

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

List E

No. S CI 2010 1354

BETWEEN:

**BOSI SECURITY SERVICES LIMITED (ACN 009 413 852) as trustee for  
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522) and  
BOS INTERNATIONAL (AUSTRALIA) LIMITED (ACN 066 601 250) and  
WESTPAC BANKING CORPORATION (ACN 007 457 141)**  
Plaintiff

and

**B.B OLIVES PTY LTD (IN LIQUIDATION) (ACN 083 992) & ORS  
(according to the Schedule attached to the Originating Motion)**  
Defendants

**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

19 March 2010  
Timbercorp Growers Group  
Tel: 03 8681 4400  
Fax: 03 8681 4499  
Solicitors Code: 101294  
Ref: MJF:1000133

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 Timbercorp Growers Group.
2. Except where I state otherwise I make this affidavit from my own knowledge.
3. Clarendon Lawyers Pty Ltd has acted for the Timbercorp Growers Group (**TGG**) and its representatives in a number of proceedings relating to the Timbercorp forestry, almond, olive and citrus managed investment schemes.

**Early days**

4. Administrators were appointed to the Timbercorp companies on 23 April 2009.
5. On 4 June 2009 the administrators issued an originating process 7114 of 2009 for an order that it was proper for them to make application to wind up the Timbercorp almond and olive schemes. Mr Christopher Garnaut instructed us to appear at the first directions hearing for this application. Mark Bland, who is also a director of Clarendon Lawyers Pty Ltd, appeared at the first directions hearing.



6. On 17 June 2009, His Honour Mr Justice Robson made an order that the administrators were justified in applying to the Court for orders that the managed investment schemes be wound up.

#### **Establishment of Timbercorp Growers Group**

7. Christopher Garnaut is founder and managing director of Garnaut Private Clients Advisers Pty Ltd (**GPCA**) which is the holder of an Australian Financial Services Licence. Mr Garnaut is the responsible officer for GPCA. GPCA is a leading independent financial advising consultancy in Australia with offices in Melbourne and Canberra and associated offices in Sydney, Brisbane, Perth and Adelaide. It is responsible for approximately \$2.5 billion assets under management. Mr Garnaut is a regular speaker at industry conferences. GPCA has 41 clients invested in various Timbercorp schemes.
8. In June and July 2009, Mr Garnaut liaised with the members of other financial planning consultancies and together they formed the Timbercorp Growers Group, of which Mr Garnaut became the chairman. Mr Garnaut used his contacts and influence to raise a fighting fund to be used for the benefit of growers for both legal expenses and obtaining expert advice. The group raised \$548,896.15 which was deposited partly in a controlled monies account, controlled by Clarendon Lawyers Pty Ltd and partly in our trust account.
9. According to our trust account records 472 financial planners and growers contributed to the fighting fund and I am informed by Mr Garnaut and verily believe that these financial planners represent approximately 80% of the investors in the Timbercorp forestry, almond and olive schemes (**Growers**).

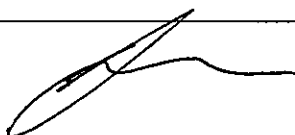
#### **Application to wind up almond and olive schemes**

10. On 25 June 2009, Mark Korda swore affidavits in relation to the almond and olive schemes in support of applications to wind up those schemes.
11. On 29 June 2009, the creditors of the Timbercorp Group of companies resolved to wind up the Timbercorp Group, including Timbercorp Securities Limited which was the responsible entity of the Timbercorp managed investment schemes.
12. The TGG instructed Clarendon Lawyers Pty Ltd to oppose the application to wind up the almond and olive schemes. We acted for a grower nominated by the TGG for each scheme in opposing the application.
13. Clarendon Lawyers Pty Ltd acted for the same growers in seeking the appointment by the Court of a temporary responsible entity to the schemes.



14. The growers we acted for and the schemes of which they are members are as follows:

| <b>Scheme</b>                   | <b>Representative Investor</b> |
|---------------------------------|--------------------------------|
| 2001 Almond<br>ARSN 095 649 746 | Peter Holt                     |
| 2002 Almond<br>ARSN 099 611 935 | Graham Goldenberg              |
| 2003 Almond<br>ARSN 103 197 299 | Malcom Arthur Weaver           |
| 2004 Almond<br>ARSN 108 336 670 | Kerree Bezencon                |
| 2005 Almond<br>ARSN 112 935 092 | Christopher Mark Littley       |
| 2006 Almond<br>ARSN 118 387 974 | Constantine Moshopoulos        |
| 2007 Almond<br>ARSN 122 511     | David Butterfield              |
| 2001 Olives<br>ARSN 094 382 082 | Pauline Emma Hammer            |
| 2002 Olives<br>ARSN 098 233 455 | David Sydney Butterfield       |
| 2003 Olives<br>ARSN 104 648 473 | Graham Goldenberg              |
| 2004 Olives<br>ARSN 108 744 378 | Kerree Anne Bezencon           |
| 2006 Olives<br>ARSN 119 182 179 | Michael Charles Vicary         |
| 2007 Olives<br>ARSN 123 155 715 | Pamela Jan Dry                 |
| 2008 Olives<br>ARSN 129 307 722 | David Butterfield/Angus Hannah |




The growers who have been nominated by the TGG as defendants in this proceeding are the same persons who appeared in proceeding 7114 of 2009 and 9408 of 2009 in relation to the relevant schemes.

15. Clarendon Lawyers Pty Ltd formed the view that the way the schemes' constitutions were drafted, an order by the Court that the schemes be wound up would immediately extinguish all growers' rights.
16. On 21 July 2009 His Honour Mr Justice Robson made a direction that meetings be held of each of the almond and olive schemes at which agreed resolutions would be put and he made orders to facilitate the holding of the meetings. He also ordered that costs be reserved.

#### **Scheme meetings**

17. The meetings of the members of the olive schemes were held at Sofitel Hotel Ballroom on 17 August 2009.
18. At the meeting the growers overwhelmingly endorsed the continuation of the schemes and agreed to amendments to the constitution to enable the schemes to be restructured.

#### **Continuation of the almond wind up application**

19. In mid-August 2009 Arnold Bloch Leibler on behalf of the liquidators served notice that the liquidators would continue with the application to wind up the almond schemes.
20. The matter was listed for 18 August 2009.

#### **Forestry proceedings**

21. The liquidators pursued a different strategy in relation to the Timbercorp forestry assets. Rather than seek to wind up the schemes, the liquidators sought an order from the Federal Court that they were justified in selling the Timbercorp scheme assets.
22. His Honour Mr Justice Finkelstein indicated at a hearing on 14 August 2009 that he was unable to facilitate the order sought because the scheme constitution did not give the liquidators any right to sell the assets. He indicated that he could make an order permitting the liquidators to amend the scheme constitutions to give the responsible entity the power to terminate the subleases of the growers, so that the land owning entities and/or TSL as head lessee could then transfer the leasehold interest in the land to a purchaser free of any subleases.
23. At the hearing on 14 August 2009 there was no appearance by any grower but I attended at Court. No notice of the proceedings had been served on us by the liquidators. When the matter came back on before the Federal Court, on 17 August 2009, the TGG and its representatives were represented in Court by counsel instructed by Clarendon Lawyers Pty Ltd. Mr Justice Finkelstein eventually made an order that the liquidators were justified in amending the constitution.

### **Amendment of constitution**

24. Instead of proceeding with the application to wind up the Timbercorp almond schemes at the hearing before Mr Justice Robson on 18 August 2009, the liquidators applied for a similar order to the order made by Mr Justice Finkelstein in the forestry proceeding.
25. On 20 August 2009, Mr Justice Robson adjourned the winding up of the almond schemes and the interlocutory process filed on behalf of the TGG to a date to be fixed and reserved costs and made a direction that the liquidators were justified in making the amendment to the scheme constitutions to enable the subleases to be terminated.

### **Appointment of special purpose liquidator**

26. On 11 September 2009 the liquidators commenced an interlocutory process in proceeding 7114 of 2009 for the appointment of Ian Carson as a special purpose liquidator. The reasons advanced by the liquidators for the appointment were that they were the liquidators of the Timbercorp land owning entities and that they would be negotiating with themselves for the cancellation of the subleases. They required the assistance of a special purpose liquidator to advise, particularly on the amount of consideration to be paid to the growers for the cancellation of their subleases.
27. The TGG represented by Mark Bland attended at Court to argue against several aspects of the appointment of Mr Carson.
28. Mr Carson had earlier been appointed as a special purpose liquidator in the almond schemes. A number of meetings occurred between Mr Carson and his lawyers, Mallesons Stephen Jaques, Mr Garnaut, Mr Owen Lennie and Clarendon Lawyers Pty Ltd on behalf of the Timbercorp Growers Group. These meetings took place at the office of GPCA at 10 Queens Road, Melbourne and at Mr Carson's office at 90 Collins Street, Melbourne.
29. In addition to the meetings, there was considerable correspondence between Clarendon Lawyers Pty Ltd on behalf of the TGG and Mallesons in which we argued for the rights of the growers. Altogether, we wrote five letters to Mallesons setting out our views on growers rights. Now produced and shown to me and marked with the letters "MJF-1" to "MJF-5" are copies of the letters written by us.
30. This correspondence relates to almond schemes, the issues are equally relevant to olive schemes because the structure of those schemes is similar to the structure of the almond schemes.

### **Application for direction regarding sale of olive assets**

31. On 10 November 2009 the liquidators brought proceeding 9998 of 2009 seeking an order that they were justified in entering into a contract to sell the olive assets to a number of purchasers being related companies of Boundary Bend Limited.
32. Counsel instructed by Clarendon Lawyers Pty Ltd on behalf of a grower George Kalil with the endorsement of the TGG attended at court to oppose the sale. He also sought approval of the sale to another buyer.



33. Ms Kerree Bezencon also appeared in this proceeding on behalf of the TGG Almonds Committee Inc to oppose the sale and seek approval of a sale to a third buyer.
34. On 12 November 2009 His Honour Mr Justice Croft made an order that the liquidators were justified in entering into the sale contract but ordered that the net proceeds of sale be held in an interest bearing trust account pending the hearing of a determination by the Court of a proceeding to determine which persons have rights to the net proceeds. He rejected the applications of Mr Kalil and Ms Bezencon. Costs were reserved.
35. Now produced and shown to me and marked with the letters "MJF-6" is a copy of the order made by His Honour Mr Justice Croft.

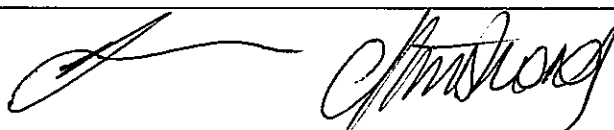
#### **Apportionment case**

36. Clarendon Lawyers and counsel Garry Bigmore QC with Sam Hopper are currently acting on behalf of representative growers nominated by the TGG in proceeding S CI 2009 10699 relating to the apportionment of the proceeds of sale of the Timbercorp Almond Assets. In that proceeding we have agreed with the solicitors for the other parties an agreed list of documents and have prepared and filed details of legal submissions and reply submissions. In my opinion it is likely that the documents and the legal issues involved in the olive schemes will be similar if not the same as those in the almond schemes.

#### **Other cases**

37. Clarendon Lawyers Pty Ltd and counsel, Garry Bigmore QC, with either Michael Galvin or Sam Hopper have appeared in the following proceedings:

| <b>Proceeding</b>                                      |   |
|--|---|
| <b>7114 of 2009<br/>Almonds and<br/>olives schemes</b> | Application by liquidators to wind up the scheme.<br>Application by growers for the appointment of a new responsible entity.<br>Interlocutory proceedings for the appointment of Mr Carson.<br>Continuation of the application to wind up the Almond Schemes. |
| <b>9408 of 2009<br/>Almond<br/>schemes</b>             | Application by liquidators for approval of sale (non-TPIF assets)   |
| <b>10382 of 2009<br/>Almond<br/>schemes</b>            | Application by liquidators for approval of sale of TPIF assets.   |
| <b>9998 of 2009<br/>Olive schemes</b>                  | Application by liquidators for approval of sale.  |
| <b>VID 2005 of 2009<br/>Forestry<br/>schemes</b>       | Application by liquidators for power of sale (Federal Court)  |
| <b>9299 of 2009<br/>Forestry<br/>schemes</b>           | Application by liquidators for approval of sale.  |



| <b>Proceeding</b>                                  |   |
|--|---|
| <b>9365 of 2009<br/>Forestry<br/>schemes</b>       | Relief against forfeiture of lease by Plantation Land Limited.          |
| <b>S CI 2009 10240<br/>Forestry<br/>schemes</b>    | Application concerning Plantation Land Limited settlement.              |
| <b>S CI 2009 10514<br/>Forestry<br/>schemes</b>    | Application by liquidators for apportionment of forestry sale proceeds. |
| <b>S CI 2009 10382<br/>TPIF Almond<br/>schemes</b> | Application by liquidators for approval of sale.                        |
| <b>S CI 2010 398<br/>Citrus schemes</b>            | Application by liquidators for approval of sale.                        |

38. We have had success in preventing the winding up of the almond and olive schemes and in opposing the liquidators obtaining an order that the almond growers in the non-TPIF schemes receive the sum of \$6 million in compensation for their rights.
39. The growers who appeared in the original winding up proceeding propose appearing in the this proceeding and wish to instruct Clarendon Lawyers to act for them.
40. If appointed to represent growers in this action, we will be arguing for their rights based on the detailed legal submissions filed in proceeding S CI 2009 10699, namely that the secured creditors interests are subject to the prior and superior rights of the growers arising under their sublease or licence and joint venture rights, that those growers rights have substantial value and they are entitled to a substantial share of the sale proceeds held in the fund.

#### **Profile of Clarendon Lawyers Pty Ltd**

41. Clarendon Lawyers is a city based law firm established on 10 October 2007. The Timbercorp matters have been under the care and custody of me and Mark Bland. I have been a barrister and solicitor of this Honourable Court for 36 years. I was a founding partner of Fernon & Ludescher in 1977, which merged with Gadens Lawyers in 1994. In 1999 I was invited to become a partner at Freehills. At that firm I practised in Melbourne, Brisbane and Sydney and worked as a partner in the financial services practice for three years in Sydney. I have practised in many areas of the law including equity, fund raising, financial services and property. Mark Bland was admitted to practice in 2000. He spent 4 years at ASIC during and immediately after the implementation of the Financial Services Reform Act 2001 both as a lawyer and manager of surveillance teams in relation to financial services. His expertise is in financial services law.

**Costs**

42. The TGG does not have any funding available to pursue the proceedings. The funds raised from the financial planners have been exhausted. All in all, I estimate the total amount of costs incurred by growers in relation to the Timbercorp matters to date to be approximately \$1.3 million.
43. The TGG seeks an order that the costs of the defendants in this proceeding be paid by the liquidators on a solicitor/client basis out of the fund established under paragraph 7 of the order of Mr Justice Croft which is Exhibit MJF-6 up to a maximum of \$100,000.

**SWORN** by the said **MICHAEL JOSEPH FERNON** )  
 at Melbourne in the State of Victoria )  
 this 19<sup>th</sup> day of March March 2010 )



Before me:  .....

**CELIA JANE ARMSTRONG**

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*

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

List E

No. S CI 2010 1354

BETWEEN:

**BOSI SECURITY SERVICES LIMITED (ACN 009 413 852) as trustee for  
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522) and  
BOS INTERNATIONAL (AUSTRALIA) LIMITED (ACN 066 601 250) and  
WESTPAC BANKING CORPORATION (ACN 007 457 141)**  
Plaintiff

and

**B.B OLIVES PTY LTD (IN LIQUIDATION) (ACN 083 992) & ORS  
(according to the Schedule attached to the Originating Motion)**  
Defendants

**CERTIFICATE IDENTIFYING EXHIBIT**

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

19 March 2010  
Timbercorp Growers Group  
Tel: 03 8681 4400  
Fax: 03 8681 4499  
Solicitors Code: 101294  
Ref: MJF:1000133

This is the exhibit marked "MJF-1" now produced and shown to **MICHAEL JOSEPH FERNON** at the time of swearing his affidavit on

Before me:  .....

**CELIA JANE ARMSTRONG**  
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*



Level 17 Rialto North Tower  
525 Collins Street Melbourne  
Victoria 3000 Australia

T 03 8681 4400 F 03 8681 4499  
www.clarendonlawyers.com.au  
ABN 43 704 593 249

17 September 2009

Our Ref: MJF:MJF:0900459

Mr Hal Bolitho  
Partner  
Mallesons Stephen Jaques  
Level 50  
600 Bourke Street  
MELBOURNE VIC 3000  
By email: hal.bolitho@mallesons.com

Dear Hal

#### **Timbercorp Almond Schemes – Growers rights**

This letter is in response to your letter of 14 September 2009 seeking additional legal arguments concerning the growers' rights. Attached to this letter are the following documents:

- (a) extracts from the transcript of court proceedings before His Honour Justice Robson on 18 August 2009 where he commented on growers' rights;
- (b) extracts from the transcript of the proceedings before His Honour on 14 September 2009; and
- (c) our letter of 11 September 2009.

#### **Background**

We have prepared this advice on behalf of the Timbercorp Growers Group (TGG) under difficult circumstances. The growers have a responsible entity and agent who is supposed to be acting in their interests and who should be putting these arguments to the creditors. The creditors are a syndicate of extremely well funded banks who have ample resources at their disposal. The TGG has no funds. We have requested the responsible entity's lawyers to confirm that they will not oppose an application to the court for payment of the TGG's legal costs, but they have refused to provide any such assurance.

Moreover, we will not have access to the advice that has been or will be provided to the responsible entity and to you by the responsible entity's lawyers. We have asked the lawyers repeatedly for this advice and have been refused.

Furthermore, we have asked from the responsible entity's lawyers copies of the loan documentation underlying the banks' security and the responsible entity's consent to us obtaining copies of the relevant water licences from the water authorities. Neither of these requests has been successful.

We protest in the strongest possible terms to the actions of the responsible entity and their lawyers in denying us this information.

Ideally we would have liked to provide you with a detailed advice involving consideration of each scheme and each grower's documents (or a sample of them). Because of these obstacles we have been unable to provide a detailed advice.

#### **Advice**

Any securities by lenders to the Timbercorp group entitles over the Water Licences, Capital Works and Almond Trees associated with the Almond Schemes are subject to the investors' rights to use and enjoy those assets because:

- (a) Mortgagees take their interest in the land subject to the interests of the growers as tenants in possession under s 42(2)(e) of the Transfer of Land Act 1958 (Vic).

- (b) Each grower has been granted a sub-lease of the Almondlots as defined in the sub-leases. The Almondlots include 'the Almond Trees, the Capital Works and the Water Licences attributable to the Project'. Clause 2.2(a) of the sub-lease should be read down to be only a reservation to Almond Land Pty Ltd of the reversion in those assets.
- (c) If the sub-lease has been terminated, surrendered or merged with the mortgagee's interest in the fee simple, the growers have rights to seek an order for relief against forfeiture under s 146(4) or alternatively survive the surrender or merger under s 139 of the *Property Law Act 1958* (Vic).
- (d) Further or alternatively, the Water Rights, Capital Works and Almond Trees form appurtenances to the head leases and sub-leases necessary and convenient for the Almondlot Operations permitted by clause 8.1 and required by clause 8.2 and any interference with them by the mortgagee constitutes a derogation from the grant (see, for example, *Wilcox v Richardson* (1997) 43 NSWLR 4).

Further, any mortgages or other securities will be taken subject to the interests of both the sub-lessees and the licencees to use and enjoy those assets because:

- (a) the water rights under the Water Licences are held on trust for the growers under clauses 3.2(a)(i) of the sub-leases and 3.3(a) of the licences;
- (b) the growers' interests in the Water Licences, the Capital Works and the Almond Trees are scheme property held on trust for the growers under s601FC(2) of the Corporations Act 2001 (Cth);
- (c) there is no power in the scheme constitutions to encumber those assets to borrow or raise money for the schemes;
- (d) accordingly any attempt to encumber the growers' beneficial interest in those assets is a breach of either or both of those trusts and the Corporations Act 2001 (Cth);
- (e) the banks are presumed to know the provisions of the Corporations Act 2001 (Cth);
- (f) we are informed that the banks acknowledged in their loan documents the interest of the growers and assume that they otherwise had knowledge, both actual and constructive, of:
  - (i) the growers' interest in the schemes;
  - (ii) the growers' interest in the Water Licences, the Capital Works and the Almond Trees; and
  - (iii) the sub-leases and licences; and
- (g) accordingly, the banks have actual or constructive knowledge that any attempt to grant a mortgage or other security over the Water Licences, Capital Works and the Almond Trees was in breach of the Corporations Act and in breach of trust. If the banks hold such a mortgage or other security, then it is subject to a constructive trust in favour of the growers under the principles in *Barnes v Addy*.

Further, any mortgages or other securities will be taken subject to the licensees' rights to use and occupy the licensed land and both the licensees' and the sub-tenant's rights to use and enjoy the Water Licences, the Almond Trees and the Capital Works on the grounds that:

- (a) the growers invested funds into the scheme which were used to improve the demised or licensed land in the expectation that they would be entitled to continue to use and enjoy the land with the benefit of the Almond Trees, the Capital Works and the Water Licences. We have been informed that the banks acknowledged in their loan documentation the interest of the growers and were, accordingly, on notice of the growers' equity and are bound by it under the principles in *Inwards v Baker* [1965] 2 QB 29; and
- (b) alternatively, the grant of the sub-leases and licences and the associated rights to use and enjoy the Capital Works, the Almond Trees and the Water Licences constituted a promise or representation to the growers that they would be entitled to the use and enjoyment of those assets for the balance of the term of their sub-leases or licences respectively. In reliance on those representations, the growers entered the scheme. The mortgagees were on notice of, consented to and acquiesced in those promises or representations and are estopped from denying the growers' interests.

Other matters

We note that the transcript of the hearing on 14 September 2009 before His Honour Justice Robson, records Mr Zwier, representing the liquidators, stating at p25:

"Mr Korda is the liquidator of the responsible entity and he owes duties and obligations in that capacity. He does. If the Growers have rights as creditors, yes it regards them. And Your Honour, there is some conflict about what that duty entails to the Grower investors. Your Honour is familiar with or Your Honour is familiar with the provisions which seem to provide that those rights have paramountcy over other rights and Your Honour has viewed it in the context of a trust beneficiary relationship. That was not the view that His Honour Justice Finkelstein expressed in relation to Forestry. What His Honour Justice Finkelstein stated in his judgment which Your Honour is also familiar with is, they are creditors with rights as unsecured creditors for the failure by the different Timbercorp entities to provide services and to meet their obligations. So, for example, the Timbercorp entities agreed to maintain the – maintain plant and equipment on the farms in a particular way and the Timbercorp entities have not done so and they've got unsecured rights in relation to that." (emphasis added)

We understand he was referring to the judgement of Finkelstein J in **Timbercorp Securities Limited (in liq) v WA Chip & Pulp Co Pty Ltd [2009] FCA 901**. No such statement was made in the judgment and we consider that Mr. Zwier's representation of it makes the error of confusing the powers and duties of the responsible entity with the powers and duties of the liquidator and ignoring the still existing trusts and managed investments scheme. As Austin J said in *Bastion v Gideon Investments* [2000] NSWSC 939 (6 October 2000)

"If there is a trust, the investors have equitable proprietary rights as beneficiaries and the company has the duties of a trustee, to be discharged by its liquidator. Those equitable proprietary rights are to be asserted against the trust fund and any assets into which the fund can be traced." (para 35)

The WA Chip & Pulp case was about a liquidator's power to disclaim property under s 568(1) of the Corporations Act. At paragraph 11 his honour stated in reference to the application of the "strict duties .... imposed on a responsible entity" under s601FC and to an officer of a responsible entity under s601FD:

"There is nothing in ss 601FC or 601FD that overrides the liquidator's duty to those interested in the winding up [of TSL]."

While this is relevant to a liquidator exercising a power of a liquidator, it is irrelevant to a liquidator exercising the power of a responsible entity or agent. Any surrender of the growers' sub-leases would involve the liquidator exercise of TSL's power as responsible entity and agent of each grower under clause 11(fa) of the Constitution of the relevant scheme. An agent owes a fiduciary duty to its principal only. Accordingly, in respect of the growers rights detailed above, if the liquidators treat them as mere unsecured creditors they will be engaging in a breach of trust, a contravention of s601FC and s601FD and a breach of TSL's fiduciary duty to growers, and they will expose themselves to civil liability for loss suffered by the growers.

Yours faithfully



Michael Fernon  
Director

Enc  
Direct Tel: 03 8681 4419  
Email: michael.fernon@clarendonslawyers.com.au

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

List E

No. S CI 2010 1354

BETWEEN:

BOSI SECURITY SERVICES LIMITED (ACN 009 413 852) as trustee for  
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522) and  
BOS INTERNATIONAL (AUSTRALIA) LIMITED (ACN 066 601 250) and  
WESTPAC BANKING CORPORATION (ACN 007 457 141)  
Plaintiff

and

B.B OLIVES PTY LTD (IN LIQUIDATION) (ACN 083 992) & ORS  
(according to the Schedule attached to the Originating Motion)  
Defendants

CERTIFICATE IDENTIFYING EXHIBIT

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

19 March 2010  
Timbercorp Growers Group  
Tel: 03 8681 4400  
Fax: 03 8681 4499  
Solicitors Code: 101294  
Ref: MJF:1000133

This is the exhibit marked "MJF-2" now produced and shown to MICHAEL JOSEPH FERNON at the time of swearing his affidavit on

Before me:.....

**CELIA JANE ARMSTRONG**  
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*



Level 17 Rialto North Tower  
525 Collins Street Melbourne  
Victoria 3000 Australia

T 03 8681 4400 F 03 8681 4499  
www.clarendonlawyers.com.au  
ABN 43 704 593 249

21 September 2009

Our Ref: MJF:MJF:0900459

Mr Hal Bolitho  
Partner  
Mallesons Stephen Jaques  
Level 50  
600 Bourke Street  
MELBOURNE VIC 3000  
By email: hal.bolitho@mallesons.com

Dear Hal

**Timbercorp Almond Schemes – Growers rights**

We refer to our letter of 17 September 2009.

We draw your attention to clauses 25 and 27 in the Australian Financial Services Licence held by Timbercorp Securities Limited.

Those clauses are pro forma clauses which ASIC has adopted for the purpose of protecting the rights of grower investors in land in agricultural managed investment schemes. We understand that Timbercorp Securities Limited has adopted the method prescribed by paragraph (d) of clause 25.

Clause 27 requires the licensee to ensure that the registration of the instrument recording the interest in land be done to ensure that it cannot be adversely affected by any existing or subsequent mortgagee, secured creditor or transferee (other than in connection with a borrowing or overhead transaction that is entered into by the licensee in accordance with the constitution of the scheme and its duties as responsible entity).

We draw your attention to clause 16 in relation to the ANZ charges numbered 1146152 and 1364242 and clause 15 in charge number 1146155, each of which is in the following terms:

*"The rights of the Chargee under this deed are subject to the terms of a Deed of Covenant dated on or about the date of this Deed from the Chargee in favour of the Growers, Timbercorp Securities Limited and Almond Management Pty Ltd."*

We have asked for this Deed of Covenant from Arnold Bloch Leibler on a number of occasions, but are yet to receive it. We have received some of the finance documentation, but not this deed.

We believe that this Deed may be of vital importance in determining growers rights and we request your assistance in obtaining a copy of it.

Yours faithfully

  
Michael Fernon  
Director

Enc  
Direct Tel: 03 8681 4419  
Email: michael.fernon@clarendonlawyers.com.au

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

List E

No. S CI 2010 1354

BETWEEN:

**BOSI SECURITY SERVICES LIMITED (ACN 009 413 852) as trustee for  
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522) and  
BOS INTERNATIONAL (AUSTRALIA) LIMITED (ACN 066 601 250) and  
WESTPAC BANKING CORPORATION (ACN 007 457 141)**  
Plaintiff

and

**B.B OLIVES PTY LTD (IN LIQUIDATION) (ACN 083 992) & ORS  
(according to the Schedule attached to the Originating Motion)**  
Defendants

**CERTIFICATE IDENTIFYING EXHIBIT**

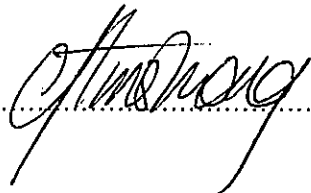
Date of document:  
Filed on behalf of:  
Prepared by:  
Clarendon Lawyers  
Level 17, Rialto North Tower  
525 Collins Street  
MELBOURNE VIC 3000

19 March 2010  
Timbercorp Growers Group

Tel: 03 8681 4400  
Fax: 03 8681 4499  
Solicitors Code: 101294  
Ref: MJF:1000133

This is the exhibit marked "MJF-3" now produced and shown to **MICHAEL JOSEPH FERNON** at the time of swearing his affidavit on

Before me:.....



**CELIA JANE ARMSTRONG**  
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*



23 September 2009

Level 17 Rialto North Tower  
525 Collins Street Melbourne  
Victoria 3000 Australia

T 03 8681 4400 F 03 8681 4499  
www.clarendonlawyers.com.au  
ABN 43 704 593 249

Our Ref: MJF:MJF:0900459

Hal Bolitho  
Partner  
Mallesons Stephen Jaques  
Level 50  
600 Bourke Street  
MELBOURNE VIC 3000

Dear Hal

**Timbercorp Almond Schemes**

We note that the BOSI finance facility also refers to a Deed of Covenant. This is defined as "the Deed of Covenant issued on 28 February 2007 by the security trustee in favour of the growers". We will need a copy of this deed to further consider the growers' position.

Yours faithfully



Michael Fernon  
Director

Direct Tel: 03 8681 4419  
Email: michael.fernon@clarendonlawyers.com.au

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

List E

No. S CI 2010 1354

BETWEEN:

**BOSI SECURITY SERVICES LIMITED (ACN 009 413 852) as trustee for  
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522) and  
BOS INTERNATIONAL (AUSTRALIA) LIMITED (ACN 066 601 250) and  
WESTPAC BANKING CORPORATION (ACN 007 457 141)**  
Plaintiff

and

**B.B OLIVES PTY LTD (IN LIQUIDATION) (ACN 083 992) & ORS  
(according to the Schedule attached to the Originating Motion)**  
Defendants

**CERTIFICATE IDENTIFYING EXHIBIT**

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

19 March 2010  
Timbercorp Growers Group

Tel: 03 8681 4400  
Fax: 03 8681 4499  
Solicitors Code: 101294  
Ref: MJF:1000133

This is the exhibit marked "MJF-4" now produced and shown to **MICHAEL JOSEPH FERNON** at the time of swearing his affidavit on

Before me:.....

**CELIA JANE ARMSTRONG**  
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*



23 September 2009

Level 17 Rialto North Tower  
525 Collins Street Melbourne  
Victoria 3000 Australia

T 03 8681 4400 F 03 8681 4499  
www.clarendonlawyers.com.au  
ABN 43 704 593 249

Our Ref: MJF:MJF:0900459

Hal Bolitho  
Partner  
Mallesons Stephen Jaques  
Level 50  
600 Bourke Street  
MELBOURNE VIC 3000

Dear Hal

**Timbercorp Almond Schemes**

We refer to your email of 22 September 2009. We don't think the issues you raised are of a concern to the growers' rights.

We presume you are considering the situation where Almond Land Pty Ltd either:

- (a) terminates the head lease to Timbercorp Securities Limited for breach; or
- (b) disclaims the head lease.

**Termination**

The head lease can be terminated for non-payment of rent.

In the case of termination the sublessees have their rights under section 146(4) of the *Property Law Act* to reinstate the lease. Indeed, this is the situation in the Timbercorp forestry schemes where Plantation Land Limited has terminated a number of leases. The liquidators are currently applying for relief against forfeiture in a representative action on behalf of the sublessees.

**Disclaimer**

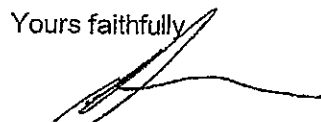
A disclaimer by the liquidators of Almond Land Pty Ltd would have no effect on the subleases. The disclaimer amounts to a surrender and section 139 of the *Property Law Act* indicates that the subleases would continue unaffected by the disclaimer. If this is not the case then the sublessees continue to have their rights under section 146(4) of the *Property Law Act* to claim relief against forfeiture and also their rights under section 568B of the *Corporations Act* to challenge the disclaimer.

In relation to the last point, we note that the leases produce substantial income for Almond Land Pty Ltd and we do not see how a disclaimer could be justified where the sublessees continue to pay the rent to enable the lessee to pay its rent under the Head Lease.

If you wish to discuss the matter further please do not hesitate to contact the writer.

We are currently reviewing the finance documents which we have obtained and will be making further submissions to you on completion of our review.

Yours faithfully

  
Michael Fernon  
Director

Direct Tel: 03 8681 4419  
Email: michael.fernon@clarendonlawyers.com.au

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

List E

No. S CI 2010 1354

BETWEEN:

BOSI SECURITY SERVICES LIMITED (ACN 009 413 852) as trustee for  
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522) and  
BOS INTERNATIONAL (AUSTRALIA) LIMITED (ACN 066 601 250) and  
WESTPAC BANKING CORPORATION (ACN 007 457 141)  
Plaintiff

and

B.B OLIVES PTY LTD (IN LIQUIDATION) (ACN 083 992) & ORS  
(according to the Schedule attached to the Originating Motion)  
Defendants

CERTIFICATE IDENTIFYING EXHIBIT

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

19 March 2010  
Timbercorp Growers Group

Tel: 03 8681 4400  
Fax: 03 8681 4499  
Solicitors Code: 101294  
Ref: MJF:1000133

This is the exhibit marked "MJF-5" now produced and shown to **MICHAEL JOSEPH FERNON** at  
the time of swearing his affidavit on

Before me:.....

**CELIA JANE ARMSTRONG**  
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*

28 September 2009

Level 17 Rialto North Tower  
525 Collins Street Melbourne  
Victoria 3000 Australia

T 03 8681 4400 F 03 8681 4499  
www.clarendonlawyers.com.au  
ABN 43 704 593 249

Our Ref: MJF:MJF:0900459

Hal Bolitho  
Partner  
Mallesons Stephen Jaques  
Level 50  
600 Bourke Street  
MELBOURNE VIC 3000

Dear Hal

**Timbercorp Almond Schemes**

We have now had the benefit of reading the following documents:

1. the BOSI Syndication Agreements;
2. the ANZ \$45M Facility Agreement;
3. the mortgages of BOSI and ANZ over the Almond Land Pty Ltd landholdings;
4. the mortgage by BOSI and ANZ over water rights;
5. two deeds of covenant executed by ANZ Bank; and
6. the deed of covenant executed by BOSI.

We now make the following supplementary submissions.

**Preferences**

Both the mortgages over land and the mortgages over water were executed on 30 December 2008 and registered in January 2009. The administration commenced on 23 April 2009 and that is the relation back date. The mortgages may be voidable at the option of the Liquidator.

ANZ's mortgages are subject to the Growers' rights

ANZ's water mortgage contains the following clause 2:

*The rights of the mortgagee under this mortgage are subject to the terms of the Deed of Covenant dated on or about 26 September 2006 between:*

- *The Growers;*
- *Australia and New Zealand Banking Group Limited;*
- *Timbercorp Securities Limited;*
- *Almond Management Pty Ltd.*

ANZ's land mortgage contains the following clause 17:

*The rights of the Mortgagee under this Deed are subject to the Terms of a Deed of Covenant dated on or about the date of this Deed, from the Mortgagee in favour of the Growers, Timbercorp Securities Limited and Almond Management Pty Ltd.*

ANZ's deed of covenant dated 26 September 2006 states that (at clause 2(1)(a)):

- (1) *The Lender acknowledges, covenants and agrees that:*

- (a) *It takes the Security, and is and will be only entitled to exercise its rights under the Security, subject to all of the Growers Rights;*

...

"Growers Rights" are defined to mean:

- (a) *in respect of existing Growers, all of their rights and interest under the Project Documents and any other rights and interests under the Project Documents which are on terms consented to in writing by the Lender; and*
- (b) *in respect of any future Growers, all of their rights and interests which are on the same terms as the rights and interest of Growers under the Project Documents as at the date of this document and any other rights and interests under the Project Documents which are on terms consented to by the Lender in writing,*

*in each case to the extent that those rights are affected by the Security.*

"Project Documents" is not defined in the ANZ deed of covenant. However, the definition of that term is incorporated from the facility agreement by clause 1.2 of the deed of covenant. That definition is contained in clause 1.1 of ANZ's facility agreement. The definition refers to Schedule 4, which refers to the sub-leases.

Consequently, on any view, the mortgagees take their rights subject to our clients' interests.

BOSI's mortgages are subject to the Growers' rights

Both of BOSI's water mortgage and land mortgage secure the payment of Secured Money (clauses 2.1 of each document).

"Secured Money" is defined in both mortgages as money advanced under or in connection with the Transaction Documents.

The "Transaction Documents" are defined by virtue of clause 1.2 of BOSI's mortgages and clause 1.1 of BOSI's syndicated loan agreement dated 15 December 2006 to include BOSI's deed of covenant.

BOSI's deed of covenant dated 28 February 2007 states that (at clause 2(a)(i)):

- (a) *The Security Trustee acknowledges, covenants and agrees in favour of the Beneficiaries that:*
- (i) *notwithstanding any other provision of this document, the Transaction Documents or any Project Document, it takes the Security, and is and will be only entitled to exercise its rights under the Security in respect of the Secured Property, subject to all of the Growers' Rights;*

...

"Beneficiaries" is defined to include each Grower.

"Growers' Rights" is defined as:

- (a) *in respect of existing Growers, all of their rights and interest under the Project Documents and any other rights and interests under the Project Documents;*
- (b) *in respect of any future Growers, all of their rights and interests which are on the same terms as the rights and interest of Growers under the Project Documents as at the date of this document and any other rights and interests under the Project Documents,*

*in each case to the extent that those rights are affected by the Security.*

"Project Documents" is defined to include, among other thing, "any ... joint venture licence or lease agreement referred to in the constitution or otherwise connected with the Project."

Consequently, on any view, BOSI's mortgages are taken subject to our clients' rights.

## Notice

Our previous submission relied in part on the banks' actual or constructive knowledge of:

1. the investors' interests in the schemes;
2. the investors' interests in the Water Licences, the Capital Works and the Almond Trees; and
3. the sub-leases and licences.

On account of the above, it is clear that both banks had actual knowledge of the growers' rights

## Head Leases

We draw your attention to the following clause in the head lease.

### *Clause 9.2 Lessor consents to Lessee subletting*

*The Lessor consents and authorises the Lessees to enter into subleases with growers.*

### *Clause 9.3 Termination*

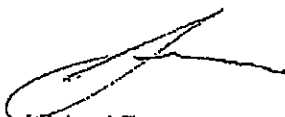
*Upon this lease terminating for whatever reason, the Lessor irrevocably authorises and consents to the granting or continuation (or both) by the Growers of a right to occupy or use the Land granted under the Sublease on the same terms and conditions as the Growers are granted Subleases, whether before or after the execution of this Lease and that the Lessor accepting the obligation of the Lessees to the Growers under Sublease.*

Timbercorp Securities Limited is the responsible entity and holds the interest in the lease on trust for the growers (s.601FC(2) of the Corporations Act). It is obliged to act on its rights under clause 9.3 to ensure that a lease will be granted to the growers if the head lease is terminated. Consequently, the subleases bind Almond Land Pty Ltd even if the lease to Timbercorp Securities Limited is terminated.

## Conclusion

The growers have paid over \$300M for valuable proprietary rights. Their investments have been used to acquire the land, buy the water rights, install the infrastructure, plant the trees and cultivate the trees. The banks have contributed a total of \$150M with full knowledge and express acknowledgment of the existing rights of growers.

Yours faithfully



Michael Fernon  
Director

Direct Tel: 03 8681 4419  
Email: michael.fernon@clarendonlawyers.com.au

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

List E

No. S CI 2010 1354

BETWEEN:

BOSI SECURITY SERVICES LIMITED (ACN 009 413 852) as trustee for  
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522) and  
BOS INTERNATIONAL (AUSTRALIA) LIMITED (ACN 066 601 250) and  
WESTPAC BANKING CORPORATION (ACN 007 457 141)  
Plaintiff

and

B.B OLIVES PTY LTD (IN LIQUIDATION) (ACN 083 992) & ORS  
(according to the Schedule attached to the Originating Motion)  
Defendants

CERTIFICATE IDENTIFYING EXHIBIT

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

19 March 2010  
Timbercorp Growers Group

Tel: 03 8681 4400  
Fax: 03 8681 4499  
Solicitors Code: 101294  
Ref: MJF:1000133

This is the exhibit marked "MJF-6" now produced and shown to **MICHAEL JOSEPH FERNON** at  
the time of swearing his affidavit on

Before me:  .....

**CELIA JANE ARMSTRONG**  
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*

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

No. 9998 of 2009

**BETWEEN:**

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 managed investments schemes listed in Schedule 1 and ors according to the Schedule.

Plaintiffs

**GENERAL FORM OF ORDER**

---

JUDGE: The Honourable Justice Croft

DATE MADE: 12 November 2009

ORIGINATING PROCESS: Originating process of the Plaintiffs filed 10 November 2009

HOW OBTAINED: On the hearing of the originating process on 11 November 2009

ATTENDANCE: Mr L Zwier and Ms B Toy-Cronin, Solicitors for the Plaintiffs  
Mr GT Bigmore of Her Majesty's Counsel and Mr SG Hopper of Counsel for the Timbercorp Growers Group  
Mr TD Cordiner for Kerree Anne Bezencon  
Ms S Hibble of Counsel for the Australian Securities and Investments Commission  
Mr PE Anastassiou of Senior Counsel and Mr RG Craig of Counsel for Westpac Banking Corporation, BOS International Australia Limited and Australia and New Zealand Banking Group Limited

OTHER MATTERS: Each of the Plaintiffs and Boundary Bend Limited have entered into sale and purchase deeds on 12 October 2009 (SPDs) which form Confidential Exhibits MAK-18 and MAK-19 to the Affidavit of Mark Anthony Korda sworn 10 November 2009 (**Affidavit**).

**THE COURT ORDERS THAT:**



The Third (Korda) and Fourth (Chesser) Plaintiffs (in their capacity as Liquidators of the First Plaintiff (TSL)) are justified in procuring the First Plaintiff as responsible entity of the managed investment schemes listed in Schedule 1 of this order (**Registered Schemes**) to enter into and perform the SPDs and extinguishing all of the rights of Growers' (investors in the schemes set on in schedules 1 and 2 of this order)

in respect of the assets the subject of the SPDs (**Growers Rights**).

2. The Third (Korda) and Fifth (Mentha) Plaintiffs (in their capacity as liquidators of the Second Plaintiff (OML) are justified in procuring the Second Plaintiff as manager of the Unregistered Olive Scheme to enter into and perform the SPDs and extinguishing all of the Grower Rights.
3. The Third and Fourth Plaintiffs (in their capacity as liquidators of the First Plaintiff) are justified in making, doing and executing such documents or things to give effect to the extinguishment of all of the Grower Rights in order to perform the SPDs.
4. The Third and Fifth Plaintiffs (in their capacity as liquidators of the Second Plaintiff) are justified in making, doing and executing such documents or things to give effect to the extinguishment of all of the Grower Rights in order to perform the SPDs.
5. The Third (Korda) and Fifth (Mentha) Plaintiffs (in their capacity as Liquidators of the Second Plaintiff (OML) are justified in disclaiming in respect of the unregistered managed investment scheme listed in Schedule 2 of this order (**Unregistered Olive Scheme**) the Project and Management Agreement as defined in the Affidavit (PMA) and the Licence and Joint Venture Agreements (as defined in the Affidavit) and to the extent necessary have leave to do so pursuant to section 568 of the *Corporations Act* 2001 (*Cth*).

**THE COURT ORDERS, DECLARES AND DIRECTS THAT:**

6. The:
  - (a) Third (Korda) and Fourth (Chesser) Plaintiffs in their capacity as liquidators of the First (TSL), Sixth (Timbercorp) and Eighth (Almond Land) Plaintiffs; and
  - (b) Third (Korda) and Fifth (Mentha) Plaintiffs in their capacity as liquidators of the Second (OML), Seventh (OLPL), Ninth (BBO), Tenth (Olivecorp Processing) and Eleventh (Boort Estate) Plaintiffs –may enter into and perform:
  - (i) the SPDs; and
  - (ii) any document referred to, in connection with, or necessary to give effect to the SPDs.
7. Upon completion of any sale under the Boort SPDs the net proceeds of sale after payment of selling costs and expenses, retentions (if any) and the costs and expenses of the liquidators of the First, Second and Sixth to Eleventh Plaintiffs referable to the preservation and realisation of the assets the subject of the SPDs, as approved by the committee of inspection of the Seventh Plaintiff and the Secured Creditors (as that term is defined in paragraph 19 of the Affidavit), or order of the Court (**Net Boort Proceeds**) are to be held by the Seventh Plaintiff in an interest bearing trust account with an Australian bank (as defined in section 9 of the *Corporations Act*), pending the hearing and determination by the Court of a proceeding to determine which person or persons have any rights to all or any part of the Net Boort Proceeds, and to be held on trust for the person or persons who are able to establish such a right, or until further order of the Court.



8. Upon completion of any sale under the Boundary Bend SPDs the net proceeds of sale (after payment of selling costs and expenses, retentions (if any) and the costs and expenses of the liquidators of the First, Second and Sixth and Eleventh Plaintiffs referable to the preservation and realisation of the assets the subject of the SPDs, as approved by the committee of inspection of the Ninth Plaintiff and the Secured Creditors (as that term is defined in paragraph 19 of the Affidavit), or order of the Court (**Net Boundary Bend Proceeds**) are to be held by the Ninth Plaintiff in an interest bearing trust account with an Australian bank (as defined in section 9 of the Corporations Act), pending the hearing and determination of a proceeding to determine which person or persons have any rights to all or any part of the Net Boundary Bend Proceeds, and to be held on trust for the person or persons who are able to establish such a right, or until further order of the Court.
9. Insofar as each of the Secured Creditors have any rights to the assets the subject of the SPDs, whether under their securities over those assets or otherwise, nothing in the release of those securities upon completion of the SPDs will prejudice those rights for the purposes of their claim to all or any part of the Net Boort Proceeds and/or Net Boundary Bend Proceeds.
10. Insofar as the Growers have any rights to the assets the subject of the SPDs nothing in order 1-5 above, or any action taken thereunder by the Third, Fourth and Fifth Plaintiffs, will prejudice those rights for the purposes of their claim to all or any part of the Net Boort Proceeds and/or Net Boundary Bend Proceeds.
11. Exhibits MAK-14, MAK-15, MAK-17, MAK-18, MAK-19, MAK-30, MAK-31 and MAK-32 to the Affidavit be kept confidential.
12. The interlocutory process of John Angus Horden dated 10 November 2009 be dismissed.
13. Costs be reserved.

DATE AUTHENTICATED:

- 3 DEC. 2009

*Hyde B.M.*

The Honourable Justice Croft



## **SCHEDULE 1**

1. 2001 Timbercorp Olive Project (ARSN 094 382 082)
2. 2002 Timbercorp Olive Project (ARSN 098 233 455)
3. 2003 Timbercorp Olive Project (ARSN 104 648 473)
4. 2004 Timbercorp Olive Project (ARSN 108 744 378)
5. 2006 Timbercorp Olive Project (ARSN 119 182 179)
6. 2007 Timbercorp Olive Project (ARSN 123 155 715)
7. 2008 Timbercorp Olive Project (ARSN 129 307 722)

## **SCHEDULE 2**

1. 2000 Timbercorp Olive Project (Private Offer) (Unregistered)
-

## **SCHEDULE OF PARTIES**

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

**OLIVECORP MANAGEMENT LTD (IN LIQUIDATION) (ACN 089 542 343)**  
**IN ITS CAPACITY AS MANAGER OF THE UNREGISTERED**  
**MANAGED INVESTMENT SCHEME LISTED IN SCHEDULE 2**  
Second Plaintiff

**MARK ANTHONY KORDA**  
Third Plaintiff

**LEANNE KYLIE CHESSER**  
Fourth Plaintiff

**MARK FRANCIS XAVIER MENTHA**  
Fifth Plaintiff

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

**OLIVECORP LAND PTY LTD (IN LIQUIDATION) (ACN 090 141 512)**  
Seventh Plaintiff

**ALMOND LAND PTY LTD (IN LIQUIDATION) (ACN 091 460 392)**  
Eighth Plaintiff

**B.B. OLIVES PTY LTD (IN LIQUIDATION) (ACN 083 992 367)**  
Ninth Plaintiff

**OLIVECORP PROCESSING FACILITY PTY LTD (IN LIQUIDATION) (ACN 098 581 081)**  
Tenth Plaintiff

**BOORT ESTATE PTY LTD (IN LIQUIDATION) (ACN 101 679 716)**  
Eleventh Plaintiff

Dated: 12 November 2009