguish the Growers' rights to enable the Sale Contract to complete.

SWORN at Melbourne in the State of)
Victoria by **MARK ANTHONY KORDA** this)
8th day of February 2010)

) 
) _____

Before me:



CATHERINE HELEN MACRAE
Arnold Bloch Leibler
Level 21, 333 Collins Street
Melbourne 3000
An Australian Legal Practitioner within the
meaning of the Legal Profession Act 2004