

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 EACH OF THE
MANAGED INVESTMENT SCHEMES LISTED IN SCHEDULE 1
AND OTHERS ACCORDING TO THE SCHEDULE
Plaintiffs


AFFIDAVIT OF MICHAEL JOSEPH FERNON

Date of document:
Filed on behalf of:
Prepared by:
Clarendon Lawyers
Level 17, Rialto North Tower
525 Collins Street
MELBOURNE VIC 3000

10 November 2009
John Angus Hordern
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Solicitors Code: 101294
Ref: MJF:0900460

I, **MICHAEL JOSEPH FERNON** of Level 17, Rialto North Tower, 525 Collins Street, Melbourne, make oath and say that:

1. I am a director of Clarendon Lawyers Pty Ltd who are solicitors for the cross applicants in this proceeding.
2. I make this affidavit on my own behalf and except where I otherwise indicate, the matters deposed to in this affidavit are deposed to from my own personal knowledge of the facts.
3. Where I depose to matters from information or belief, I believe such matters to be true.
4. On 29 September 2009 His Honour Justice Pagone in proceeding number 9299 of 2009 (**Forestry Proceeding**) made an order, inter alia, that Mark Korda and Leanne Chesser would be acting reasonably and appropriately in procuring Timbercorp Securities Limited as responsible entity of the Timbercorp Forestry Schemes to pay the Commonwealth Bank of Australia Ltd (**CBA**) from the proceeds of sale arising from the sale of the Timbercorp forestry assets such amount as would be required to cause the CBA to either release or assign all of its securities over the Timbercorp Group Companies. Now produced and shown to me and marked with the letters "**MJF-1**" is a copy of His Honour's order.
5. The affidavit of Mark Anthony Korda filed in this proceeding (**Korda's Affidavit**) indicates that the CBA securities have been assigned to Fenceport Pty Ltd in return for that entity paying to



the CBA \$26 million of the Timbercorp forestry growers proceeds of sale of the Timbercorp forestry assets.

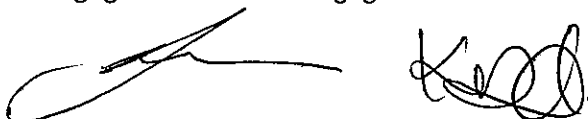
6. In the Forestry Proceeding, counsel for the TGG, Mr Bigmore QC asked Mr. Korda whether the CBA had entered into a deed of covenant where it recognised the growers' rights. Mr Korda responded that he could not recall and had not seen such a document. Now produced and shown to me and marked with the letters "MJF-2" is an extract from the transcript of the Forestry Proceeding where he made this response.
7. Now produced and shown to me and marked with the letters "MJF-3" is a copy of the deed of covenant entered into by the CBA recognising the growers' rights.
8. Now produced and shown to me and marked with the letters "MJF-4" and "MJF-5" are copies of:
 - (a) "MJF-4" - the fixed and floating charge number 1142932; and
 - (b) "MJF-5" - registered land mortgage AD627415B,
 referred to in paragraph 88 of Korda's Affidavit.

I do not have a copy of the CBA Facility Agreement referred to in paragraph 90 of Korda's Affidavit, or the "land mortgage (over water shares)" referred to in paragraph 88 of his affidavit, but exhibit MJF-4 refers to a facility agreement dated the same date as the exhibit, ie, 8 March 2005 not "2004" as stated in paragraph 90 of Korda's Affidavit.

9. Exhibit "MJF-4" at clause 2, says that the security is to be "subject to the deed of covenant".
10. Now produced and shown to me and marked with the letters "MJF-6", "MJF-7", "MJF-8" and "MJF-9" are copies of:
 - (a) "MJF-6" - a Third Amendment Agreement dated 30 December 2008 to a Syndicated Loan Agreement between Timbercorp Limited, BOSI and others;
 - (b) "MJF-7" - land mortgage AG323075S dated 30 December 2008 between BB Olives Pty Ltd and BOSI Security Services Limited;
 - (c) "MJF-8" - water mortgage MOR001534 dated 30 December 2008; and
 - (d) "MJF-9" - a Deed of Covenant dated 28 February 2007 by BOSI Security Services Limited.

Exhibit "MJF-6" is an amended version of the earlier Syndicated Loan Agreement dated 15 December 2006 referred to in paragraph 90(b) of Korda's Affidavit. Exhibits "MJF-7" and "MJF-8" are the documents referred to in Korda's Affidavit at paragraph 89(c).

11. The Loan Agreement in exhibit "MJF-7" refers to elements of the schemes and it contains a definition of "Growers" and clause 12.4(k) refers to the growers' subleases. It includes within the definition of "Transaction Document", "the Deed of Covenant" which is defined as "*the deed of covenant issued on 28 February 2007 by the Security Trustee in favour of the Growers*". The BOSI land mortgages and water mortgages in "MJF-5" and "MJF-6" are dated



30 December 2008 which is also within six months of the relation back date relevant to the liquidation of the Timbercorp entities.

12. The Deed of Covenant referred to in Exhibit "MJF-9" at clause 2.1(a)(i) says:

"Notwithstanding any other provisions of this document, the Transaction Documents or any Project Documents, [the Security Trustee] takes the Security and is and will only be entitled to exercise its rights under the Security in respect of the Secured Property subject to all of the Growers Rights."

13. On 6 and 8 October 2009 His Honour Mr Justice Robson considered an application by the liquidators of the first named plaintiff in proceeding No. 9408 of 2009 (**the Almond Proceeding**) which included an application for an order that the liquidators were justified in cancelling the rights of growers in the almond schemes in consideration of the payment of the sum of \$6 million. His Honour ordered that the liquidators are justified in entering into the Sale and Purchase Deed of the Timbercorp almond assets (**SPD**) and extinguishing all of the rights of the growers in the schemes set out in schedule 1 and 2 to the order. His Honour further ordered that upon completion of the SPD the net proceeds of the sale be placed into an interest bearing account with an Australian bank pending a hearing and determination by the Court to determine which person, or persons, have any rights to all, or any part of the net proceeds held on trust until further ordered by the Court. Now produced and shown to me and marked with the letters "**MJF-10**" are copies of the judgment dated 8 October 2009 and final order dated 23 October 2009.

14. The current proceeding by the liquidators seeks to emulate the dealing with sale proceeds approved by His Honour in the Almond Proceeding. If the liquidators' application is successful and as a result of the liquidator's actions in assigning the loan to Fenceport Pty Ltd on behalf of the forestry growers, the most likely outcome if the liquidators' application were successful is that there will be a new proceeding in which approximately 10,500 forestry growers will be opposed to over 4,700 olive growers concerning the apportionment of the proceeds of the sale of the olive assets.

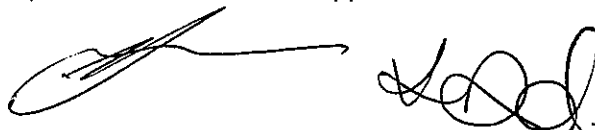
15. In any such new proceeding, the olive growers are likely to argue that their rights take precedence over the former rights of the CBA inherited by the forestry growers because of the deed of covenant signed by the CBA. Now produced and shown to me and marked with the letters "**MJF-11**" is a copy of a letter sent by me on behalf of the TGG to Mr Leon Zwier acting for the liquidators raising concerns about the proposed transfer of debt from the CBA to forestry growers and in particular, the effect of the CBA deed of covenant. Now produced and shown to me and marked with the letters "**MJF-12**" is Mr Zwier's response. Now produced and shown to me and marked with the letters "**MJF-13**" is my reply to him.

16. Clarendon lawyers have now issued an interlocutory process to have the issue of the almond growers' rights and apportionment of proceeds resolved. Now produced and shown to me and marked with the letters "**MJF-14**" is a copy of the interlocutory process. The Australia &



New Zealand Banking Group Ltd and BOSI Security services Ltd on behalf of a syndicate of banks have entered appearances in those proceedings.

17. It is now likely that we will issue class action writs in order to have the matter properly resolved. As the relevant schemes adopt different structures it may be necessary to issue a number of different class action writs
18. A proceeding to determine olive growers' rights and their value will be extremely complicated. For example, if the proceeding is commenced by olive growers there will need to be class actions on behalf of growers in different schemes against class defendants in each forestry scheme. There could be a multiplicity of class actions. There will also be persons who are both timber growers and olive growers. For example, John Angus Hordern who has been a party to a number of Timbercorp related proceedings, is an investor in both forestry schemes and olive schemes.
19. The Timbercorp Growers Group (TGG) and Clarendon Lawyers have represented growers in a number of court proceedings relating to the Timbercorp managed investment schemes to date. These proceedings include:
 - VID595 of 2009 – Winding up of the Forestry Schemes (Federal Court);
 - 7114 of 2009 – Winding up of the Olive and Almond Schemes (Supreme Court);
 - 9299 of 2009 – Approval of the Forestry Schemes asset sale (Supreme Court);
 - 9408 of 2009 – Approval of the Almond Schemes asset sale (Supreme Court);
 - 9365 of 2009 – Plantation Land Limited v S.J. Ostwald Consulting Pty Ltd (Supreme Court).
20. Both of the TGG and Clarendon Lawyers will be conflicted and unable to act on behalf of either party in the new proceeding.
21. Neither of the two groups of growers will have funding to institute and pursue the proceeding.
22. There are also significant legal obstacles for the liquidators in transferring the CBA loan. The constitutions of the Timbercorp forestry schemes do not permit the responsible entity to take assignments of loans, invest in special purpose loan vehicles or make loans to itself as responsible entity of other schemes.
23. The acceptance by the liquidators of the Great Land Olives Limited proposal to acquire the Timbercorp Olive Assets allows the CBA facility to be repaid in full, thereby avoiding the potential dispute between forestry growers and olive growers, and the legal difficulties which would arise if the responsible entity were to implement the transfer of the CBA loan facility to Timbercorp forestry growers.
24. Paragraph 52 of Korda's Affidavit does not correctly describe what occurred at court on 28 August 2009. Prior to court we indicated to Arnold Bloch Leibler that the TGG would oppose the proposed amendments to the olive scheme constitutions to permit the responsible entity to cancel growers leases. The liquidators withdraw their application and indicated they would



proceed to make the amendment without court approval. There was nothing for Mr Galvin on behalf of the TGG to oppose.

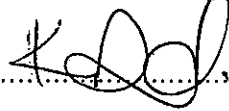
25. Paragraph 118 of Korda's Affidavit is not correct. The TGG were not represented at court on that occasion by senior counsel. Rather, Mr Bland, solicitor from Clarendon Lawyers, represented the TGG at court.

SWORN by the said **MICHAEL JOSEPH FERNON**
at Melbourne in the State of Victoria
this 10th day of November 2009

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Before me:.....



KATE FELICITY DESMOND
of Clarendon Lawyers Pty Ltd
Level 17, Rialto North Tower
525 Collins St, Melbourne Victoria 3000
an Australian Legal Practitioner within the
meaning of the *Legal Profession Act 2004*