

## **JOINT OUTLINE OF SUBMISSIONS**

### **IN THE MATTERS OF:**

Proceeding S APCI 2011 0103 (Almond Land Rights Appeal Proceeding)

Proceeding S CI 2011 6604 (Liparoo and Yungera Rights Proceeding)

Proceeding S CI 2011 6606 (Solara Rights Proceeding)

Proceeding S CI 2010 1354 (BB Olives Rights Proceeding)

Proceeding S CI 2011 6777 (Fenceport Rights Proceeding)

**28 September 2012**

Prepared by:

**Allens**

Lawyers  
101 Collins Street  
Melbourne VIC 3000  
Solicitor code: 21455  
Tel: (03) 9614 1011  
Ref: Clint Hinchin

Solicitors for ANZ in the:

- Almond Land Rights Appeal Proceeding
- Liparoo and Yungera Rights Proceeding
- Solara Rights Proceeding

**Arnold Bloch Leibler**

Lawyers and Advisers  
Level 21, 333 Collins Street  
Melbourne VIC 3000  
Solicitor code: 54  
Tel: (03) 9229 9999  
Ref: Jane Sheridan

Solicitors for Fenceport in the Fenceport Rights Proceeding

**Ashurst Australia**

Level 26  
181 William Street  
Melbourne VIC 3000  
Solicitor code: 53  
Tel: (03) 9679 3000  
Ref: Ross McClymont

Solicitors for BOSI in the:

- Almond Land Rights Appeal Proceeding
- BB Olives Rights Proceeding

## A. Introduction

1. This outline of submissions is filed on behalf of:
  - (a) BOSI, the security trustee for a syndicate of banks (the **Syndicate Banks**) comprised of Australia and New Zealand Banking Group Limited (**ANZ**), Westpac Banking Corporation and BOS International Australia Limited;
  - (b) ANZ, in its capacity as a bilateral lender to companies within the Timbercorp Group; and
  - (c) Fenceport Pty Ltd (**Fenceport**).
2. By summonses dated 27 August 2012 together with the affidavits enumerated and defined in Schedule A, the liquidators of certain companies in the Timbercorp Group, representative growers appointed by the Supreme Court of Victoria, BOSI, ANZ, Fenceport and other interested parties, seek approval for the compromise of five proceedings emanating from the collapse of the Timbercorp Group and the sale of certain of the assets used in its horticultural schemes.
3. Specifically, the Court has been asked to approve the compromise of each of the following proceedings (and bind absent parties represented by the representative growers) pursuant to r 16.01(4) of the *Supreme Court (General Civil Procedure) Rules* 2005 (**Rules**):
  - (a) Court of Appeal Proceeding S APCI 2011 0103 (**Almond Land Rights Appeal Proceeding**)<sup>1</sup>;
  - (b) Supreme Court of Victoria Proceeding S CI 2011 6604 (**Liparoo and Yungera Rights Proceeding**);
  - (c) Supreme Court of Victoria Proceeding S CI 2011 6606 (**Solara Rights Proceeding**);
  - (d) Supreme Court of Victoria Proceeding S CI 2010 1354 (**BB Olives Rights Proceeding**); and

---

<sup>1</sup> By orders dated 24 August 2012, their Honours Justices Buchanan and Osborn of the Court of Appeal made orders by consent in the Almond Land Rights Appeal Proceeding remitting the Almond Land Rights Appeal Proceeding to the Honourable Justice Judd of the trial division of the Supreme Court of Victoria: (a) for hearing and determination of any application to approve the compromise of that proceeding (Compromise Application); or (b) if Justice Judd deems fit, for the purpose of making directions for the hearing and determination of the Compromise Application by another judge of the trial division. See: Second McClymont Almond Land Affidavit at exhibit RWM-1.

(e) Supreme Court of Victoria Proceeding S CI 2011 6777 (**Fenceport Rights Proceeding**);

(together the **Timbercorp Apportionment Proceedings**).

4. The compromises were executed on 25 July 2012, by each of the relevant parties to the Timbercorp Apportionment Proceedings and Timbercorp Securities Limited (the **Deeds of Compromise**)<sup>2</sup>. The Deeds of Compromise each contain conditions precedent which require that by 31 December 2012 the Court:

(a) approve the compromise pursuant to rule 16.01(4) and order that the compromise shall be binding on absent persons represented by the representative growers appointed in respect of that proceeding;

(b) make equivalent orders in each of the remaining Timbercorp Apportionment Proceedings<sup>3</sup>.

The Deeds of Compromise are, therefore, cross-conditional; none can take effect unless all are approved.

5. BOSI is a party to the Almond Land Rights Appeal Proceeding and BB Olives Rights Proceeding. ANZ is a party to the Almond Land Rights Appeal Proceeding, Liparoo and Yungera Rights Proceeding, and the Solora Rights Proceeding. Fenceport is a party to the Fenceport Rights Proceeding. Accordingly, this outline of submissions addresses each of the Timbercorp Apportionment Proceedings, and is filed as a single document by the secured creditors in each of the proceedings so that common issues can be addressed without repetition and particular matters relevant to each proceeding can be identified and explained in context.

6. For the reasons set out below, it is respectfully submitted that the Court ought to approve the Deeds of Compromise and make orders in the terms set out in Schedule 2 of the Deeds of Compromise executed in relation to the BB Olives Rights Proceeding, the Almond Land Rights Appeal Proceeding and the Solora Rights Proceeding, Schedule 3 of the Deed of Compromise executed in relation to the Fenceport Rights Proceeding and Schedule 4 of the Deed of Compromise executed in relation to the Liparoo and Yungera Rights Proceeding.

---

<sup>2</sup> Exhibit CJA-1 to the Second Armstrong Affidavit filed in each proceeding.

<sup>3</sup> Clause 3.1 of each of the Deeds of Compromise.

7. These submissions address each of the following matters in turn:
- (a) background to the Timbercorp Group and its collapse;
  - (b) termination of the Almond, Olive and Citrus Schemes (the subject of the Apportionment Proceedings) and the sale of associated land and assets;
  - (c) court orders concerning the proceeds of sale;
  - (d) the issues raised by, and decision of Davies J in, the Almond Land Rights Proceeding;
  - (e) the appeal from the decision of Davies J in the Almond Land Rights Proceeding;
  - (f) overview of factual matters concerning BB Olives, Liparoo and Yungera, Solora and Fenceport Rights Proceedings, including the secured creditors' interests;
  - (g) overview of the background to and content of the Deeds of Compromise;
  - (h) identification of relevant principles in determining whether the Court should approve a compromise under r 16.01(4) of the Rules; and
  - (i) application of the relevant legal principles to the circumstances of the Timbercorp Apportionment Proceedings, and reasons which support Court approval in each case.

## **B. Factual Background**

### The Timbercorp Group and operation of agribusiness schemes

8. The Timbercorp Group operated agribusinesses. Timbercorp Limited (**Timbercorp**) was the parent entity of the Timbercorp Group<sup>4</sup>.
9. The Timbercorp Group's primary business activities were the establishment, development, marketing and management of primary industry based projects, the acquisition of land, water rights and infrastructure and the provision of finance to "Growers" in projects. The Timbercorp Group invested more than \$2 billion in agribusiness projects involving 18,500 investors since 1992<sup>5</sup>.

---

<sup>4</sup> See eg: Third McClymont Almond Land Affidavit at [13].

<sup>5</sup> See eg: Third McClymont Almond Land Affidavit at [14].

10. The operations of the Timbercorp Group could broadly be categorised as follows: corporate (including head office located at 461 Bourke Street, Melbourne), forestry, almonds, olives, other crops and a loan book<sup>6</sup>. Those operations were conducted by 4 companies dedicated to corporate operations, 7 companies dedicated to forestry operations and 29 companies dedicated to horticultural operations.
11. At the time of the appointment of administrators (23 April 2009), the Timbercorp Group operated 33 registered managed investment schemes (**Schemes**). Timbercorp Securities Ltd (in liq) (**TSL**), a wholly owned subsidiary of Timbercorp, was the responsible entity (**RE**) for each of the Schemes<sup>7</sup>.
12. TSL was the RE of the following registered Schemes, relevant to the current approval applications:
  - (a) the 2001, 2002, 2003 and 2004 Timbercorp Olive Schemes the subject of the Fenceport Rights Proceeding;
  - (b) the 2006, 2007 and 2008 Timbercorp Olive Schemes, the subject of the BB Olives Rights Proceeding;
  - (c) the 2001, 2002, 2003, 2004 and 2005 Timbercorp Almond Schemes the subject of the Liparoo and Yungera Rights Proceeding;
  - (d) the 2002, 2005, 2006 and 2007 Timbercorp Almond Schemes the subject of the Almond Land Rights Appeal Proceeding; and
  - (e) the 2005 Timbercorp Citrus Scheme the subject of the Solora Rights Proceeding.
13. Other Timbercorp Group companies acted as managers for forestry and horticultural projects which were not registered as managed investment schemes under the *Corporations Act* (**Private Offer Schemes**). At the time of the appointment of administrators, there were two Private Offer Schemes in addition to the 33 Schemes<sup>8</sup>. Those two Private Offer Schemes are also relevant to the present applications. Specifically:

---

<sup>6</sup> See eg: Third McClymont Almond Land Affidavit at [15].

<sup>7</sup> See eg: Second McClymont Almond Land Affidavit at [16].

<sup>8</sup> Third McClymont Almond Land Affidavit at [17].

- (a) the 2000 Timbercorp Olive Private Offer Project, managed by Olivecorp Management Ltd (in liquidation), is the subject of the Fenceport Rights Proceeding<sup>9</sup>; and
  - (b) the 2002 Almond Private Offer Project, managed by Almond Management Pty Ltd (**Almond Management**)<sup>10</sup>, is the subject of the Liparoo and Yungera Rights Proceeding and the Almond Land Rights Appeal Proceeding.
14. The purpose of each of the relevant Schemes and Private Offer Schemes was as follows:
- (a) in respect of each of the Timbercorp Almond Schemes and the 2002 Almond Private Offer Project (together, the **Almond Schemes**) - the cultivation of almonds for commercial sale<sup>11</sup>;
  - (b) in respect of each of the Timbercorp Olive Schemes and the 2000 Timbercorp Olive Private Offer Project (together, the **Olive Schemes**) - the cultivation of olives for the production of olive oil for commercial sale<sup>12</sup>; and
  - (c) in respect of the 2005 Timbercorp Citrus Scheme (the **Citrus Scheme**) – the cultivation of citrus trees and the harvesting and processing of citrus for commercial sale<sup>13</sup>.
15. The land on which the schemes were relevantly conducted was owned by the following entities:
- (a) in respect of the of the Almond Schemes which are the subject of the Almond Land Rights Appeal Proceeding – Almond Land Pty Ltd (in liquidation) (**Almond Land**)<sup>14</sup>;
  - (b) in respect of the of the Almond Schemes which are the subject of the Liparoo and Yungera Rights Proceeding – OIM#2 Pty Ltd (Receivers and Managers Appointed in its capacity as trustee of Timbercorp Orchard Trust #3 (in respect of the **Liparoo Land**) and OIM#5 Pty Ltd (Receivers and Managers

---

<sup>9</sup> Korda Fenceport Affidavit at [11].

<sup>10</sup> Third Hinchin Liparoo and Yungera Affidavit at [5].

<sup>11</sup> See eg: Third Hinchin Liparoo and Yungera Affidavit at [14].

<sup>12</sup> See eg: Korda Fenceport Affidavit at [13].

<sup>13</sup> Third Hinchin Solara Affidavit at [14].

<sup>14</sup> Affidavit of Ross Whyte McClymont sworn on 15 December 2009 and filed in Supreme Court of Victoria Proceeding No S CI 2009 10699 at [8].

Appointed in its capacity as trustee of Timbercorp Orchard Trust #5 (in respect of the **Yungera Land**);<sup>15</sup>

- (c) in respect of the Olives Schemes which are the subject of the BB Olives Rights Proceeding – Almond Land and B.B. Olives Pty Ltd (in liquidation) (**BB Olives**)<sup>16</sup>;
- (d) in respect of the Olives Schemes which are the subject of the Fenceport Rights Proceeding – Olivecorp Land Pty Ltd (in liquidation) (**Olivecorp Land**)<sup>17</sup>;
- (e) in respect of the Citrus Scheme which is the subject of the Solora Proceeding – OIM#2 in its capacity as trustee of Timbercorp Orchard Trust #2<sup>18</sup> (**Solora Land**).

#### Collapse of the Timbercorp Group – insolvency of Timbercorp entities and schemes

- 16. On 23 April 2009, voluntary administrators were appointed to each of the companies of the Timbercorp Group<sup>19</sup>.
- 17. 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 including TSL<sup>20</sup>.
- 18. Since 29 June 2009:
  - (a) Mark Anthony Korda and Leanne Kylie Chessser have been liquidators of Almond Land, Almond Management, Timbercorp and TSL<sup>21</sup>;
  - (b) Mark Anthony Korda, Leanne Kylie Chessser and Mark Francis Xavier Mentha have been liquidators of BB Olives<sup>22</sup>;
  - (c) Mark Anthony Korda and Mark Francis Xavier Mentha have been liquidators of Olivecorp Land<sup>23</sup>;

<sup>15</sup> Third Hinchin Liparoo and Yungera Affidavit at [15].

<sup>16</sup> McClymont BB Olives Affidavit at [7].

<sup>17</sup> Korda Fenceport Affidavit at [13].

<sup>18</sup> Third Hinchin Solora Affidavit at [15]. The Citrus Scheme was also conducted on a second property known as the “Kangara” property, owned by Align Funds Management Limited. The property and attendant assets were the subject of a separate sale process, the net proceeds of which are being held on trust pending the hearing and determination of a separate proceeding, which is not the subject of this approval process: Third Hinchin Solora Affidavit at [19] and [20].

<sup>19</sup> See eg: Third McClymont Almond Land Affidavit at [21].

<sup>20</sup> See eg: Third McClymont Almond Land Affidavit at [22].

<sup>21</sup> See eg: Third McClymont Almond Land Affidavit at [22].

<sup>22</sup> Third McClymont BB Olives Affidavit at [22].

(together, the **Liquidators**).

19. On 16 September 2009, ANZ appointed David McEvoy and Paul Kirk as joint and several receivers and managers of the charged assets of OIM#2, including the Solora Land and Liparoo Land, and joint and several receivers and managers of the charged assets of OIM#5, including the Yungera Land. Mr Fung replaced Mr McEvoy on 18 May 2010<sup>24</sup>.
20. From and upon their appointment, Mr Korda and Ms Chesser undertook the following investigations in relation to the financial position of the Timbercorp Group:
  - (a) examining the flow of funds through the various companies in the Timbercorp Group and the use of intercompany accounts;
  - (b) assessing the process for receipt and distribution of harvest proceeds to the Timbercorp Group and Growers;
  - (c) preparation of corporate and operational cash flows to understand the Timbercorp Group monthly commitments;
  - (d) assessing each Project to understand the underlying viability of the Project from both a Grower and Timbercorp Group perspective; and
  - (e) analysis of the Grower loan arrears<sup>25</sup>.
21. Mr Korda and Ms Chesser's preliminary investigations indicated that the Timbercorp Group had combined liabilities of \$661 million owing to secured lenders, \$250 million owing in other loans and debts, \$14 million owing to unsecured creditors and \$5 million owing in respect of employee entitlements (including redundancy payments)<sup>26</sup>.
22. On 4 June 2009, the Liquidators<sup>27</sup> filed an originating process seeking a direction that they were justified in applying to wind up the Almond Schemes and Olive Schemes. The Liquidators submitted to the Court in that application that TSL was hopelessly insolvent and that they did not have the money required to continue maintaining the Almond Schemes and Olive Schemes.

---

<sup>23</sup> Korda Fenceport Affidavit at [2].

<sup>24</sup> Third Hinchin Solora Affidavit at [21] and [22]; Third Hinchin Liparoo and Yungera Affidavit at [23]-[25].

<sup>25</sup> See eg: Third McClymont Almond Land Affidavit at [23].

<sup>26</sup> See eg: Third McClymont Almond Land Affidavit at [24].

<sup>27</sup> With the exception of Mr Mentha.



23. In relation to the Citrus Scheme, the liquidators commenced an “informal winding up” process,<sup>28</sup> having concluded that “the original scheme arrangements [had] broken down due to the insolvency of TSL and the other companies in the Timbercorp group and the inability of TSL to fund the continued operations of the Citrus Scheme”.<sup>29</sup> As part of this process, orders were made by Davies J on 26 February 2010<sup>30</sup> that the Liquidators were justified in, among other things, procuring TSL to terminate or surrender each relevant Grower licence and to extinguish all of the rights of Growers (as investors in the Citrus Scheme) in respect of the assets the subject of the sale contract concerning the Solara Land<sup>31</sup>.
24. Mr Korda summarised TSL's financial position as at 4 June 2009 as follows:
- (a) TSL had no funds on hand, in its own capacity. To the extent that it did come into funds, such funds would be insignificant compared to the funds required by TSL to meet its obligations as RE;
  - (b) TSL, in its own right, had no significant assets;
  - (c) TSL had no employees; and
  - (d) TSL had no infrastructure<sup>32</sup>.
25. Mr Korda also deposed that as at 4 June 2009, in respect of the Almond Schemes and Olive Schemes:
- (a) the quantum and timing of harvest proceeds of a number of the Schemes was uncertain;
  - (b) the majority of head leases of the land which was utilised in relation to the Schemes were only paid until 30 June 2009;
  - (c) due to direct and joint venture ownership in a number of schemes, the Timbercorp Group was required to contribute to ongoing Scheme costs and the Timbercorp Group did not have the financial capacity to meet these ongoing obligations;

---

<sup>28</sup> Third Hinchin Solara Affidavit at [30]-[31]. The “informal winding up process” was referred to by Davies J in *Re Timbercorp Securities Ltd (In liq)* (2010) 77 ACSR 91 at [12].

<sup>29</sup> *Re Timbercorp Securities Ltd (In liq)* (2010) 77 ACSR 91 at [12].

<sup>30</sup> See further below.

<sup>31</sup> Third Hinchin Solara Affidavit at [30]-[31]. The “informal winding up process” was referred to by Davies J in *Re Timbercorp Securities Ltd (In liq)* (2010) 77 ACSR 291 at [12].

<sup>32</sup> See eg: Third McClymont Almond Land Affidavit at [26].

- (d) Timbercorp had historically borne a portion of the management costs of many of the Schemes pending receipt of harvest proceeds or payment by Growers of management fees in arrears, but Timbercorp was not in a position to do so in the future; and
  - (e) Timbercorp Finance Pty Ltd (in liquidation), a Timbercorp subsidiary, had historically provided finance to certain Growers, to enable them to pay their ongoing scheme obligations and Timbercorp Finance was no longer in a position to continue to finance Growers<sup>33</sup>.
26. On the basis of *inter alia*, the following matters, Mr Korda and Ms Chesser reached the conclusion that the Almond Schemes and Olive Schemes were insolvent<sup>34</sup>:
- (a) approximately \$247 million was required in operational expenditure for the 2010 almond crop management and harvest<sup>35</sup>;
  - (b) TSL did not have \$247 million and TSL was not permitted to borrow \$247 million, or any funds at all, as responsible entity<sup>36</sup>;
  - (c) approximately \$62 million was required for operations, rental and other operational expenditure for the 2010 olive crop management and harvest. TSL did not have \$62 million in available funds. Under the Olive Schemes' constitutions, TSL was not permitted to borrow \$62 million, or any funds<sup>37</sup>;
  - (d) even if TSL invoiced the Growers for the operational expenditure for the 2010 olive crop management and harvest, it would not be paid in full by them<sup>38</sup>;
  - (e) in simple terms, the proceeds of sale for almonds and olives to be harvested in 2010 was going to be less than the costs of growing them<sup>39</sup>;
  - (f) the 2001 Olive Scheme was insolvent because:

---

<sup>33</sup> See eg: Third McClymont Almond Land Affidavit at [27].

<sup>34</sup> The Schemes are, of course, not legal entities in their own right, although they have been described as “insolvent” in a number of the affidavits and judgments referred to in these submissions. The same term has been deployed in these submissions to convey the fact that the schemes were financially unviable.

<sup>35</sup> See eg: Third McClymont Almond Land Affidavit at [28(a)].

<sup>36</sup> See eg: Third McClymont Almond Land Affidavit at [28(b)].

<sup>37</sup> See eg: Third McClymont BB Olives Affidavit at [28(b)].

<sup>38</sup> See eg: Third McClymont BB Olives Affidavit at [28(c)].

<sup>39</sup> See eg: Third McClymont Almond Land Affidavit at [28(c)]; affidavit of Mark Anthony Korda sworn on 4 June 2009 and filed in Supreme Court of Victoria Proceeding No S CI 2009 7114 at [38] (exhibit RWM-8 to the Third McClymont Almond Land Affidavit).

- (i) there was an estimated "Cumulative Scheme Cashflow - Before CAPEX" deficit of \$1,090,000 to the end of September 2009; and
  - (ii) TSL did not have the capacity to fund cashflow deficit or the capital expenditure and temporary water requirement of \$227,000 identified as necessary to the end of September 2009<sup>40</sup>;
- (g) the 2002 Olive Scheme was insolvent because:
- (i) there was an estimated "Cumulative Scheme Cashflow - Before CAPEX" deficit of \$719,000 to the end of September 2009; and
  - (ii) TSL did not have the capacity to fund the cashflow deficit or capital expenditure and temporary water requirement of \$151,000 identified as necessary to the end of September 2009<sup>41</sup>;
- (h) the 2003 Olive Scheme was insolvent because:
- (i) there was an estimated "Cumulative Scheme Cashflow - Before CAPEX" deficit of \$883,000 to the end of September 2009; and
  - (ii) TSL did not have the capacity to fund the cashflow deficit or capital expenditure of \$28,000 identified as necessary to the end of September 2009<sup>42</sup>;
- (i) the 2004 Olive Scheme was insolvent because:
- (i) there was an estimated "Cumulative Scheme Cashflow - Before CAPEX" deficit of \$217,000 to the end of September 2009; and
  - (ii) TSL did not have the capacity to fund the cashflow deficit or capital expenditure of \$7,000 identified as necessary to the end of September 2009<sup>43</sup>;
- (j) the 2006 Olive Scheme was insolvent because:

---

<sup>40</sup> Affidavit of Mark Anthony Korda sworn on 9 July 2009 (in relation to 2001 Timbercorp Olive Project) and filed in Supreme Court of Victoria Proceeding No S CI 2009 7114 at [8.10].

<sup>41</sup> Affidavit of Mark Anthony Korda sworn on 9 July 2009 (in relation to 2002 Timbercorp Olive Project) and filed in Supreme Court of Victoria Proceeding No S CI 2009 7114 at [8.10].

<sup>42</sup> Affidavit of Mark Anthony Korda sworn on 9 July 2009 (in relation to 2003 Timbercorp Olive Project) and filed in Supreme Court of Victoria Proceeding No S CI 2009 7114 at [8.8].

<sup>43</sup> Affidavit of Mark Anthony Korda sworn on 9 July 2009 (in relation to 2004 Timbercorp Olive Project) and filed in Supreme Court of Victoria Proceeding No S CI 2009 7114 at [8.8].

- (i) there was an estimated "Cumulative Scheme Cashflow - Before CAPEX" deficit of \$793,000 to the end of September 2009; and
  - (ii) TSL did not have the capacity to fund the capital expenditure of \$1,962,000 identified as necessary to the end of September 2009<sup>44</sup>;
- (k) the 2007 Olive Scheme was insolvent because:
- (i) there was an estimated "Cumulative Scheme Cashflow - Before CAPEX" deficit of \$590,000 to the end of September 2009; and
  - (ii) TSL did not have the capacity to fund the capital expenditure of \$2,156,000 identified as necessary to the end of September 2009<sup>45</sup>;
- (l) the 2008 Olive Scheme was insolvent because:
- (i) there was an estimated "Cumulative Scheme Cashflow - Before CAPEX" deficit of \$2,332,000 to the end of September 2009; and
  - (ii) TSL did not have the capacity to fund the capital expenditure of \$3,292,000 identified as necessary to the end of September 2009<sup>46</sup>;
- (m) the 2002 Almond Scheme was insolvent because:
- (i) there was an estimated "Cumulative Scheme Cashflow - Before CAPEX" deficit of \$2,247,000 to the end of September 2009; and
  - (ii) TSL did not have the capacity to fund the capital expenditure and temporary water requirement of \$346,000 identified as necessary to the end of September 2009<sup>47</sup>;
- (n) the 2003 Almond Scheme was insolvent because:
- (i) there was an estimated "Cumulative Scheme Cashflow - Before CAPEX" deficit of \$4,001,000 to the end of September 2009; and
  - (ii) TSL did not have the capacity to fund the capital expenditure of \$120,000 identified as necessary to the end of September 2009<sup>48</sup>;

---

<sup>44</sup> See eg: Third McClymont BB Olives Affidavit at [28(d)].

<sup>45</sup> See eg: Third McClymont BB Olives Affidavit at [28(e)].

<sup>46</sup> See eg: Third McClymont BB Olives Affidavit at [28(f)].

<sup>47</sup> See eg: Third McClymont Almond Land Affidavit at [28(d)].

<sup>48</sup> Affidavit of Mark Anthony Korda sworn on 9 July 2009 (in relation to 2003 Timbercorp Almond Project) and filed in Supreme Court of Victoria Proceeding No S CI 2009 7114 at [8.8].

- (o) the 2004 Almond Scheme was insolvent because:
    - (i) there was an estimated "Cumulative Scheme Cashflow - Before CAPEX" deficit of \$4,908,000 to the end of September 2009; and
    - (ii) TSL did not have the capacity to fund the capital expenditure of \$156,000 identified as necessary to the end of September 2009<sup>49</sup>;
  - (p) the 2005 Almond Scheme was insolvent because:
    - (i) there was an estimated "Cumulative Scheme Cashflow - Before CAPEX" deficit of \$4,510,000 to the end of September 2009; and
    - (ii) TSL did not have the capacity to fund the capital expenditure of \$5,968,000 identified as necessary to the end of September 2009<sup>50</sup>;
  - (q) the 2006 Almond Scheme was insolvent because:
    - (i) there was an estimated "Cumulative Scheme Cashflow - Before CAPEX" deficit of \$7,002,000 to the end of September 2009; and
    - (ii) TSL did not have the capacity to fund the capital expenditure of \$17,450,000 identified as necessary to the end of September 2009<sup>51</sup>;
  - (r) the 2007 Almond Scheme was insolvent because:
    - (i) there was an estimated "Cumulative Scheme Cashflow - Before CAPEX" deficit of \$8,077,000 to the end of September 2009; and
    - (ii) TSL did not have the capacity to fund the capital expenditure of \$42,020,000 identified as necessary to the end of September 2009<sup>52</sup>.
27. Likewise, in *Re Timbercorp Securities Ltd (In liq)*, Davies J found on the evidence before her in that proceeding that the hopeless insolvency of TSL meant it could no longer fund the operations of the Citrus Scheme, and the assets were at risk of wasting<sup>53</sup>.

---

<sup>49</sup> Affidavit of Mark Anthony Korda sworn on 9 July 2009 (in relation to 2004 Timbercorp Almond Project) and filed in Supreme Court of Victoria Proceeding No S CI 2009 7114 at [8.8].

<sup>50</sup> See eg: Third McClymont Almond Land Affidavit at [28(e)].

<sup>51</sup> See eg: Third McClymont Almond Land Affidavit at [28(f)].

<sup>52</sup> See eg: Third McClymont Almond Land Affidavit at [28(g)].

<sup>53</sup> (2010) 77 ACSR 91 at [1]. See further at [12], where she accepted the Liquidators' evidence that "the original scheme arrangements have broken down due to the insolvency of TSL and other companies in the Timbercorp group and the inability of TSL to fund the continued operations of the Citrus Scheme". See also Third Hinchin Solara Affidavit at [58]-[69].

28. In addition to TSL, other key operational entities within the Timbercorp Group were also hopelessly insolvent: namely, Almond Management<sup>54</sup>, Almond Land<sup>55</sup>, and Olivecorp Management Limited<sup>56</sup>.

Termination of schemes and arrangements for sale of assets

29. On 17 June 2009 Justice Robson made directions that the Liquidators were justified in procuring TSL to apply to wind up the Almond Schemes and Olive Schemes<sup>57</sup>.
30. Between 31 July 2009 and 17 August 2009 no party made an unconditional and binding offer to take on the role as permanent or replacement RE of the Almond Schemes<sup>58</sup>.
31. On 18 August 2009, Mr Korda and Ms Chessser pressed their application to wind up the Almond Schemes as TSL, the RE, remained hopelessly insolvent and the Almond Schemes each had a significant cashflow deficiency. Mr Korda and Ms Chessser were also concerned about the risk of severe wastage of the almond orchards if the almond assets were not sold or the Almond Schemes recapitalised in the near term. According to Mr Korda, he and Ms Chessser<sup>59</sup>:

“had discussed between ourselves our concern about the risk of severe wastage of the almond orchards if the almond assets were not sold or Almond Projects recapitalised in the short term. We also decided that in order to achieve the best outcome for the stakeholders, we would need to demonstrate to a potential bidder that it could, if it wished, buy the Almond assets with title clear from the secured creditors’ claims and the Growers’ claims”.

<sup>54</sup> Almond Management was hopelessly insolvent because the estimated level of unsecured creditors, including guarantees provided by Almond Management to the various financiers of the Timbercorp Group, was \$400,212,263. This was \$244,090,346 higher than the book value of Almond Management's assets (being \$156,121,917) (Affidavit of Mark Anthony Korda sworn on 9 November 2010 and filed in Supreme Court of Victoria Proceeding No S CI 2009 10699 at [19]. Exhibit RWM-10 to the Third McClymont Almond Land Affidavit).

<sup>55</sup> As at 23 April 2009, Almond Land was indebted to Timbercorp in the sum of \$177,754,627.40 and owed a further \$425,114,918 to secured creditors. As these amounts were significantly in excess of the estimated realisable value of Almond Land's assets, and in light of the significant forecast capital expenditure obligations in respect of the Almond Projects and Timbercorp's incapacity to meet any shortfall, Mr Korda formed the view that Almond Land was unable to meet its debts when they fell due and was hopelessly insolvent (Affidavit of Mark Anthony Korda sworn on 9 November 2010 and filed in Supreme Court of Victoria Proceeding No S CI 2009 10699 at [20]. Exhibit RWM-10 to the Third McClymont Almond Land Affidavit).

<sup>56</sup> Korda 10 November 2009 affidavit at [8] (exhibit RWM-7 to the Third McClymont Almond Land Affidavit).

<sup>57</sup> Exhibit RWM-20 to the Third McClymont Almond Land Affidavit.

<sup>58</sup> Third McClymont Almond Land Affidavit at [30]; Affidavit of Mark Anthony Korda sworn on 10 November 2009 and filed in proceeding no S CI 2009 9998 at [41].

<sup>59</sup> Korda 3 March 2010 Affidavit, at [97]. Exhibit RWM-6 to the Third McClymont Almond Land Affidavit and exhibit CCH-2, document 28 to the Third Hinchey Liparoo and Yungera Affidavit.

32. Likewise, Mr Korda deposed<sup>60</sup> that, having sought and received expressions of interest for the possible purchase of the assets deployed in the Almond Schemes or the recapitalisation of the Almond Schemes, he and Ms Chesser were concerned that unless the Almond Schemes are wound up, the Interested Parties would not be willing to engage in the sale process and exhibited a confidential letter from one of the Interested Parties which was illustrative of this concern<sup>61</sup>.
33. The application to wind up the Almond Schemes was opposed by the Timbercorp Growers Group. As an alternative to immediately winding up the Almond Schemes, the Liquidators sought directions that they were justified in amending the Constitutions of the Almond Schemes to give the RE an express power to terminate Growers' rights so that they could engage in an orderly sale or recapitalisation process<sup>62</sup>.
34. Mr Korda and Ms Chesser's conclusions in relation to the need to terminate the interests of the Growers to facilitate an unencumbered realisation of the Almond Schemes, with respect, were manifestly sound. Because of the lack of immediate funds available to the schemes, and the dearth of any means of funding their continued operation, the almond orchards needed to be sold quickly before they wasted and their value was significantly impaired. The urgency of the situation was particularly intense due to the timing of the Timbercorp administration, and the likelihood that, in the event the almond orchards were not attended to after 9 October 2009 with irrigation, fertiliser, pest and disease sprays, by 30 June 2010 some trees in the almond orchards would die with the remaining trees being materially impaired<sup>63</sup>. Moreover, Mr Korda and Ms Chesser anticipated that there was no realistic prospect of selling the assets encumbered by the Almond Schemes – a conclusion ultimately borne out by the fact that although the assets were offered for sale or recapitalisation<sup>64</sup>, no person sought to recapitalise the Almond Schemes during the

---

<sup>60</sup> Korda 17 August 2009 Affidavit at [49].

<sup>61</sup> MAK-69 to Korda 3 March 2010 Affidavit (exhibit RWM-18 to the Third McClymont Almond Land Affidavit).

<sup>62</sup> Third McClymont Almond Land Affidavit at [32].

<sup>63</sup> Korda 5 October 2009 Affidavit at [94] (exhibit RWM-9 to the Third McClymont Almond Land Affidavit and exhibit CCH-2, document 30 to the Third Hinchin Liparoo and Yungera Affidavit).

<sup>64</sup> Korda 5 October 2009 Affidavit at [113(b)] (exhibit RWM-9 to the Third McClymont Almond Land Affidavit and exhibit CCH-2, document 30 to the Third Hinchin Liparoo and Yungera Affidavit).

160 day administration<sup>65</sup> and no party made an offer other than on an unencumbered basis<sup>66</sup>. It was therefore inevitable that the interests of the Growers in these insolvent Almond Schemes – in particular, their interests under their sub-leases – would have to be terminated to facilitate a sale.

35. On 21 August 2009, Justice Robson made a direction that Mr Korda and Ms Chesser were justified in causing TSL to amend the constitutions of the Almond Schemes to give TSL the explicit power to "assign, terminate, surrender or otherwise deal with any Sublease/Licence and Joint Venture Agreement"<sup>67</sup>.
36. As no party had offered to take up the role of permanent replacement RE of the Olive Schemes by 28 August 2009, Mr Korda and Ms Chesser had the application to wind up the Olive Schemes listed for mention. As with the Almond Schemes, they were also concerned about wastage to the olive crop and that TSL was hopelessly insolvent<sup>68</sup>.
37. As the Liquidators had already obtained directions that they were justified in causing TSL to amend the constitutions of the registered Almond Schemes to give TSL the explicit power to "assign, terminate, surrender or otherwise deal with any Sublease/Licence and Joint Venture Agreement", the Liquidators made the same amendments in respect of the Olive Schemes. This course of action was not opposed by ASIC or the Timbercorp Growers Group<sup>69</sup>.
38. Thus, by 28 August 2009, TSL had the power to terminate the interests of the Growers in the registered Almond and Olive Schemes, to facilitate a realisation of the assets of those schemes<sup>70</sup>.
39. As with the Olives Schemes, the Liquidators of the Citrus Scheme took the view that having regard to considerations such as the hopeless insolvency of TSL and its inability to fund the continued operations of the Citrus Scheme, an amendment to the constitution of the Citrus Scheme should also be made to permit the assignment,

---

<sup>65</sup> Korda 6 October 2009 Affidavit at [8(b)] (exhibit RWM-13 to the Third McClymont Almond Land Affidavit and exhibit CCH-2, document 31 to the Third Hinchin Liparoo and Yungera Affidavit).

<sup>66</sup> Korda 3 March 2010 Affidavit at [115] (exhibit RWM-6 to the Third McClymont Almond Land Affidavit and exhibit CCH-2, document 28 to the Third Hinchin Liparoo and Yungera Affidavit).

<sup>67</sup> Exhibit RWM-21 to the Third McClymont Almond Land Affidavit.

<sup>68</sup> Third McClymont BB Olives Affidavit at [31].

<sup>69</sup> Third McClymont BB Olives Affidavit at [32].

<sup>70</sup> In respect of the 2002 Private Offer Scheme, by notice of disclaimer dated 2 December 2009 and lodged with ASIC, the liquidators of AMPL and Almond Land disclaimed the LJVAs and the Project and Management Agreement to facilitate a sale of the assets encumbered by that scheme.



termination or surrender of the Growers' licences to facilitate an unencumbered sale of the assets used in connection with the scheme<sup>71</sup>. The validity of this amendment was challenged by the TGG Citrus Committee Inc and another grower, but found by Davies J to be a valid exercise of the power conferred by section 601GC(1)(b) of the *Corporations Act*<sup>72</sup>. Accordingly, by virtue of these amendments, TSL also had the power to terminate the interests of the Growers in the Citrus Scheme.

40. The realisation of the assets was facilitated by entry into the following agreements:
- (a) on 18 September 2009, Timbercorp Limited, TSL, Almond Management and Almond Land together with Mr Korda and Ms Chesser entered into a conditional sale and purchase deed (**Almond Rights SPD**) with Olam Orchards Australia Pty Limited (ACN 139 442 535) (**Olam Orchards**) guaranteed by Olam International Limited (**Olam**) to sell certain of the "Almond Assets" deployed in the 2002 Private Offer Scheme, 2002 Almond Scheme, 2005 Almond Scheme, 2006 Almond Scheme and 2007 Almond Scheme, for a price of \$128 million<sup>73</sup>;
  - (b) on 12 October 2009:
    - (i) Timbercorp, TSL, Almond Land and BB Olives together with Mr Korda, Mr Mentha and Ms Chesser entered into a conditional sale and purchase deed (**BB Olives Rights Land SPD**) with Boundary Bend Limited (**BBL**) to sell certain of the "Olive Assets" deployed in the 2006 Olive Scheme, 2007 Olive Scheme and 2008 Olive Scheme for a price of \$2,036,000<sup>74</sup>;
    - (ii) BB Olives together with Mr Korda and Mr Mentha, entered into a conditional sale and purchase deed (**BB Olives Rights Water SPD**) with BBL to sell certain of the "Water Shares" deployed in the 2006

<sup>71</sup> See *Re Timbercorp Securities Ltd (In liq)* (2010) 77 ACSR 91, eg at [12], [13], [16].

<sup>72</sup> *Re Timbercorp Securities Ltd (In liq)* (2010) 77 ACSR 91 at [19].

<sup>73</sup> Affidavit of Ross Whyte McClymont sworn on 15 December 2009 and filed in Supreme Court of Victoria Proceeding No S CI 2009 10699 at [9]; CI 6.1 of the "Sale and Purchase Deed – Almond Assets" (exhibited as 'Confidential exhibit MAK-69' to the affidavit of Mark Anthony Korda sworn on 3 March 2012 and filed in Supreme Court of Victoria Proceeding No S CI 2009 10699).

<sup>74</sup> CI 5.1 of the "Sale and Purchase Deed (Olive Assets – BBE)".

Olive Scheme, 2007 Olive Scheme and 2008 Olive Scheme for a price of \$21,464,000<sup>75</sup>;

- (iii) Timbercorp, TSL, Olivecorp Land, Olivecorp Processing Facility Pty Ltd, Boort Estate Pty Ltd, Olivecorp Management, together with Mr Korda, Mr Mentha and Ms Chesser entered into a conditional sale and purchase deed (**Boort SPD**) with BBL to sell certain of the "Olive Assets" deployed in the 2000 Olive Private Offer Project, 2001 Olive Scheme, 2002 Olive Scheme, 2003 Olive Scheme and 2004 Olive Scheme for a price of \$6,665,900<sup>76</sup>;
- (iv) Olivecorp Land together with Mr Korda and Mr Mentha, entered into a conditional sale and purchase deed (**Boort Water SPD**) with BBL to sell certain of the "Water Shares" deployed in the 2000 Olive Private Offer Project, 2001 Olive Scheme, 2002 Olive Scheme, 2003 Olive Scheme and 2004 Olive Scheme for a cumulate price of \$29,334,100<sup>77</sup>;

(c) on 16 November 2009:

- (i) OIM#2, Messrs Fung and Kirk (as the **Receivers**), Olam Orchards and Olam signed a contract for the sale of the Liparoo Land and associated assets falling within the definition of "Property" in that contract (**Liparoo Sale Contract**)<sup>78</sup>; and
- (ii) OIM#5, the Receivers, The Trust Company of Australia Limited, Olam Orchards and Olam signed a contract for sale of the Yungera Land and associated assets falling within the definition of "Property" in that contract (**Yungera Sale Contract**)<sup>79</sup>;

with the combined net sale proceeds (at the time of settlement) being \$147,529,984<sup>80</sup>;

- (d) on 18 December 2009, OIM#2, the Receivers, Agriproperty Pty Ltd and CostaExchange Limited signed a contract for the sale of the Solora Land and

<sup>75</sup>Particulars of Sale to the "Contract for sale of Water Shares".

<sup>76</sup> Cl 5.1 of the "Sale and Purchase Deed (Olive Assets – Boort)"

<sup>77</sup>Particulars of Sale to the "Contract for sale of Water Shares"; also Particulars of sale of the Contract for sale of Water Shares (Mortgagee), which is annexure D to the Boort SPD.

<sup>78</sup> Third Hinchin Liparoo and Yungera Affidavit at [26], confidential exhibit CCH-3, document 1.

<sup>79</sup> Third Hinchin Liparoo and Yungera Affidavit at [26], confidential exhibit CCH-3, document 1.

<sup>80</sup> Third Hinchin Liparoo and Yungera Affidavit at [38].

associated assets falling within the definition of "Property" in that contract (the **Solora Sale Contract**)<sup>81</sup>, with the net sale proceeds (at the time of settlement) being \$13,327,604.51<sup>82</sup>.

41. The way in which Fenceport advanced funds, and became a secured creditor, is as follows:<sup>83</sup>
- (a) Prior to the commencement of the application for directions in relation to the sale of assets used in the Olives Schemes, the Liquidators of certain Timbercorp entities entered in a sale and purchase deed to sell forestry assets (**Forestry Assets**) owned by certain companies in the Timbercorp Group (**Forestry Borrowers**) (the **Forestry Sale**).
  - (b) The Commonwealth Bank of Australia (**CBA**) held securities over both the Forestry Assets and the Olive Assets (**CBA Securities**). It was a condition precedent to the sale and purchase deed for the Forestry Sale that the CBA Securities over the Forestry Assets be released. However, the CBA would not release the security over the Forestry Assets unless all of the CBA Securities were repaid. The CBA Securities secured facilities advanced by CBA to both the Forestry Borrowers, Olivecorp Land and Olivecorp Processing Pty Ltd (together, **Olive Borrowers**). On the date of the settlement of the Forestry Sale, the Olivecorp Borrowers were indebted to the CBA for an amount of approximately \$54 million (**CBA Olive Indebtedness**).
  - (c) On 29 September 2009, the Liquidators of TSL filed an application for directions in respect of the sale and purchase deed for the Forestry Sale supported by an affidavit of Mr Korda of that date explaining the CBA's requirement that both its Olive and Forestry facilities be repaid before it would release the CBA Securities and apportion the sale proceeds of the Forestry Sale.
  - (d) The purchaser under the Forestry sale and purchase deed allocated \$124 million net of costs to the assets the subject of the CBA Securities. This left a shortfall of approximately \$26 million.

---

<sup>81</sup> Third Hinchin Solora Affidavit at [23], confidential exhibit CCH-3, document 1.

<sup>82</sup> Third Hinchin Solora Affidavit at [34].

<sup>83</sup> Third Sheridan Fenceport Affidavit at [39].

- (e) On 6 October 2009, Justice Pagone gave a direction allowing the Liquidators of TSL to procure TSL to pay the CBA from the sale proceeds. This meant that the Liquidators could apply funds allocated by the purchaser to the purchase of the Forestry trees (an asset of the Growers in the Forestry Schemes) to release the CBA securities over the assets used in both the Forestry Schemes and the Olives Schemes.
- (f) To effect this, pursuant to the Fenceport trust deed, the funds that would have been payable to Growers in the Forestry Schemes went instead to Fenceport to be held on trust on behalf of TSL as responsible entity of the Forestry Schemes pending agreement or, if no agreement was reached, determination as to the apportionment between the Growers in the Forestry Schemes.
- (g) Fenceport then advanced \$26 million to the Olive Borrowers (**Advance**) to enable the full repayment of the CBA Olive Indebtedness and the discharge of all CBA Securities. The Advance was made pursuant to a loan agreement between the Olive Borrowers, TSL, Olivecorp Management and Fenceport (**Loan Agreement**).
- (h) In consideration of Fenceport providing the Advance to the Olive Borrowers, each of the Olive Companies agreed to grant to Fenceport certain securities over the same property that was secured by the CBA Securities in relation to the relevant Olive Assets (**New Securities**). The details of the New Securities are set out in schedule 3 to the Loan Agreement.
- (i) The New Securities secured the Advance made under the Loan Agreement. The final repayment date under the Loan Agreement was the date on which the Olive Companies received the amount of money from the sale of the Olive Assets that the Court ordered or approved for distribution to the Olive Companies for application towards the repayment of the Advance.
- (j) To the extent that the sale price for the whole of the relevant Olive Assets was less than the Advance, Fenceport agreed to release the relevant Olive Assets from the New Securities after receiving a declaration from each Olive Borrower stating that the settlement amount was the best price reasonably obtainable for the relevant Olive Assets in the circumstances.

- (k) In effect, Fenceport is a trustee for Forestry Growers who re-financed the assets used in the Olives Schemes.

Orders in respect of proceeds of sale of assets

42. On 30 September 2009, BOSI and ANZ made a conditional written offer to Almond Land that BOSI and ANZ would pay \$6 million (less costs) to Almond Land, to be paid to TSL as RE (for the benefit of the Growers) in full and final settlement of all claims by the Growers to the sale proceeds the subject of the Almond Rights SPD<sup>84</sup>.
43. The Liquidators accepted BOSI and ANZ's offer, subject to a direction of the Court that they were justified in doing so, as they believed it to be the best option available to TSL, informed *inter alia* by legal advice and their own assessment of the commercial value of the Growers' interests in the Almond Schemes<sup>85</sup>.
44. On 9 October 2009, Justice Robson authorised Mr Korda and Ms Chesser to enter into and perform the Almond Rights SPD (in their capacity as liquidators of Timbercorp, Almond Land, TSL and Almond Management). Justice Robson declined to order that the Liquidators were justified in accepting BOSI and ANZ's offer of \$6 million and instead ordered that the net proceeds of the Almond Rights SPD be held on trust pending the hearing and determination of a proceeding to determine the rights (if any) of any person to share in those proceeds (**Robson J Orders**). His Honour relevantly determined that<sup>86</sup>:

“[77]... there is uncertainty at this stage as to precisely what property rights of the growers are to be transferred or surrendered as part of the consideration for the payment of the purchase price of approximately \$128 million. Until those rights are identified it is not possible according to law to fairly assess the value of the rights being surrendered on behalf of the growers....

[87] The liquidators (in their capacity as liquidators of TSL, TL, Almond Management and Almond Land) are justified in instituting or participating in proceedings to determine the extent and measure of the interest in the fund constituted by the proceeds of sale of the Almond Assets of some \$128 million of TSL (as the responsible entity of the managed investment schemes listed in schedule 1 to this order), Almond Management (as the manager of the unregistered managed investment scheme listed in schedule 2 to this order), TC, Almond Land and any other person whose property rights are to be extinguished, sold or transferred to Olam Orchards Australia Pty Ltd

<sup>84</sup> Third McClymont Almond Land Affidavit at [40].

<sup>85</sup> Third McClymont Almond Land Affidavit at [41].

<sup>86</sup> *Re Timbercorp Securities Ltd (in liq) (No 2)*(2009) 74 ACSR 626 at [77] and [87].

under the Sale and Purchase Deed and to hold the said fund in trust for those persons pending the hearing and determination of such proceeding or further order of this court.”

45. On 2 December 2009, the Almond Rights SPD completed and the Grower rights were extinguished.
46. The proceedings contemplated by Justice Robson were thus commenced by BOSI on 15 December 2009 (**Almond Land Rights Proceeding**). Furthermore, following the Robson J Orders:
  - (a) on 12 November 2009, Croft J ordered that the net sale proceeds of the BB Olives Rights Land SPD, BB Olives Rights Water SPD, Boort SPD and Boort Water SPD be held on trust pending the hearing and determination of a proceeding to determine which (if any) person had a right to share in those proceeds - thus prompting settlement of the sales, extinguishment of the Grower rights and the commencement of the BB Olives Rights Proceeding, and also leading to the commencement of the Fenceport Rights Proceeding;
  - (b) on 11 December 2009, Davies J ordered that the net sale proceeds of the Liparoo and Yungera Sale Contracts be held on trust pending the hearing and determination of a proceeding to determine which person or persons have any rights to all or any part of those proceeds (which orders led to the settlement of the sales, extinguishment of the Grower rights and the commencement of the Liparoo and Yungera Rights Proceeding)<sup>87</sup>;
  - (c) on 26 February 2010, Davies J ordered that the net sale proceeds of the Solora Sale Contract be held on trust pending the hearing and determination of a proceeding to determine which person or persons have any rights to all or any part of those proceeds (which orders also led to the settlement of the sales, extinguishment of the Grower rights and the commencement of the Solora Rights Proceeding)<sup>88</sup>.
47. As each of the Almond Land Rights Proceeding, Liparoo and Yungera Rights Proceeding, Fenceport Rights Proceeding, BB Olives Rights Proceeding and Solora Rights Proceeding involved similar issues, it was considered appropriate for one such proceeding to be heard and determined first, with the intention that the result in that

---

<sup>87</sup> Third Hinchin Liparoo and Yungera Affidavit at [34]-[37].

<sup>88</sup> Third Hinchin Solora Affidavit at [30]-[33].

proceeding would then form the basis for determination of the other proceedings. This led to the hearing and determination of the Almond Land Rights Proceeding in early 2011<sup>89</sup>.

### C. The Almond Land Rights Proceeding

#### The primary issues and relevant terms of the Almond Schemes the subject of the Almond Land Rights Proceeding

48. On 15 June 2011, Justice Davies delivered reasons for judgment in the Almond Land Rights Proceeding (the **Judgment**)<sup>90</sup>. The primary issues for determination in the Almond Land Rights Proceeding were identified at paragraph 8 of the Judgment:

- “
- (a) the intent and effect of the orders of Robson J [Orders]... The issue is whether Robson J reserved to the Court in the Rights Proceeding the task of valuing the pre-extinguishment rights and interests of the growers and the banks in the assets sold in order to determine the division of the net proceeds between them, as contended for by the growers, or whether it was incumbent on both claimants to establish rights of a proprietary nature in the assets that were sold in order to found an entitlement to share in the net proceeds, as contended for by the banks;
  - (b) if rights of a proprietary nature in the assets sold must be shown to found the entitlement, whether the project arrangements gave the growers any proprietary interest in those assets;
  - (c) given that the projects could not continue under the Timbercorp structure, whether the growers' rights held any value just before they were extinguished; and
  - (d) if so, the value to be ascribed to those rights.”<sup>91</sup>

49. The Almond Land Rights Proceeding concerned the 2002 Private Offer Scheme, 2002 Almond Scheme and the 2005-2007 Almond Schemes.

50. The 2002 Private Offer Scheme and 2002 Almond Scheme operated under the following structure and pursuant to the following relevant terms<sup>92</sup>:

<sup>89</sup> Page 4 of the Notice to Growers in relation to the BB Olives Rights Proceeding, exhibited as part of MAK-2 to the Korda BB Olives Affidavit.

<sup>90</sup> *BOSI Security Services Ltd v Australia and New Zealand Banking Group Ltd* (2011) 84 ACSR 341; exhibit RWM-3 to the Third McClymont Almond Land Affidavit.

<sup>91</sup> As discussed further below, an additional issue raised by BOSI and ANZ, not here articulated by Davies J, was whether the rights of the Growers in the assets sold were of a kind that gave them an entitlement to share in the net proceeds of sale of the assets; in this regard, the Banks contended that a leasehold interest, while proprietary in nature, was an encumbrance on the land and not a right of a kind which could give rise to an entitlement to any part of the proceeds of sale of the land.

- (a) Almond Land granted a head lease of the land used in the scheme to TSL;
- (b) TSL then sub-leased the land back to Almond Land<sup>93</sup>;
- (c) the scheme was conducted as a joint venture between Almond Land and each Grower pursuant to a Licence and Joint Venture Agreement (LJVA's)<sup>94</sup>, which provided *inter alia* that -
  - (i) Almond Land contributed the "Almondlots" on which the joint venture operations were to be carried out – this meant that Almond Land supplied the land, the almond trees, the infrastructure for the orchards and the water licences<sup>95</sup>;
  - (ii) the joint venture operations were the growing, cultivating and harvesting of almonds for commercial gain<sup>96</sup>;
  - (iii) the joint venture interests of Almond Land and the Growers in the almonds produced and harvest proceeds were 10% and 90% respectively<sup>97</sup>;
  - (iv) the Growers paid Almond Land a tax-deductible fee in return for the right to use and occupy the Almondlots under licence from Almond Land for a limited duration<sup>98</sup>;
  - (v) the licence granted by Almond Land was solely for the purpose of the joint venture operations and conferred no right of exclusive occupation on the Growers<sup>99</sup>;
  - (vi) the Growers expressly agreed that the land, the almond trees, the capital works and the water licences, would be and would remain, the property of Almond Land<sup>100</sup>;

---

<sup>92</sup> See: Third Hinchin Liparoo and Yungera Affidavit at [21(e)].

<sup>93</sup> See: Third Hinchin Liparoo and Yungera Affidavit at [21(f)].

<sup>94</sup> A reference to the LJVA's in this outline of submissions includes both the 2002 Private Offer Scheme LJVA and 2002 Almond Scheme LJVA.

<sup>95</sup> As the Judgment describes at [41], an "Almondlot" was defined as: "Each separate identifiable area of the Land comprising approximately 0.25 hectares on which a Grower will carry on the business of primary production in a joint venture with [Almond Land] and includes the Capital Works [i.e. the infrastructure and capital works, including the Almond Trees that [Almond Land] has carried out, at its cost, on the Land] and Water Licences [i.e. the water licences owned or acquired by [Almond Land]] attributed to the Project." Clause 2, Private Offer LJVA.

<sup>96</sup> Clause 11.1 and clause 8 LJVA's. See also Judgment at [40] and [43].

<sup>97</sup> Clause 1.1 and 11.4, Private Offer LJVA. See also Judgment at [40].

<sup>98</sup> LJVA's clauses 4.1 and 7. Judgment at [35], [43] and [44].

<sup>99</sup> LJVA's clause 3.1., 3.2, 8.1(a). Judgment at [43].



- (d) Almond Land and each Grower entered into a management agreement (in the case of the 2002 Private Offer Scheme with Almond Management and in the case of the 2002 Almond Scheme with TSL) pursuant to which the Growers agreed to pay management fees for the cultivation and harvesting of the almonds<sup>101</sup>;
  - (e) Almond Management engaged Select Harvest Limited as an independent contractor to manage the almond orchards on a day to day basis and to harvest, process and market the almond crops; and
  - (f) the “Joint Venture Assets” under the Project and Management Agreements did not extend to include the land, almond trees, water licences or capital works comprising the Almondlots<sup>102</sup>.
51. As it was a registered scheme, the 2002 Almond Scheme also had a constitution. As Davies J noted<sup>103</sup>, clause 13.1 did not provide a Grower with a proprietary right to the land, capital works, almond trees or water licences, but rather stated that a Grower:
- “is entitled to the whole of the Crop [i.e. the Almonds taken from the Almond Trees grown on the Growers’ Almondlots] and Product [i.e. Almonds in saleable condition] in each Financial Year in proportion to the Grower’s Participating Interest”.
52. The 2005-2007 Almond Schemes operated under the following structure and pursuant to the following relevant terms:
- (a) Almond Land granted a head lease of the land used in the scheme to TSL:
    - (i) the demise was solely for the purpose and duration of the schemes<sup>104</sup>;
    - (ii) under the head lease the Water Licences were licenced to TSL<sup>105</sup>;
  - (b) TSL then sub-leased the land to the Growers;
    - (i) the demise was contained in clause 3.1(a) of the 2005-2007 Almond Scheme sub-leases and provided that the sub-lease was being granted

---

<sup>100</sup> Clause 2.2, Private Offer LJVA. See: Judgment at [35].

<sup>101</sup> Judgment at [34].

<sup>102</sup> Clause 1.1 Project and Management Agreement, 2002 Private Offer Scheme. See Judgment at [42].

<sup>103</sup> Judgment at [51], citations omitted from the passage quoted.

<sup>104</sup> Clause 5.1, 2005-2007 Leases. Judgment at [69].

<sup>105</sup> Clause 1.1, 2005-2007 Lease. Judgment at [72].

- to the Grower to use and occupy the relevant... Land Lots for the sole purpose of conducting the “Almondlot operations”<sup>106</sup>;
- (ii) save for the Menegazzo and Westmores 2007 Almond Scheme sub-leases, “Land Lot” was defined to include “the Almond Trees, the Capital Works and the Water Licences attributed to the Project”<sup>107</sup>;
  - (iii) the Growers acknowledged that the Capital Works, Almond Trees and Water Licences were and would at all times remain, the property of Almond Land<sup>108</sup>;
  - (iv) Almond Land was obliged to ensure that TSL was able to fully exploit Almond Land’s water licences “for the benefit of all of the Growers in the Project under and in accordance with the Almondlot Management Agreement”<sup>109</sup>;
- (c) each Grower entered into an Almondlot Management Agreement with TSL pursuant to which the Growers agreed to pay management fees for the cultivation and harvesting of the almonds;
  - (d) TSL then contracted those works out to Almond Management, who in turn engaged Select Harvest Limited as an independent contractor to management the almond orchards on a day to day basis and to harvest, process and market the almond crops<sup>110</sup>;
  - (e) the Constitutions of the 2005-2007 Almond Schemes provided that:
    - (i) The term “Participant Grower” in the Constitution was a reference to the particular Grower “in respect of the Almondlot or Almondlots that have been sub-leased to it under the sub-leases”<sup>111</sup>;
    - (ii) an “Almondlot” was defined as<sup>112</sup>:

---

<sup>106</sup> Clause 3.1(a), 2005-2007 Almond Scheme sub-leases. Judgment at [55]. Note that there is a minor difference in the wording of the demise in the 2005 Wagera sub-lease - a difference described as “immaterial” in the Judgment at footnote 59.

<sup>107</sup> Clause 1.1, 2005-2007 sub-leases (save for Menegazzo and Westmores 2007 sub-leases). The definition of “Land Lot” in the Menegazzo and Westmores 2007 sub-leases is set out in paragraph 56(c)(i) of the Judgment. The distinction does not appear to have been relevant to her Honour’s decision.

<sup>108</sup> Clause 2.2, 2005-2007 Almond Scheme sub-leases. Judgment at [70].

<sup>109</sup> Clause 3.2 2005-2007 Almond Scheme sub-leases. Judgment at [72].

<sup>110</sup> Management Agreements (exhibited as part of RMW-19 to the Third McClymont Almond Land Affidavit).

<sup>111</sup> Clause 1.2(k), 2005-2007 Almond Scheme Constitutions. Judgment at [66].

<sup>112</sup> Clause 1.1, 2005-2007 Almond Scheme Constitutions, Judgment at [66].

An interest in the Project held by the Participant Grower, including its interest in, and rights in relation to, each stapled and separately identifiable area of the Land comprising approximately 0.25 hectares on which a Participant Grower will conduct the Almondlot Operations and which includes the Almond Trees, the Capital Works and the Capital Water Licences attributed to the Project, and in relation to a Participant Grower means the Participant Grower's Almondlots.

- (iii) TSL (as RE) was empowered to lease the Land to the Land Owner, and sub-lease it to, the Grower<sup>113</sup>;
- (iv) "Land" was defined as "the land on which the Project will be conducted, as described in the product disclosure statement and such other land which is used in the Project"<sup>114</sup>; and
- (v) the sub-leases must be read subject to the terms and conditions of the Constitution<sup>115</sup>;
- (f) each of the 2005-2007 product disclosure statements described the "Land" as including the "Water Licences and Capital Works"<sup>116</sup>.

The first issue for determination: The intent and effect of the Robson J Orders

53. The Growers contended that by making the Robson J Orders, his Honour determined that the Growers in fact had valuable rights traceable into the sale proceeds and that Almond Land Rights Proceeding was confined to the valuation of both the Growers' and BOSI and ANZ's (**the Banks**) pre-extinguishment rights<sup>117</sup>. Her Honour rejected the Growers' contention and reasoned as follows:

[28] Robson J did not rule that each party's proportionate share of the net proceeds was to be determined by the value of their respective rights, without regard to whether the rights given up were rights of a proprietary nature in the assets sold. It is apparent from a consideration of the reasons of Robson J that his Honour was concerned with the measure of the growers' *property* rights surrendered or transferred as part of the consideration paid by Olam. This is explicit in paragraph 77 of his Honour's reasons, where his Honour stated:

77. As the evidence in this case indicates, there is uncertainty at this stage as to precisely what property rights of the growers are to

<sup>113</sup> Clause 11(l), 2005-2007 Almond Scheme Constitutions. Judgment at [61].

<sup>114</sup> Clause 1.1, 2005-2007 Almond Schemes Constitutions. Judgment at [63].

<sup>115</sup> Clause 18.1, 2005-2007 Almond Schemes Constitutions. Judgment at [62].

<sup>116</sup> 2005 and 2006 Almond Scheme PDS at p.59. 2007 Almond Scheme PDS at p.71.

<sup>117</sup> Judgment at [25] and [27].

be transferred or surrendered as part of the consideration for the payment of the purchase price of approximately \$128 million. Until those rights are identified it is not possible according to law to fairly assess the value of the rights being surrendered on behalf of the growers.

...

[29] The misconception in the growers' primary case is that it presupposes that rights were given up in exchange for an interest in the net proceeds so that, pursuant to the orders of Robson J, the growers' and the banks' proportionate shares of the fund are to be measured by the value of the rights that each gave up. **The difficulty with that submission is that Robson J's orders did not create in the growers any entitlement or any right to share in the net proceeds that the growers did not otherwise possess nor, in my opinion, on a fair reading of his Honour's decision, did his Honour purport to do so. Robson J could not create any interest for the growers in the net proceeds that they did not possess in law or equity...**

[30] It was therefore incumbent upon the growers in this proceeding to found their entitlement to a share of the net proceeds. In order to do so they needed to establish that they held rights of a proprietary nature in and with respect to the Almond Assets that were converted into the fund constituted by the net proceeds from the sale of the Almond Assets. It was not sufficient for the growers merely to establish that the rights that were extinguished to enable the SPD to be completed were rights that had value."

(Emphasis added.)

54. Thus, her Honour proceeded to consider the question of the proper characterisation of the Growers' pre-extinguishment rights and, in particular, whether they were of a proprietary nature<sup>118</sup>.

Were the Growers' pre-extinguishment rights of a proprietary nature?

55. The Growers conceded that the rights of the Growers in the 2002 Private Offer Scheme and 2002 Almond Scheme were contractual in nature and did not confer a proprietary interest<sup>119</sup>. As her Honour noted<sup>120</sup>:

"[47] Relevantly, the growers only acquired rights of a proprietary nature in the almonds that they grew. They did not acquire any proprietary interest in the land, the almond trees, the capital works or the water licences, which they were authorised to use and occupy by licence only".

---

<sup>118</sup> Judgment at [31].

<sup>119</sup> Judgment at [48] and [52].

<sup>120</sup> Judgment at [47], footnote omitted.

56. Her Honour thus concluded that, because their rights in respect of the assets sold were contractual only, the Growers in the 2002 Almond Scheme and the 2002 Private Offer Scheme had no entitlement to share in the net proceeds of sale.<sup>121</sup>
57. In relation to the 2005-2007 Almond Schemes, her Honour rejected the Banks' contention that the demise of a "Land Lot" was a demise of the physical land only, not the Growers' interest comprised by an Almondlot. Her Honour thus held that the definition of Almondlot meant that the Growers had a proprietary interest in the land, Capital Works and Trees by reason of the demise of those interests from TSL pursuant to the sub-leases<sup>122</sup>. However, her Honour determined that the Water Licences were not the subject of the demise from Almond Land to TSL and from TSL to the Growers, as the Water Licences were subject to a separate grant of a licence to TSL by Almond Land<sup>123</sup>. Accordingly, the Growers' interest in the Water Licences was of a contractual nature only<sup>124</sup>.
58. The effect of her Honour's judgment was, therefore that, for the 2005-2007 Almond Scheme Growers, the Growers' leasehold interest in the land, capital works and trees entitled them to make a claim on the net proceeds of sale referable to those assets, to be assessed by the value of those interests prior to their extinguishment<sup>125</sup>.
59. Her Honour also considered and rejected the following alternative arguments put by the Growers:
- (a) *First*, the contention that it would be derogation from the grant of the sub-lease for Almond Land or TSL to interfere with or to deny the Growers access to the land, trees, capital works and water licences. In this regard, her Honour reasoned that:
- "[74] The principle of non-derogation from grant entitles a lessee to remedies against the landlord [footnote omitted] but does not operate to create property rights that did not already exist under the terms of the grant. Accordingly if the assets were not part of the demise, this principle would not have advanced their case."

---

<sup>121</sup> Judgment at [48], [52].

<sup>122</sup> Judgment at [67]-[73].

<sup>123</sup> Judgment at [72].

<sup>124</sup> Judgment at [73].

<sup>125</sup> Judgment at [79].

- (b) *Secondly*, the contention that their rights to use and enjoy the land, capital works, water licences and trees constituted covenants that bound the reversion, on the basis that: (i) the covenant alleged to touch and concern Almond Land's land was not identified; and (ii) TSL could not confer upon the Growers a right it did not obtain from Almond Land and the head lease did not contain an express or inferred covenant to the effect argued by the Growers<sup>126</sup>.

Given that the projects could not continue under the Timbercorp structure, did the Growers' rights held any value just before they were extinguished?

60. Justice Davies assessed the value of the Growers' proprietary rights by reference to the following questions<sup>127</sup>:
- (a) first, were the relevant projects viable under the existing structures; and
  - (b) secondly, were the projects viable if restructured?
61. In relation to the first question, her Honour held that the Almond Schemes could not continue under their existing structures and were at risk of "imminent and inevitable" termination<sup>128</sup>, for the following reasons:

"[84] First, the insolvency of the Timbercorp Group meant that the projects could not continue under their existing structures. It was not a disputed fact that TSL, AL and AM were hopelessly insolvent. Nor was it a disputed fact that the Timbercorp group had no capacity to fund the capital expenditure for which it was responsible and that it had no capacity to absorb any funding shortfall arising from any defaults on participant grower invoices. All of the projects required significant cash contributions above the fees that the growers were contractually obliged to pay in order to meet operating requirements in relation to the management and harvesting of the 2010 crop. The lack of immediate funds meant that the continued operations could not be funded.

[85] Secondly, the operating and capital expenses of each of the projects were expected to exceed the anticipated 2010 harvest returns. The projects themselves had cash flow deficiencies and, in the view of the liquidators (which was not challenged), were insolvent because the projected returns were less than the project expenses, which the projects could not meet.

[86] Thirdly the orchards were at risk of wastage and impairment because of the lack of immediate funds available to the projects and the lack of any means of funding the continued operations.

---

<sup>126</sup> Judgment at [77]-[78].

<sup>127</sup> Judgment at [82].

<sup>128</sup> Judgment at [83].

[87] I find that the growers' rights under the projects as they were structured held no value at the time of extinguishment of those rights. The insolvency of the Timbercorp group and the cash flow deficiencies of the projects meant that the projects could not be funded and that they were at imminent and inevitable risk of termination as the purpose of the projects could not be accomplished."

62. In answering the question as to whether the Almond Schemes were viable if restructured, Davies J identified the relevant enquiry as being:

"[95] The growers' case on valuation depended on them showing on the balance of probabilities that the extinguishment of their rights lost them the opportunity to have the projects restructured and continued to full term. In order to value that lost opportunity the Court then makes an assessment of the probability or possibility of a viable restructure occurring, based on a consideration of the evidence. The value is ascertained by reference to the degree of probability or possibility of the event happening so that to have value, the possibility must be more than a mere hope or speculation. Thus the growers' case required some evidentiary basis from which the Court could evaluate the likelihood of the restructure counterfactual eventuating had the growers' rights not been extinguished. (Citations omitted.)"

63. Ultimately, her Honour concluded that there was no practical possibility of the Almond Schemes being restructured and thus continuing<sup>129</sup>. Her Honour reached this conclusion, by having regard to *inter alia* the following matters:

- (a) a new RE would need to have been appointed<sup>130</sup>;
- (b) Huntley Management Limited (**HML**) was the only company willing to undertake that responsibility, however there were insuperable contingencies in the way of HML replacing TSL as permanent RE<sup>131</sup>;
- (c) the orchards had to be sold to a new entity prepared to purchase the orchards subject to the rights of the Growers<sup>132</sup>;
- (d) a new manager would have to be located to replace TSL and/or Almond Management<sup>133</sup>;
- (e) the rights the Growers possessed were only valuable insofar as the orchards were being cared for and managed – the time in which the Growers could effect a restructure was therefore limited<sup>134</sup>;

---

<sup>129</sup> Judgment at [137].

<sup>130</sup> Judgment at [97].

<sup>131</sup> Judgment at [116].

<sup>132</sup> Judgment at [118].

<sup>133</sup> Judgment at [118].

- (f) there was no restructure proposal and therefore no factual basis from which the Court could evaluate the possibility that any restructure proposal would eventuate<sup>135</sup>;
  - (g) Mr Knox of HML's unchallenged and unequivocal evidence was that HML would not take on the role of permanent RE without modifications to s.601FS and s.601FT of the *Corporations Act 2001* (Cth) – modifications which had been rejected by ASIC<sup>136</sup>; and
  - (h) any modifications required by a restructure may have put the tax effectiveness of the Almond Schemes into jeopardy, rendering further involvement in the projects unattractive to investors<sup>137</sup> – in circumstances, where the changes required to effect the restructure would require member approval.<sup>138</sup>
64. By reason of the foregoing matters, her Honour concluded that no value could be or should be afforded to the Growers' rights:

“[137] These matters demonstrated, in my view, that any prospect that the projects would have been continued was wishful thinking and unfounded in the reality of the situation that the growers found themselves in, regrettable as it was. I could not conclude on the state of the evidence that there was any possibility, other than a theoretical possibility, that the projects would have continued, if the growers' rights had not been extinguished. Accordingly, in my view no value can or should be attributed to the rights given up.”

#### **D. The Almond Land Rights Appeal Proceeding**

65. By Notice of Appeal dated 11 July 2011, the representative growers in the Almond Land Rights Proceeding appealed against the orders made by Davies J following her Judgment<sup>139</sup>. The competing contentions of the representative growers and the secured creditors, BOSI and ANZ, are set out in Schedule B to these submissions.
66. In summary:
- (a) the Growers challenge Davies J's findings that:

---

<sup>134</sup> Judgment at [119].

<sup>135</sup> Judgment at [124].

<sup>136</sup> Judgment at [134].

<sup>137</sup> Judgment at [135(a)].

<sup>138</sup> Judgment at [124].

<sup>139</sup> Exhibit RWM-10 to the McClymont Almond Land Affidavit.



- (i) the nature of their interests gave the Growers in the 2002 Almond Project and the 2002 Private Offer Project no entitlement to share in the net proceeds of sale of the assets;
  - (ii) the Growers needed to establish rights of a proprietary nature in respect of the assets which were sold so as to ground an entitlement to share in the proceeds of sale;
  - (iii) in the circumstances, the Almond Schemes, and therefore the Growers' interests, were at risk of imminent and inevitable termination, with the result that no value could be ascribed to the rights of the Growers in the 2005-2007 Almond Schemes;
- (b) BOSI and ANZ seek to uphold the judgment, including on the alternative ground that the rights of the Growers in the 2005-2007 Almond Schemes under their sub-leases were in the nature of encumbrances and were not of a kind which could give rise to an entitlement to share in the proceeds of sale of the assets.

#### **E. The Remaining Apportionment Proceedings**

67. For the reasons that follow, it is appropriate that the Almond Land Rights Proceeding form the basis for assessing the likely manner in which the cognate issues arising in the remaining Timbercorp Apportionment Proceedings will be determined. Each of the remaining Timbercorp Apportionment Proceedings is now considered in turn:

##### **BB Olives Rights Proceeding**

68. On 16 March 2010, BOSI commenced the BB Olives Rights Proceeding seeking declarations as to its and various other parties' rights, if any, to the net sale proceeds arising from the sale of certain assets owned by BB Olives and Almond Land pursuant to the BB Olives Rights Land SPD and BB Olives Rights Water SPD.
69. The BB Olives Rights Proceeding concerns the land and assets used in the 2006-2008 Olive Schemes. The purpose of the BB Olives Rights Proceeding is to determine how the net sale proceeds are to be apportioned between:
- (a) BOSI as the secured creditor;
  - (b) the Growers; and

- (c) other interested parties claiming an interest in the net sale proceeds.
70. On 22 March 2010, the Court, *inter alia*, made orders appointing the following representative growers in respect of the BB Olives Rights Proceeding:
- (a) Michael Charles Vicary as the representative of the Growers in the 2006 Olive Scheme;
  - (b) Pamela Jan Dry as the representative of the Growers in the 2007 Olive Scheme; and
  - (c) David Butterfield as the representative of the Growers in the 2008 Olive Scheme.
71. The other parties to this proceeding are BB Olives, Almond Land and Timbercorp, as well as their liquidators, Messrs Korda, Mentha and Chesser. As noted above, BB Olives and Almond Land were the entities that owned the land on which the Olive Schemes were conducted.
72. The 2006-2007 Olive Schemes operated under the following structure and pursuant to the following relevant terms:
- (a) BB Olives granted a head lease of the land used in the schemes to TSL:
    - (i) the demise was solely for the purpose and duration of the schemes<sup>140</sup>;
    - (ii) under the head lease the Water Licences were licenced to TSL<sup>141</sup>;
  - (b) TSL then sub-leased the land to the Growers:
    - (i) the demise was contained in clause 3.1(a) of the sub-leases for the 2005-2007 Olive Schemes (the **Olive Scheme sub-leases**) and provided that the sub-lease was being granted to the Grower to use and occupy the relevant Grovelots for the sole purpose of conducting the “Grovelot operations”<sup>142</sup>;
    - (ii) “Grovelot” was defined in the Olive Scheme sub-leases to mean<sup>143</sup>:
 

an interest in the Project held by a Participant Grower, including its interest in, and rights in relation to, each stapled and separately identifiable area of the Land comprising 0.25 hectares...on which the

---

<sup>140</sup> Clause 5.1, 2006-2007 Olive Scheme Leases.

<sup>141</sup> Clause 1.1, 2006-2007 Olive Scheme Leases.

<sup>142</sup> Clause 3.1(a), 2006-2007 Olive Scheme sub-leases.

<sup>143</sup> Clause 1.1, 2006-2007 Olive Scheme sub-leases.

Participant Grower will conduct the Grovelot Operations, including the Olive Trees, Capital Works and the Water Licences attributed to the Project.

- (iii) the Growers acknowledged expressly in the Olive Scheme sub-leases that the Capital Works, Olive Trees and Water Licences were and would at all times remain, the property of BB Olives<sup>144</sup>;
- (iv) BB Olives was obliged under the Olive Scheme sub-leases to ensure that its rights under the Water Licences were fully exploited to maximize the use and enjoyment of them by all Growers in the Project<sup>145</sup>;
- (c) each Grower entered into a Grovelot Management Agreement with TSL pursuant to which the Growers agreed to pay management fees for the cultivation, harvesting and processing of the olives;
- (d) TSL then contracted those works out to Olivecorp Management Limited, who in turn engaged Boundary Bend Estate Management Pty Ltd as an independent contractor to manage the olive groves on a day to day basis and to harvest, process and market the olives and olive oil;
- (e) the Constitutions of the 2006-2007 Olive Schemes provided that:
  - (i) the term “Participant Grower” in the Constitution was a reference to the particular Grower in respect of the Grovelot or Grovelots that have been sub-leased to it under the sub-lease<sup>146</sup>;
  - (ii) a “Grovelot” was defined as<sup>147</sup>:

An interest in the Project held by the Participant Grower, including its interest in, and rights in relation to, each stapled and separately identifiable area of the Land comprising approximately 0.25 hectares... on which a Participant Grower will conduct the Grovelot Operations and which includes the Olive Trees, the Capital Works and the Capital Water Licences attributed to the Project, and in relation to a Participant Grower means the Participant Grower’s Grovelots.

---

<sup>144</sup> Clause 2.3, 2006-2007 Olive Scheme sub-leases.

<sup>145</sup> Clause 3.2(a) 2006-2007 Olive Scheme sub-leases.

<sup>146</sup> Clause 1.2(k), 2006-2007 Olive Scheme Constitutions.

<sup>147</sup> Clause 1.1, 2006-2007 Olive Scheme Constitutions.

- (iii) TSL (as RE) was empowered to lease the “Land” from the Land Owner, and sub-lease it to the Grower<sup>148</sup>;
  - (iv) “Land” was defined as “the land on which the Project will be conducted, as described in the product disclosure statement and such other land which is used in the Project”<sup>149</sup>;
  - (v) the sub-leases must be read subject to the terms and conditions of the Constitution<sup>150</sup>;
  - (f) each of the 2006-2007 product disclosure statements described the “Land” as including the “Water Licences and Capital Works”<sup>151</sup>.
73. The foregoing reveals that the rights conferred upon the Growers in the 2006-2007 Olive Schemes were materially the same to those conferred upon the Growers in the 2005-2007 Almond Schemes. Accordingly, applying the reasoning of Davies J in the Almond Land Rights Proceeding (and without modification having regarding to BOSI's and ANZ's notice of contention in the Almond Land Rights Appeal Proceeding), it is likely that the Growers in the 2006-2007 Olive Schemes will be held to have:
- (a) an interest in the Water Licences of a contractual nature only<sup>152</sup>; and
  - (b) a leasehold interest in the land, capital works and olive trees, entitling them to make a claim on the net proceeds of sale of the BB Olives Rights Land SPD and BB Olives Rights Water SPD referable to those assets, to be assessed by the value of those interests prior to their extinguishment<sup>153</sup>.
74. The 2008 Olive Scheme operated under the following structure and pursuant to the following relevant terms:
- (a) BB Olives and Almond Land granted a head lease of the land used in the scheme to TSL;

---

<sup>148</sup> Clause 11(l), 2006-2007 Olive Scheme Constitution.

<sup>149</sup> Clause 1.1, 2006-2007 Olive Scheme Constitutions.

<sup>150</sup> Clause 18.1, 2006-2007 Olives Scheme Constitutions.

<sup>151</sup> 2007 Olive Scheme PDS at p.83. 2006 Olive Scheme PDS at p.63.

<sup>152</sup> Judgment at [73].

<sup>153</sup> Judgment at [79].

- (b) TSL then granted a Grower a licence to use a part of the land for the cultivation of olive trees and the harvesting and processing of olives, which provided *inter alia* that -
- (i) BB Olives contributed the “Lots”<sup>154</sup> on which the Grovelot Operations were to be carried out – this meant that BB Olives supplied the land, the olive trees, the infrastructure for the olive groves and the water licences;
  - (ii) the Growers paid TSL a tax-deductible fee in return for the right to use and occupy the Grovelots under licence from BB Olives for a limited duration<sup>155</sup>;
  - (iii) the licence granted by TSL was solely for the purpose of the Grovelot Operations<sup>156</sup>;
  - (iv) the Growers expressly agreed that the land, the olive trees, the capital works and the water licences, would be and would remain, the property of BB Olives<sup>157</sup>;
  - (v) BB Olives was obliged to ensure that its rights under the Water Licences were fully exploited to maximize the use and enjoyment of them by all Growers in the Project<sup>158</sup>;
- (c) each Grower entered into a Grovelot Management Agreement with TSL pursuant to which the Growers agreed to pay management fees for the cultivation, harvesting and processing of the olives; and
- (d) TSL then contracted those works out to Olivecorp Management Limited, who in turn engaged Boundary Bend Estate Management Pty Ltd as an independent contractor to manage the olive groves on a day to day basis and to harvest, process and market the olives and olive oil.

75. As it was a registered scheme, the 2008 Olive Scheme also had a constitution. As in the case of the 2002 Almond Scheme<sup>159</sup>, clause 13.1 of the 2008 Olive Scheme

---

<sup>154</sup> Being the Andersons Lots, Suttons Lots, Westmores Lots and Ryans Lots.

<sup>155</sup> Clauses 4.1 and 7, 2008 Olive Scheme Licence Agreements.

<sup>156</sup> Clause 3.1 and 8.1, 2008 Olive Scheme Licence Agreements.

<sup>157</sup> Clause 2.3, 2008 Olive Schemes Licence Agreement.

<sup>158</sup> Clause 3.2(a) 2008 Olive Scheme Licence Agreements.

<sup>159</sup> Judgement at [51], citations omitted from the passage quoted.

Constitution did not provide a Grower with a proprietary right but rather stated that a Grower:

“is entitled to a several share of the whole of the Olives and the Crop (as defined) in each Financial Year in proportion to the Grower’s Participating Interest”.

76. It is therefore evident that the rights of the Growers in the 2008 Olive Scheme were of a contractual rather than proprietary nature. Thus, by force of Davies J’s reasoning in the Almond Land Rights Proceeding concerning the Growers in the 2002 Almond Scheme and the 2002 Private Offer Project, the Growers in the 2008 Olive Scheme will be unable to share in the net proceeds of the BB Olives Land SPD and BB Olives Water SPD, by reason of *inter alia*, their lack of a proprietary interest in the assets, the sale of which resulted in those proceeds.
77. On the available evidence, it is also manifestly clear that the Growers in the 2006-2008 Olive Schemes will be unable to establish that those schemes were viable:
  - (a) under their existing structures; or
  - (b) if restructured.
78. Specifically:
  - (a) as in the case of the Almond Schemes, the Olive Schemes could not continue under their existing structures and were at risk of “imminent and inevitable termination”. The matters set out in paragraphs 84 to 87 of the Judgment apply equally in the case of the Olive Schemes<sup>160</sup>;
  - (b) the insolvency of the Timbercorp Group meant that the Olive Schemes could not continue under their existing structures;
  - (c) the Timbercorp Group had no capacity to fund the capital expenditure for which it was responsible and that it had no capacity to absorb any funding shortfall arising from any defaults on Grower invoices;
  - (d) all of the Olive Schemes required significant cash contributions above the fees that the Growers were contractually obliged to pay in order to meet operating requirements in relation to the management and harvesting of the 2010 crop.

---

<sup>160</sup> Those matters are set out in the Third McClymont BB Olives Affidavit at [66].

The lack of immediate funds meant that the continued operations could not be funded;

- (e) the Olive Schemes were insolvent;
- (f) the olive groves were at risk of wastage and impairment because of the lack of immediate funds available to the Olive Schemes and the lack of any means of funding the continued operations;
- (g) the insolvency of the Timbercorp Group and the cash flow deficiencies of the Olive Schemes meant that the schemes could not be funded and that they were at imminent and inevitable risk of termination as the purpose of the Olive Schemes could not be accomplished;
- (h) moreover, the factors enumerated in sub-paragraphs 63(a), (c), (d), (f) and (h) above, with regard to the practically insuperable hurdles which faced any proposal for a continuation of the projects, apply with equal force to the Olive Schemes. A consideration of those matters in conjunction with the fact that:
  - (i) as at 28 August 2009, no party had offered to take on the role of replacement RE of the Olive Schemes on an unconditional and binding basis; and
  - (ii) the assets used in the 2006-2008 Olive Schemes were offered for sale or recapitalisation, and only four bids were received<sup>161</sup> - all of which were for the sale of the assets rather than recapitalisation of the schemes,

leads to the conclusion that no practical possibility of restructuring the 2006-2008 Olive Schemes has been identified or is likely to be identified.

79. There is one additional matter which provides further support for the conclusion that there was no realistic possibility of the 2006-2008 Olive Schemes continuing and realising value for the Growers. In *Re Willmott Forests Limited*<sup>162</sup>, the Court of Appeal recently concluded that a liquidator is entitled, on behalf of a company in liquidation which leases real property to another, to disclaim the lessee's interest in that property under s 568(1) of the *Corporations Act* 2001 (Cth). The availability of

<sup>161</sup> Korda 10 November 2009 affidavit at [64] and [72].

<sup>162</sup> [2012] VSCA 202. Nb. It is understood that an application for special leave to appeal this decision has been filed in the High Court.

disclaimer permits the liquidator to dispose of the freehold in the affected property, unencumbered by the lease, or to otherwise free itself of the lessee's interest. Such a course was, therefore, available (relevantly) to the liquidators of BB Olives as the owner of the land used in the 2006-2008 Olive Schemes had the orders facilitating the unencumbered sale of the assets not been made by Croft J on 12 November 2009, as described in paragraph 46(a) above. The Court of Appeal's decision provides further confirmation – along with the reasons outlined by Davies J in her judgment in the Almond Land Rights Proceeding – that a critical ingredient for the restructuring of the 2006-2008 Olive Schemes was in fact absent at the time the Growers' rights were extinguished; namely, security of tenure in the land the subject of those projects.

### Liparoo and Yungera Rights Proceeding

80. On 6 December 2011, ANZ commenced the Liparoo and Yungera Rights Proceeding by filing an originating motion, summons and supporting affidavit of Clint Hinchin<sup>163</sup>. ANZ seeks declarations as to its and various other parties rights, if any, to the net sale proceeds held on trust by the Receivers.
81. The Liparoo and Yungera Rights Proceeding concerns the land and assets the subject of the 2001 to 2005 Almond Schemes and the 2002 Almond Private Offer Project. Specifically:
  - (a) the 2001 Almond Scheme, the 2002 Almond Scheme, and the 2002 Private Offer Project were conducted on the Liparoo Land; and
  - (b) the 2003 Almond Scheme, the 2004 Almond Scheme, and the 2005 Almond Scheme were conducted on the Yungera Land<sup>164</sup>.
82. The purpose of the Liparoo and Yungera Rights Proceeding is to determine how the net proceeds from the sale of the Liparoo and Yungera properties and assets are to be apportioned between:
  - (a) ANZ as secured creditor;
  - (b) the Growers; and
  - (c) other interested parties claiming an interest in the net sale proceeds<sup>165</sup>.

---

<sup>163</sup> Hinchin Liparoo and Yungera Affidavit.

<sup>164</sup> Third Hinchin Liparoo and Yungera Affidavit at [17]-[18].



83. On 16 December 2011, the Court, *inter alia*, made orders appointing the following representative growers in respect of the Liparoo and Yungera Rights Proceeding<sup>166</sup>:
- (a) Graham Dace was appointed as the representative of the Growers in the 2001 Timbercorp Almond Project;
  - (b) Graham Goldenberg was appointed as the representative of the Growers in the 2002 Timbercorp Almond Project;
  - (c) Goran Runje was appointed as the representative of the Growers in the 2003 Timbercorp Almond Project;
  - (d) Graeme Philip Cole was appointed as the representative of the Growers in the 2004 Timbercorp Almond Project;
  - (e) Christopher Mark Littley was appointed as the representative of the Growers in the 2005 Timbercorp Almond Project; and
  - (f) David Butterfield was appointed as the representative of the Growers in the 2002 Private Offer Project.
84. The other parties to the proceeding are OIM#2, OIM#5 and the receivers and managers of those companies.
85. The 2002 Almond Scheme, the 2002 Private Offer Project and the 2005 Almond Scheme (insofar as they were conducted on the Almond Land) were the subject of the Judgment of Davies J, as described in paragraphs 55 and 56 above<sup>167</sup>. In relation to the 2002 Almond Scheme and the 2002 Private Offer Project, Davies J decided that the rights of the Growers were contractual only, and they therefore had no entitlement to make a claim on the net sale proceeds. In relation to the 2005 Almond Scheme, Davies J decided that the Growers held rights of a proprietary character in the land, trees and capital works, but those rights did not entitle the Growers to make a claim on the net sale proceeds because no value could be attributed to them (as those Schemes were not viable under the structures existing at the time the relevant Growers' rights were extinguished or under possible alternative structures).

---

<sup>165</sup> Third Hinchin Liparoo and Yungera Affidavit at [6].

<sup>166</sup> Third Hinchin Liparoo and Yungera Affidavit at [52].

<sup>167</sup> See also Third Hinchin Liparoo and Yungera Affidavit at [61].

86. The relevant project documents in relation to the 2002 Almond Scheme, the 2002 Private Offer Project and the 2005 Almond Scheme are described in the Third Hinchin Liparoo and Yungera Affidavit at paragraph 21.
87. Turning to the first of the remaining three projects the subject of the Liparoo and Yungera Rights Proceeding – the 2001 Almond Scheme (on the Liparoo Land) – the relevant project documents included a series of lease and licence agreements as follows:
- (a) by lease dated 12 October 2005, OIM#2 granted to Timbercorp a lease of the land, and use of water licences for the purposes of the Liparoo Projects<sup>168</sup>;
  - (b) by sub-lease dated 12 October 2005, Timbercorp sub-leased the land, and granted use of the water licences, to Almond Land<sup>169</sup>;
  - (c) by lease dated 1 March 2001, Almond Land leased the land to TSL, which lease was varied by deeds of variation dated 7 March 2002 and 16 July 2002<sup>170</sup>;
  - (d) by lease dated 1 March 2001, TSL sub-leased the land back to Almond Land, which sub-lease was varied by deeds of variation dated 7 March 2002 and 16 July 2002<sup>171</sup>;
  - (e) Almond Land and TSL entered into “licence and joint venture” agreements with Growers for each Grower’s participation in the management of an almond orchard, cultivation of almond trees, and the harvesting and processing of almonds<sup>172</sup>, and which provided *inter alia* that:

---

<sup>168</sup> Clause 5, Liparoo Projects head lease; Third Hinchin Liparoo and Yungera Affidavit at [21(a)] and exhibit CCH-1, document 1. It appears that this lease and the lease referred to in the following sub-paragraph were interposed in 2005 on the structure in place since 2001 (referred to in sub-paragraph (c) and following) at around the time OIM#2 became the trustee of TOT#3. See the Fisher Liparoo and Yungera Affidavit at [7] and exhibit ADF-1. In the licence and joint venture agreement dated 30 June 2001 (Exhibit CCH-1, document 13 to the Third Hinchin Liparoo and Yungera Affidavit), Almond Land was described as the “Land Owner” of the land on which the Project would be conducted.

<sup>169</sup> Clause 5, Liparoo Projects sub-lease; Third Hinchin Liparoo and Yungera Affidavit at [21(b)] and exhibit CCH-1, document 2.

<sup>170</sup> Third Hinchin Liparoo and Yungera Affidavit at [21(c)] and exhibit CCH-1, documents 3-5.

<sup>171</sup> Third Hinchin Liparoo and Yungera Affidavit at [21(d)] and exhibit CCH-1, documents 6-8.

<sup>172</sup> Third Hinchin Liparoo and Yungera Affidavit at [21(g)] and exhibit CCH-1, document 13.

- (i) the Growers acknowledged that the Capital Works and Water Licences were, and would at all times remain, the property of the Land Owner<sup>173</sup>;
  - (ii) Growers had the right to use and occupy the JV Almondlots solely for the purpose of the Joint Venture Operations<sup>174</sup>, and the licence did not confer a right of exclusive occupation in the JV Almondlots on the Growers<sup>175</sup>;
  - (iii) the licence was limited in duration, being expressed to continue until the earlier of the termination of the Joint Venturer's Participating Interest in the Project, 30 June 2019, and termination of the Project<sup>176</sup>.
88. The remaining two projects the subject of the Liparoo and Yungera Rights Proceeding, the 2003 and 2004 Almond Schemes (conducted on the Yungera property), operated under the following arrangements:
- (a) by lease dated 26 May 2006, Trust Company of Australia Limited (**The Trust Company**) granted a lease of the land, and use of water licences, to Timbercorp<sup>177</sup>;
  - (b) by sub-lease dated 26 May 2006, Timbercorp sub-leased the land, and granted use of the water licences, to Almond Land<sup>178</sup>;
  - (c) in relation to the 2003 Almond Scheme:
    - (i) by lease dated 11 March 2003, Almond Land leased the land to TSL<sup>179</sup>;
    - (ii) by sub-lease dated 11 March 2003, TSL sub-leased the land back to Almond Land<sup>180</sup>;
    - (iii) Almond Land then entered into "licence and joint venture" agreements with Growers for each Grower's participation in the management of an

---

<sup>173</sup> Clause 2.4.

<sup>174</sup> Clause 3.1.

<sup>175</sup> Clauses 3.2, 8.1(e), (f) and (h).

<sup>176</sup> Clause 4.1.

<sup>177</sup> Third Hinchin Liparoo and Yungera Affidavit at [22(a)] and clause 5 of exhibit CCH-1, document 18.

<sup>178</sup> Third Hinchin Liparoo and Yungera Affidavit at [22(b)] and clause 5 of exhibit CCH-1, document 19.

<sup>179</sup> Third Hinchin Liparoo and Yungera Affidavit at [22(c)] and exhibit CCH-1, document 20.

<sup>180</sup> Third Hinchin Liparoo and Yungera Affidavit at [22(d)] and exhibit CCH-1, document 21.

almond orchard, cultivation of almond trees, and the harvesting and processing of almonds<sup>181</sup>, and which provided *inter alia* that:

- (A) the Growers acknowledged that the capital works and water licences were, and would at all times remain, the property of the Land Owner<sup>182</sup>;
  - (B) Growers had the right to use and occupy the JV Almondlots solely for the purpose of the Joint Venture Operations<sup>183</sup>, and the licence did not confer a right of exclusive occupation in the JV Almondlots on the Growers<sup>184</sup>;
  - (C) the licence was limited in duration, being expressed to continue until the earlier of the termination of the Joint Venturer's Participating Interest in the Project, 30 June 2023, and termination of the Project<sup>185</sup>;
- (d) in relation to the 2004 Almond Scheme:
- (i) by lease dated 3 January 2006, Almond Land leased the land to TSL<sup>186</sup>;
  - (ii) by deed of sub-lease between Almond Land, TSL and Growers<sup>187</sup>, TSL granted the Growers a sub-lease to use and occupy the Almondlots for the cultivation of almond trees and the harvesting and processing of almonds, subject to terms including:
    - (A) the capital works, almond trees on, and water licences attaching to the Almondlots, remained the property of Almond Land<sup>188</sup>;
    - (B) any additional water licences purchased by Almond Land would not attach to the Almondlots and would remain the property of Almond Land<sup>189</sup>;

---

<sup>181</sup> Third Hinchin Liparoo and Yungera Affidavit at [22(g)] and exhibit CCH-1, document 24.

<sup>182</sup> Clause 2.3.

<sup>183</sup> Clause 3.1.

<sup>184</sup> Clauses 3.2, 8.1(e), (f) and (h).

<sup>185</sup> Clause 4.1.

<sup>186</sup> Third Hinchin Liparoo and Yungera Affidavit at [22(e)] and exhibit CCH-1, document 22.

<sup>187</sup> Third Hinchin Liparoo and Yungera Affidavit at [22(h)] and exhibit CCH-1, document 25.

<sup>188</sup> Clause 2.2(a).

<sup>189</sup> Clause 3.2(b).

- (C) the sub-lease was limited in duration, being expressed to continue until the earlier of the day prior to expiration or termination of the lease between Almond Land and TSL, termination of the Grower's Participating Interest in the Project, 30 June 2024, and termination of the Project<sup>190</sup>;
- (D) the sub-lease to Growers did not confer upon them exclusive rights of occupation<sup>191</sup>.

89. The project documents, as described above, reveal the following matters:

- (a) the rights conferred upon Growers in the 2004 Almond Scheme were the same as those conferred upon the Growers in the 2005-2007 Almond Schemes the subject of the Almond Land Rights Proceeding. Accordingly, if the reasoning of Davies J were applied (again, without modification having regard to BOSI's and ANZ's notice of contention in the Almond Land Rights Appeal Proceeding) to the Liparoo and Yungera Proceeding in relation to the 2004 Almond Scheme:
  - (i) the Growers' interest in the water licences would be found to be contractual in nature only<sup>192</sup>; and
  - (ii) the Growers' held a leasehold interest in the land, capital works and almond trees, entitling them to make a prima facie claim on the net sale proceeds of the Yungera Land, to be assessed by the value of those interests prior to their extinguishment<sup>193</sup>;
- (b) nevertheless, even if the Growers in the 2004 Almond Scheme were found to have enjoyed rights of a nature which entitled them to a prima facie entitlement to share in the net proceeds of sale, it is highly likely that those rights will be found to be of no value for the same reasons identified by Davies J in relation to the 2005-2007 Almond Schemes. In short, the project was not viable under its existing structure<sup>194</sup>, and the evidence does not support a finding that there was a realistic prospect of the Growers' identifying

---

<sup>190</sup> Clause 4.1.

<sup>191</sup> Clause 8.2(g)-(i) and (k).

<sup>192</sup> Judgment at [73].

<sup>193</sup> Judgment at [79]. It will be remembered, in this regard, that ANZ contends that a leasehold interest in an asset does not give the holder of the interest a right to share in the proceeds of sale of the asset.

<sup>194</sup> Third Hinchin Liparoo and Yungera Affidavit at [87] to [89].

a viable alternative structure. There were no bids made or maintained for the assets the subject of the 2004 Almond Scheme which contemplated the continuation of the project<sup>195</sup>; and

- (c) in relation to the 2001 Almond Scheme (a Liparoo project) and the 2003 Almond Scheme (a Yungera project), the rights of the Growers were merely contractual in nature (rather than proprietary). Thus, applying the analysis and conclusions expressed by Davies J in her Judgment concerning the 2002 Almond Scheme and the 2002 Private Offer Project, the Growers in the 2001 Almond Scheme and the 2003 Almond Scheme would have no entitlement to share in any of the net sale proceeds.

### Solara Rights Proceeding

- 90. On 6 December 2011, ANZ commenced the Solara Rights Proceeding by filing an originating motion, summons and supporting affidavit of Clint Hinchin<sup>196</sup>. ANZ seeks declarations as to its and various other parties rights, if any, to the net sale proceeds held on trust by the Receivers.
- 91. The Solara Rights Proceeding concerns the land and assets the subject of the Citrus Scheme. The purpose of the Solara Rights Proceeding is to determine how the net sale proceeds from the sale of land and related assets are to be apportioned between:
  - (a) ANZ as secured creditor;
  - (b) the Growers; and
  - (c) other interested parties claiming an interest in the net sale proceeds<sup>197</sup>.
- 92. On 16 December 2011, the Court, *inter alia*, made orders appointing Robert and Elizabeth Bugden as representative growers in respect of the Solara Rights Proceeding<sup>198</sup>.
- 93. The project documents for the Citrus Scheme included a series of lease and licence agreements<sup>199</sup>:

---

<sup>195</sup> Third Hinchin Liparoo and Yungera Affidavit at [93].

<sup>196</sup> Third Hinchin Solara Affidavit at [4].

<sup>197</sup> Third Hinchin Solara Affidavit at [6].

<sup>198</sup> Third Hinchin Solara Affidavit at [7].

<sup>199</sup> Third Hinchin Solara Affidavit at [18].

- (a) by lease dated 19 May 2005 (as varied by a deed of variation dated 9 September 2005) OIM#2 leased the Solora Land, including the capital works, to Timbercorp, together with a sub-licence of certain water licences owned by OIM#2<sup>200</sup>;
- (b) by sub-lease dated 19 May 2005 (as varied by deed of variation dated 9 September 2005) Timbercorp sub-leased the Solora Land to TSL, which also included the water licences and capital works<sup>201</sup>, and which demise was solely for the purpose and duration of the Citrus Scheme<sup>202</sup>; and
- (c) TSL entered into licence agreements with each of the Growers in respect of the Solora Land, granting the Growers a licence to use a part of the land for the cultivation of citrus trees and the harvesting and processing of citrus. The licence agreement provided, among other things, that:
  - (i) the licence was granted to the Grower to use the relevant Citruslots for the sole purpose of conducting the Citruslot Operations<sup>203</sup>, where "Citruslot" was defined to mean:
 

'an interest in the Project held by a Participant Grower, including its interest in, and rights in relation to, each coupled Existing Citruslot and New Citruslot (being approximately 0.25 hectares of the Orchard) on which a Participant Grower will conduct the Citruslot Operations and which includes the Citrus Trees, the Capital Works and the Required Water Licences attributed to the Project'<sup>204</sup>;
  - (ii) the Growers acknowledged that the Capital Works, Citrus Trees and Water Licences were, and would at all times remain, the property of OIM#2<sup>205</sup>;
  - (iii) the Growers paid TSL a tax-deductable fee in return for the right to use and occupy the Citruslots under licence from OIM#2 for a limited duration<sup>206</sup>;

---

<sup>200</sup> Clause 3.1, Citrus Project head lease.

<sup>201</sup> Clause 3.1, Citrus Project sublease. Note that, notwithstanding the reference in this clause to a 'lease' of the water licences being given, all Timbercorp enjoyed under the head lease, and could therefore confer on TSL under the sub-lease, was a licence to use the water licences.

<sup>202</sup> Clause 10.1, Citrus Project sublease.

<sup>203</sup> Clauses 3.1 and 8.1, Citrus Project licence.

<sup>204</sup> Clause 1.1, Citrus Project licence.

<sup>205</sup> Clauses 2.2(a) and 3.2(c), Citrus Project licence.

- (iv) TSL was obliged to ensure that its rights under the Water Licences were fully exploited to maximise the use and enjoyment of them by all Growers in the Project<sup>207</sup>;
- (v) the licence did not confer rights of exclusive occupation on the Growers<sup>208</sup>;
- (vi) the licence was limited in duration, being expressed to continue until the earlier of the expiry or termination of the sub-lease between Timbercorp and TSL, termination of the Grower's participating interest in the project, 29 June 2027, and termination of the Project.

94. The foregoing reveals that the Growers' rights in relation to the Citrus Scheme were of a contractual nature only, rather than of proprietary character. Thus, if the reasoning of Davies J in the Almond Land Rights Proceeding (in relation to the 2002 Private Offer Scheme and 2002 Almond Scheme were applied (without modification) to the Solora Proceeding, the Growers in the Citrus Scheme would have no entitlement to share in the net proceeds obtained from the sale of the Solora Land and related assets.

95. Further, even if it were found that the Growers had some right of a character entitling them to a prima facie interest in the net sale proceeds, on the available evidence there is no realistic prospect of the Growers in the Citrus Schemes establishing that the scheme was viable under the existing structure or if restructured. Thus, such rights as they may have had were worthless:

- (a) as already stated, TSL, the RE of the Citrus Scheme, could not perform its obligations because it was hopelessly insolvent and unable to fund the operations of the scheme<sup>209</sup>;
- (b) the available evidence does not reveal any alternative for continuation of the Citrus Scheme. Specifically, there is no material upon which the Court could conclude that the Citrus Scheme could have been restructured and continued as a viable project. While Food and Beverage Australia Limited and interests associated with a Grower, Ms Kerree Anne Bezençon, made proposals for the

---

<sup>206</sup> Clauses 4.1 and 7, Citrus Project licence.

<sup>207</sup> Clause 3.2(b), Citrus Project licence.

<sup>208</sup> Clauses 5.2, 8.2(g)-(i) and (k), 9.1 and 9.2, Citrus Project licence.

<sup>209</sup> See paragraphs 23 and 29 above.



appointment as replacement RE, none of these proposals succeeded<sup>210</sup>. Further, while the Receivers offered the Solora Land and associated assets for sale either encumbered by the Citrus Scheme or unencumbered, they received only three bids, with all purchasers indicating that they would only purchase the Solora Land and associated assets free from any encumbrances relating to the rights of the Growers in the Citrus Scheme<sup>211</sup>;

- (c) it therefore follows that, as Davies J found in the Almond Land Rights Proceeding, there was no alternative to extinguishment of the Growers' rights in the Citrus Scheme given that and the interests of Growers in the scheme were liable to imminent and inevitable extinction.

#### Fenceport Rights Proceeding

- 96. On 13 December 2011, Fenceport commenced the Fenceport Rights Proceeding seeking declarations as to its and various other parties' rights, if any, to the net sale proceeds arising from the sale of certain assets owned by Olivecorp Land pursuant to the Boort SPD and Boort Water SPD.
- 97. The Fenceport Rights Proceeding concerns the land and assets used in the 2000 Olive Private Offer Project and 2001-2004 Olive Schemes. The purpose of the Fenceport Rights Proceeding is to determine how the net sale proceeds are to be apportioned between:
  - (a) Fenceport as the secured creditor;
  - (b) the Growers; and
  - (c) other interested parties claiming an interest in the net sale proceeds.
- 98. On 16 December 2011, the Court, *inter alia*, made orders appointing the following representative growers in respect of the Fenceport Rights Proceeding:
  - (a) Con Moshopoulos as the representative of the Growers in the 2000 Olive Private Offer Project;
  - (b) Pauline Emma Hammer as the representative of the Growers in the 2001 Olive Scheme;

---

<sup>210</sup> Third Hinchin Solora Affidavit at [65].

<sup>211</sup> Third Hinchin Solora Affidavit at [66] and [67].

- (c) David Sydney Butterfield as the representative of the Growers in the 2002 Olive Scheme;
  - (d) Graham Goldenberg as the representative of the Growers in the 2003 Olive Scheme; and
  - (e) Shun King Li as the representative of the Growers in the 2004 Olive Scheme.
99. The other parties to this proceeding are Olivecorp Land and its liquidators, Messrs Korda and Mentha. As noted above, Olivecorp Land was the entity that owned the land on which the Olive Schemes were conducted.
100. The 2000 Olive Private Offer Project operated under the following structure and pursuant to the following relevant terms:
- (a) Olivecorp Land granted a lease of the land used in the schemes to Olivecorp Management:
    - (i) the demise was solely for the purpose of the 2000 Olive Private Offer Project<sup>212</sup>; and
    - (ii) in the event of the 2000 Olive Private Offer Project ended, the demise would automatically terminate<sup>213</sup>;
  - (b) Olivecorp Management then sub-leased the land back to Olivecorp Land;
    - (i) Olivecorp Land was obliged to use the land only in accordance with the 2000 Olive Private Offer Project<sup>214</sup>;
    - (ii) the sub-lease would automatically terminate in the event that the 2000 Olive Private Offer Project ended<sup>215</sup>;
  - (c) Olivecorp Land then entered into a licence and joint venture agreement with each of the Growers for each Grower's participation in the management of an olive grove, cultivation of olives and the production of olive oil for commercial sale, and which provided *inter alia* that:

---

<sup>212</sup> Clause 6, 2000 Olive Private Offer Lease.

<sup>213</sup> Clause 12, 2000 Olive Private Offer Lease.

<sup>214</sup> Clause 4, 2000 Olive Private Offer Sub-Lease.

<sup>215</sup> Clause 8, 2000 Olive Private Offer Sub-Lease.

- (i) the Growers acknowledged that the capital works and water licences were, and would at all times remain, the property of Olivecorp Land (the landowner)<sup>216</sup>;
- (ii) Growers had the right to use and occupy the olive groves solely for the purpose of the 2000 Olive Private Offer Project<sup>217</sup>;
- (iii) the licence did not confer a right of exclusive occupation in the olive groves on the Growers;<sup>218</sup>
- (iv) the licence was limited in duration, being expressed to continue until the earlier of the termination of the Grower's participating interest in the 2000 Olive Private Offer Project, and the termination of the 2000 Olive Private Offer Project<sup>219</sup>.

101. The 2001 and 2002 Olive Projects operated under the following structure and pursuant to the following relevant terms:

- (a) Olivecorp Land granted a lease of the land used in the schemes to TSL:
  - (i) the demise was solely for the purpose of the 2001 and 2002 Olive Projects<sup>220</sup>; and
  - (ii) in the event of the 2001 or 2002 Olive Project ended, the demise would automatically terminate<sup>221</sup>;
- (b) TSL then sub-leased the land back to Olivecorp Land;
  - (i) Olivecorp Land was obliged to use the land only in accordance with the 2000 Olive Private Offer Project<sup>222</sup>;
  - (ii) the sub-lease would automatically terminate in the event that the 2000 Olive Private Offer Project ended<sup>223</sup>;
- (c) Olivecorp Land and TSL then entered into a licence and joint venture agreement with each of the Growers for each Grower's participation in the

<sup>216</sup> Clause 2.4, 2000 Olive Private Offer License and Joint Venture Agreement.

<sup>217</sup> Clause 3.1, 2000 Olive Private Offer License and Joint Venture Agreement.

<sup>218</sup> Clause 3.2, 2000 Olive Private Offer License and Joint Venture Agreement.

<sup>219</sup> Clause 3.2, 2000 Olive Private Offer License and Joint Venture Agreement.

<sup>220</sup> Clause 6, 2001 and 2002 Olive Projects Lease.

<sup>221</sup> Clause 12, 2001 and 2002 Olive Projects Lease.

<sup>222</sup> Clause 4, 2001 and 2002 Olive Projects Sub-Lease.

<sup>223</sup> Clause 8, 2001 and 2002 Olive Projects Sub-Lease.

management of an olive grove, cultivation of olives and the production of olive oil for commercial sale, and which provided *inter alia* that:

- (i) the Growers acknowledged that the capital works and water licences were, and would at all times remain, the property of Olivecorp Land (the landowner)<sup>224</sup>;
- (ii) Growers had the right to use and occupy the olive groves solely for the purpose of the 2001 and 2002 Olive Projects<sup>225</sup>;
- (iii) the licence did not confer a right of exclusive occupation in the olive groves on the Growers;<sup>226</sup>
- (iv) the licence was limited in duration, being expressed to continue until the earlier of the termination of the Grower's participating interest in the 2000 Olive Private Offer Project, and the termination of the 2000 Olive Private Offer Project<sup>227</sup>.

102. The foregoing reveals that the Growers' rights in relation to the 2000 Olive Private Offer Project, the 2001 Olive Project and the 2002 Olive Project were of a contractual nature only, rather than a proprietary character. Accordingly, if the reasoning of Davies J in the Almond Land Rights Proceeding in relation to the 2002 Almond Private Offer Scheme and the 2002 Almond Scheme were applied (without modification) to the Fenceport Rights Proceeding, the Growers in the 2000 Olive Private Offer Project, the 2001 Olive Project and the 2002 Olive Project would have no entitlement to share in the net proceeds from the sale of the Olive Assets.

103. The 2003 and 2004 Olive Projects operated under the following structure and pursuant to the following relevant terms:

- (a) by lease dated 15 May 2003, Olivecorp Land leased the land to TSL, for use in accordance with the scheme documents of the 2003 and 2004 Olive Projects<sup>228</sup>; and

---

<sup>224</sup> Clause 2.4, 2001 and 2002 Olive Projects Licence and Joint Venture Agreement.

<sup>225</sup> Clause 3.1, 2001 and 2002 Olive Projects Licence and Joint Venture Agreement.

<sup>226</sup> Clause 3.2, 2001 and 2002 Olive Projects Licence and Joint Venture Agreement.

<sup>227</sup> Clause 4.1, 2001 and 2002 Olive Projects Licence and Joint Venture Agreement.

<sup>228</sup> Clause 6, 2003 and 2004 Olive Projects Lease.

- (b) by deed of sub-lease between Olivecorp Land, TSL and the Growers, TSL granted the Growers a sub-lease to use and occupy the Olive Grovelots for the cultivation of olives and the production of olive oil, subject to terms including:
  - (A) the capital works, olive trees on, and water licences attaching to the olive grovelots, remained the property of Olivecorp Land<sup>229</sup>; and
  - (B) the sub-lease was limited in duration, being expressed to continue until the earlier of the day prior to expiration or termination of the lease between Olivecorp Land and TSL, termination of the Grower's Participating Interest in the 2003 or 2004 Olive Project, 30 June 2026, and termination of the Projects<sup>230</sup>;
  - (C) the sub-lease to Growers did not confer upon them exclusive rights of occupation<sup>231</sup>.

104. The foregoing reveals that the Growers' rights in relation to the 2003 Olive Project and the 2004 Olive Project were of a proprietary character. Accordingly, if the reasoning of Davies J in the Almond Land Rights Proceeding in relation to the 2005 Almond Project was applied (without modification) to the Fenceport Rights Proceeding, the rights of the Growers in the Growers in the 2003 Olive Project and the 2004 Olive Project would not entitle them to make a claim on the net sale proceeds because no value could be attributed to them (as those Schemes were not viable under the structures existing at the time the relevant Growers' rights were extinguished or under possible alternative structures).
105. Further, even if it were found that the Growers had some right of a character entitling them to a prima facie interest in the net sale proceeds, on the available evidence, there is no realistic prospect of the Growers in the Olive Projects the subject of the Fenceport Rights Proceeding establishing that the schemes were viable under the existing structure or if restructured.<sup>232</sup> Accordingly, such rights as they may have had were worthless.

---

<sup>229</sup> Clause 2.3, 2003 and 2004 Olive Projects Sub-Lease.

<sup>230</sup> Clause 4.1, 2003 and 2004 Olive Projects Sub-Lease.

<sup>231</sup> Clause 5.2, 2003 and 2004 Olive Projects Sub-Lease.

<sup>232</sup> Second Sheridan Fenceport Affidavit at [81].

## F. Rights of secured creditors

### Liparoo and Yungera Rights Proceeding

106. ANZ's entitlement to the net sale proceeds under the Liparoo Sale Contract and the Yungera Sale Contract arises from its position as a secured creditor. The Liparoo and Yungera properties were subject to securities granted in favour of ANZ. These securities secured (among other things) amounts owing to ANZ pursuant to the following bilateral facilities<sup>233</sup>:
- (a) a \$27.6 million Loan Facility provided to OIM#2 (as trustee for TOT#3) on or about 30 September 2005 (**TOT#3 Facility**); and
  - (b) a \$72.9 million Loan Facility provided to OIM#5 (as trustee for TOT#5) on or about 12 April 2006 (**TOT#5 Facility**).
107. The total amount of the secured debt owed to ANZ as at 31 August 2012 under the TOT#3 Facility and the TOT#5 Facility was<sup>234</sup>:
- (a) AUD\$35,086,347.93 in respect of the TOT#3 Facility; and
  - (b) AUD\$90,060,823.31 in respect of the TOT#5 Facility.
108. In respect of the TOT#3 Facility, the interest margin (including a 2% default rate) continues to accrue at 2.75% per annum, together with a facility fee of 1% per annum<sup>235</sup>. In respect of the TOT#5 Facility, the interest margin (including a 2% default rate) continues to accrue at 3.75% per annum<sup>236</sup>.
109. In addition, pursuant to a deed of guarantee and indemnity dated on or around 30 September 2005 given by OIM#2 in favour of ANZ, OIM#2<sup>237</sup>:
- (a) guarantees that ANZ will be paid all money which OIM#2 (as trustee for TOT#2) owes to ANZ for any reason under or in relation to the relevant transaction documents (clause 2.1); and
  - (b) indemnifies ANZ against any loss that it suffers in the event that all money which OIM#2 (as trustee for TOT#2) owes to ANZ for any reason under or in relation to the relevant transaction documents is not paid to ANZ (clause 2.2).

<sup>233</sup> Third Hinchin Liparoo and Yungera Affidavit at [27].

<sup>234</sup> Third Hinchin Liparoo and Yungera Affidavit at [28].

<sup>235</sup> Third Hinchin Liparoo and Yungera Affidavit at [28].

<sup>236</sup> Third Hinchin Liparoo and Yungera Affidavit at [28].

<sup>237</sup> Third Hinchin Liparoo and Yungera Affidavit at [29], exhibit CCH-2, document 7.

110. On the basis of this guarantee and indemnity, read together with the charge and mortgage referred to immediately below, the secured debt owed by OIM#2 to ANZ includes (in addition to the amount set out at above) any amount owing to ANZ in respect of the Solora Secured Debt Shortfall (as defined in clause 1.1(mm) of the Solora Deed of Compromise)<sup>238</sup>.
111. The securities held by ANZ in relation to the above facilities included the following:
- (a) in respect of the TOT#3 Facility<sup>239</sup>:
    - (i) a first ranking fixed and floating charge dated 30 September 2005 from OIM#2 in favour of ANZ over all rights, property and undertaking of OIM#2 which relate to TOT#3<sup>240</sup>; and
    - (ii) a real property mortgage (No. AE000193F) dated 30 September 2005 from OIM#2 in favour of ANZ over the Liparoo Land<sup>241</sup>;
  - (b) in respect of the TOT#5 Facility:
    - (i) first ranking fixed and floating charge dated 26 May 2006 from OIM#5 in favour of ANZ over all rights, property and undertaking of OIM#5 which related to TOT#5<sup>242</sup>;
    - (ii) fixed and floating charge dated 26 May 2006 from The Trust Company, in favour of ANZ over all rights, property and undertaking of The Trust Company which related to TOT #5<sup>243</sup>; and
    - (iii) a real property mortgage (No: AE486453Q) dated 26 May 2006 from The Trust Company in favour of ANZ over the Yungera Land<sup>244</sup>.

### Solora Rights Proceeding

112. Turning to the position of ANZ, the Solora Land was subject to securities granted in favour of ANZ to secure amounts owing pursuant to a \$9.398 million loan facility

<sup>238</sup> Third Hinchin Liparoo and Yungera Affidavit at [29].

<sup>239</sup> Third Hinchin Liparoo and Yungera Affidavit at [31].

<sup>240</sup> Third Hinchin Liparoo and Yungera Affidavit Exhibit CCH-2, document 8.

<sup>241</sup> Third Hinchin Liparoo and Yungera Affidavit Exhibit CCH-2, document 9.

<sup>242</sup> Third Hinchin Liparoo and Yungera Affidavit Exhibit CCH-2, document 10.

<sup>243</sup> Third Hinchin Liparoo and Yungera Affidavit Exhibit CCH-2, document 11.

<sup>244</sup> Third Hinchin Liparoo and Yungera Affidavit Exhibit CCH-2, document 12.

provided to OIM#2 on about 30 September 2005, which was later varied to \$11.4 million by a Deed of Variation dated 18 April 2007 (the **TOT#2 Facility**)<sup>245</sup>.

113. The securities held by ANZ in relation to the TOT#2 Facility were:
  - (a) a first ranking fixed and floating charge dated 30 September 2005 from OIM#2 over all rights, property and undertaking of OIM#2 which relate to TOT#2<sup>246</sup>; and
  - (b) a real property mortgage dated 27 October 2005 from OIM#2 over the Solora Land<sup>247</sup>.
114. The total amount of the secured debt owed to ANZ under the TOT#2 Facility as at 31 August 2012 was AUD\$13,360,280.51, with the interest margin (including a 2% default rate) continuing to accrue at 2.75% per annum together with a facility fee accruing at 1% per annum<sup>248</sup>.

#### Almond Land Rights Appeal Proceeding

115. The Syndicate Banks advanced principal of \$200 million to Timbercorp (**Syndicate Loan**)<sup>249</sup>. As at 13 September 2012, the amount owed to the Syndicate Banks was \$183,627,796.80 (taking into account the \$82,864,365 paid to BOSI as a result of the Almond Land Rights Proceeding).
116. ANZ granted to Almond Land a loan facility of up to \$45 million for the purpose of funding the almond operations of Timbercorp and its subsidiaries<sup>250</sup>. The amount owed by Almond Land to ANZ under the facility (including interest) as at 14 January 2011 was \$56,244,445.57<sup>251</sup>. That indebtedness was reduced by \$48,084,378.68 being the proceeds paid to ANZ as a result of the Almond Land Rights Proceeding.
117. The land and water shares sold pursuant to the Olam SPD were, until completion, subject to securities in favour of BOSI and the first respondent, ANZ. Those

---

<sup>245</sup> Third Hinchin Solora Affidavit at [24].

<sup>246</sup> Third Hinchin Solora Affidavit Exhibit CCH-2, document 9.

<sup>247</sup> Third Hinchin Solora Affidavit Exhibit CCH-2, document 10.

<sup>248</sup> Third Hinchin Solora Affidavit at [25].

<sup>249</sup> Third McClymont Almond Land Affidavit at [35].

<sup>250</sup> Third McClymont Almond Land Affidavit at [36].

<sup>251</sup> Third McClymont Almond Land Affidavit at [36].



securities secured the debts referred to in the previous two paragraphs and relevantly included<sup>252</sup>:

- (a) Registered Land Mortgage No AG360673L dated 30 December 2008 in favour of BOSI;
- (b) Registered Water Mortgage No MOR001572 dated 30 December 2008 in favour of BOSI;
- (c) Registered Land Mortgage No AE683873S dated 26 September 2006 in favour of ANZ;
- (d) Registered Land Mortgage No AG290139V dated 24 December 2008 in favour of ANZ;
- (e) Limited fixed and floating charge (ASIC No 1364261) registered 6 October 2006 in favour of ANZ; and
- (f) Limited fixed and floating charge (ASIC No 1364257) registered 6 October 2006 in favour of ANZ.

#### BB Olives Rights Proceeding

118. In relation to BOSI's claim to the net sale proceeds the subject of the BB Olives Rights Proceeding, BB Olives also guaranteed to BOSI the due and punctual payment of the Syndicate Loan – a promise, which was secured, *inter alia* by securities referred to in the following paragraph. Certain of the Water Shares and Olive Assets sold pursuant to the Water SPD and Land SPD respectively were, until completion, subject to those securities<sup>253</sup>.

119. Specifically:

- (a) twelve of the thirteen titles comprising the land owned by BB Olives and sold pursuant to the Land SPD were the subject of registered land mortgage No: AG323075S dated 30 December 2008 in favour of BOSI<sup>254</sup>;

---

<sup>252</sup> Third McClymont Almond Land Affidavit at [37].

<sup>253</sup> Third McClymont BB Olives Affidavit at [37].

<sup>254</sup> Third McClymont BB Olives Affidavit at [38(a)].

- (b) eleven of the twelve "Water Shares" sold pursuant to the Water SPD were the subject of registered water mortgage No MOR001534 dated 30 December 2008 in favour of BOSI<sup>255</sup>; and
- (c) the Olive Assets also included shares in BBL owned by Timbercorp. Those shares are "Charged Property" pursuant to a Featherweight Fixed and Floating Charge granted by Timbercorp to BOSI and dated 15 December 2006<sup>256</sup>.

### Fenceport Rights Proceeding

120. Fenceport's rights as a secured creditor are outlined in paragraph 41 above.

### **G. Background to Deeds of Compromise**

121. As stated above, on 16 December 2011, Davies J made orders appointing representative growers pursuant to r 16.01(2) of the Rules in each of the Liparoo and Yungera Rights Proceeding, Solora Rights Proceeding, and the Fenceport Rights Proceeding. Representative Growers in the Almond Land Rights Proceeding were appointed pursuant to orders made on 22 December 2009, and in the BB Olives Rights Proceeding on 22 March 2010. (The representative growers appointed in each proceeding are hereafter referred to collectively as the "**Representative Growers**").
122. Immediately prior to the hearing on 16 December 2011, affidavits were filed on behalf of:

- (a) ANZ in which it was stated that (among other things)<sup>257</sup>:

Following the appointment by the Court of the Grower Representatives... ANZ intends to put a without prejudice settlement proposal to those representatives with a view to ascertaining if a compromise of the proceeding can be reached which would be binding on all Growers, subject to the approval of the Court.

- (b) Fenceport in which it was stated that (among other things)<sup>258</sup>:

Assuming that orders are granted by the Court to have the five nominated Growers from each of the Boort Schemes joined as defendants and appointed as representatives in this proceeding, the plaintiffs intend to then enter into without prejudice negotiations with those Growers with a view to seeking a compromise of the dispute as to the parties' entitlement to the Boort Net Proceeds.

---

<sup>255</sup> Third McClymont BB Olives Affidavit at [38(b)].

<sup>256</sup> Third McClymont BB Olives Affidavit at [38(c)].

<sup>257</sup> Hinchin Liparoo and Yungera Affidavit at [54] and Hinchin Solora Affidavit at [50].

<sup>258</sup> Korda Fenceport Affidavit at [39].

123. On 24 February 2012, a settlement proposal was put to the Representative Growers by ANZ in the Liparoo and Yungera Rights Proceeding and Solara Rights Proceeding<sup>259</sup>. Similar offers were then made by secured creditors in the remaining Timbercorp Apportionment Proceedings. Negotiations about the terms of the settlement proposals took place over nearly five months between February and July 2012<sup>260</sup>, involving legal representatives for each of the parties, with Clarendon Lawyers acting on behalf of the Representative Growers in each proceeding<sup>261</sup>.
124. On 25 July 2012, Deeds of Compromise were executed by the parties to each of the respective Timbercorp Apportionment Proceedings<sup>262</sup>.

## **H. Deeds of Compromise**

125. Clauses 2, 4 and 5 are central to the Deeds of Compromise. In summary, they address the parties' respective entitlements to the "Fund"<sup>263</sup> comprising the net sale proceeds from the sale of assets and land the subject of each proceeding and, if Court approval is obtained, provide that the parties (including Growers<sup>264</sup>) will give mutual releases to one another in relation to their entitlements to each such Fund.
126. Before turning to some of the detail of how it is proposed each Fund will be allocated, three other features of the Deeds of Compromise bear noting.
127. First, each Deed of Compromise only takes effect if (in certain cases, among other things) there is court approval of each of the other Deeds of Compromise pursuant to r 16.01(4) of the Rules<sup>265</sup>. Accordingly, if any one of the Deeds of Compromise does not receive court approval, none will be effective; this reflects the intended objective of a global (cf piecemeal) settlement of the Timbercorp Apportionment Proceedings. Further, court approval must be obtained before 31 December 2012.
128. Secondly, notices are required to be sent to Growers informing them of matters including the background to the relevant proceedings; the substance of the relevant Deed of Compromise including the mechanism for payment of monies out of the

---

<sup>259</sup> Third Hinchin Liparoo and Yungera Affidavit at [96]; Third Hinchin Solara Affidavit at [70]; Third Sheridan Fenceport Affidavit at [84].

<sup>260</sup> Third Hinchin Liparoo and Yungera Affidavit at [97]; Third Hinchin Solara Affidavit at [71].

<sup>261</sup> Third Hinchin Liparoo and Yungera Affidavit at [97]; Third Hinchin Solara Affidavit at [71].

<sup>262</sup> Third Hinchin Liparoo and Yungera Affidavit at [98]; Third Hinchin Solara Affidavit at [71].

<sup>263</sup> Defined in cl 1.1 of the Deeds of Compromise.

<sup>264</sup> Defined in cl 1.1 of the Deeds of Compromise as the "Participant Growers".

<sup>265</sup> Clause 3 of the Deeds of Compromise.

Fund; the proposed approval process; and Growers' options in relation to the Deed of Compromise and the approval process<sup>266</sup>. The notices are required to be uploaded onto various websites, with short letters to be sent to Growers informing them of the notices and an advertisement also placed in The Australian newspaper.

129. Thirdly, TSL is responsible for performing a range of administrative roles in connection with the compromise and approval application, such as distributing the notices to Growers, establishing a telephone hotline and email information service, and recording and providing to Representative Growers details of comments, questions, answers and objections made, given or raised by Growers<sup>267</sup>.
130. The mechanism for allocation and distribution of the Fund in each proceeding is in clause 4 of the Deeds of Compromise. The operation of clause 4 is broadly consistent across all the deeds. There are, however, some minor variations reflecting circumstances particular to each proceeding.

#### Liparoo and Yungera

131. Clause 4 of the Liparoo and Yungera Deed of Compromise provides, in substance, that the following payments are to be made by the Receivers from the Fund following court approval of the Deeds of Compromise:
  - (a) to the extent approved by the Court, the unpaid costs of the Receivers;
  - (b) to TSL, to be held on trust for distribution to, or on behalf of, Growers, in accordance with their entitlements (as further defined in the Deed of Compromise<sup>268</sup>):
    - (i) \$8,000,000 or approximately 5% of the gross sale proceeds of the subject assets, with \$2,094,096.18 of that sum to be apportioned between Growers in the Liparoo Projects, and \$5,905,903.82 of that sum to be apportioned between Growers in the Yungera Projects, with such apportionment to be based on the number of the almondlots held by each Grower in those projects on 10 February 2010 (being the date

---

<sup>266</sup> Clause 6 of the Deeds of Compromise.

<sup>267</sup> Clause 9 of the Deeds of Compromise.

<sup>268</sup> Summarised in the Third Hinchey Liparoo and Yungera Affidavit at [120(g)-(l)].

on which the Growers' rights were extinguished pursuant to court order)<sup>269</sup>;

(ii) \$1,796,000 for Growers in the 2001 Almond Project, to be apportioned on a pro-rated basis according to the number of almondlots held by each Grower on 10 February 2010 (being the date on which the Growers' rights in the Liparoo Projects were extinguished pursuant to court order)<sup>270</sup>;

(c) to ANZ, in respect of amounts outstanding under the TOT#3 Facility and TOT#5 Facility<sup>271</sup> and any shortfall owing to ANZ under the TOT#2 Facility following payment to ANZ in respect of that facility under the Solora Deed of Compromise<sup>272</sup>; and

(d) the balance of the Fund to be paid to OIM#2 and OIM#5.

132. The \$8,000,000 allocated to the Growers in the Liparoo and Yungera Projects equates to \$521.31 per lot located on the Liparoo and Yungera Land<sup>273</sup>.

133. The additional \$1,796,000 allocated to the Growers in the 2001 Almond Project equates to \$2,000 per lot<sup>274</sup>.

### Solora

134. Clause 4 of the Solora Deed of Compromise provides, in substance, that the following payments are to be made by the Receivers from the Fund following court approval of the Deeds of Compromise:

- (a) to the extent approved by the Court, the unpaid costs of the Receivers;
- (b) to TSL, to be held on trust for distribution to, or on behalf of, Growers, in accordance with their entitlements (as further defined in the Deed of

---

<sup>269</sup> The different values attributable to the almondlots are identified in the Third Hinchin Liparoo and Yungera Affidavit at [102(e) and (f)].

<sup>270</sup> This additional amount is payable by way of consideration for the extinguishment of the interests of these Growers in the trees on their almondlots: see the definition of "2001 Timbercorp Almond Project Grower Tree Payment" in clause 1.1(aaa) of the Liparoo and Yungera Deed of Compromise. See further paragraph 140 below.

<sup>271</sup> Third Hinchin Liparoo and Yungera Affidavit at [23]-[32].

<sup>272</sup> Third Hinchin Liparoo and Yungera Affidavit at [29].

<sup>273</sup> Third Hinchin Liparoo and Yungera Affidavit at [102(b)(i)], [102(e)(i)].

<sup>274</sup> Third Hinchin Liparoo and Yungera Affidavit at [102(b)(ii)], [102(e)(ii)]. See also fn 272, above and paragraph 140 below concerning these Growers' entitlements.

Compromise<sup>275</sup>), \$650,000 or approximately 5% of the gross sale proceeds of the subject assets, to be apportioned between the Growers on a pro-rated basis according to the number of citruslots held by each Grower on 9 April 2010 (being the date on which the Growers' rights in the Citrus Project were extinguished pursuant to court order);

- (c) to ANZ, in respect of amounts outstanding under the TOT#2 Facility<sup>276</sup>;
- (d) the balance of the Fund, if any, to be paid to OIM#2.

135. The \$650,000 allocated to the Growers in the Solara Projects equates to \$316.80 per lot<sup>277</sup>.

### Almond Land

136. Clause 4 of the Almond Land Deed of Compromise provides, in substance, that following court approval of the Deeds of Compromise, BOSI will pay \$3,819,000 and ANZ will pay \$2,181,000 (in total, \$6 million) to TSL, to be held on trust for distribution to, or on behalf of, Growers, in accordance with their entitlements (as further defined in the Deed of Compromise<sup>278</sup>). The Growers' entitlement amounts to approximately 5% of the gross sale proceeds of the subject assets, and the settlement sum to be apportioned between the Growers on a pro-rated basis according to the number of almondlots held by each Grower on 2 December 2009 (being the date on which the Growers' rights were extinguished pursuant to court order). The \$6 million allocated to Growers in the Almond Land Projects equates to \$186.57 per lot located on the Almond Land.

### BB Olives

137. Clause 4 of the BB Olives Deed of Compromise<sup>279</sup> provides, in substance, that the following payments are to be made by the liquidators of BB Olives from the Fund following court approval of the Deeds of Compromise:

- (a) 1,185,000 or approximately 5% of the gross sale proceeds of the subject assets to TSL, to be:

<sup>275</sup> Summarised in the Third Hinchin Solara Affidavit at [76(c)-(h)].

<sup>276</sup> Third Hinchin Solara Affidavit at [21]-[28].

<sup>277</sup> Third Hinchin Solara Affidavit at [76(b)].

<sup>278</sup> Third McClymont Almond Land Affidavit at [53].

<sup>279</sup> Exhibit CJA-4 to Second Armstrong BB Olives Affidavit.

- (i) held on trust for distribution to, or on behalf of, Growers, in accordance with their entitlements (as further defined in the Deed of Compromise); and
  - (ii) apportioned on a pro-rated basis according to the number of grovelots held by each Grower on 11 January 2010 (being the date on which the Growers' rights in the 2006-2008 Olive Projects were extinguished pursuant to court order);
- (b) the balance of the Fund to be paid to BOSI.
138. The \$1,185,000 allocated to the Growers in the 2006-2008 Olive Projects equates to \$92.43 per lot.

### Fenceport

139. Clause 4 of the Fenceport Deed of Compromise provides<sup>280</sup>, in substance, that the following payments are to be made by the Liquidators of Olivecorp Land from the Fund following court approval of the Deeds of Compromise:
- (a) to TSL, to be held on trust for distribution to, or on behalf of, Growers, in accordance with their entitlements (as further defined in the Deed of Compromise), \$1,815,000 or approximately 5% of the gross sale proceeds of the subject assets, to be apportioned between the Growers in the 2000 Olives Private Offer Project and the 2001–2004 Olives Schemes on a pro-rated basis according to the number of Grovelots held by each Grower on 11 January 2010 (being the date on which the Growers' rights in the relevant Olives Schemes were extinguished pursuant to court order);
  - (b) to Fenceport, in respect of amounts outstanding to repay the Advance and discharge the New Securities;
  - (c) the balance of the Fund to be paid to Olivecorp Land.
140. The \$1,815,000 allocated to the Growers in the 2000 Olive Private Offer Project and 2001–2004 Olives Schemes equates to \$163.81 per lot<sup>281</sup>.

### Summary

---

<sup>280</sup> Summarised in the Second Sheridan Fenceport Affidavit at [90].

<sup>281</sup> Third Hinch Solora Affidavit at [76(b)].

141. The following three tables show the Growers' respective entitlements under the Deeds of Compromise for each of the projects<sup>282</sup>:

| <b>Timbercorp Almond Project</b> | <b>Almond Land Compromise Grower entitlement per lot</b> | <b>Liparoo &amp; Yungera Compromise entitlement per lot</b> | <b>Tree purchase per lot</b> | <b>Total Grower entitlement per lot</b> |
|----------------------------------|--|---|------------------------------|---|
| 2001 Almond                      | -  | \$521.31  | \$2,000                      | \$2,521.31                              |
| 2002 Almond (private offer no 1) | \$53.46  | \$371.93  | -                            | \$425.39                                |
| 2002 Almond                      | \$54.89  | \$367.93  | -                            | \$422.82                                |
| 2003 Almond                      | -  | \$521.31  | -                            | \$521.31                                |
| 2004 Almond                      | -  | \$521.31  | -                            | \$521.31                                |
| 2005 Almond                      | \$121.24   | \$182.54  | -                            | \$303.78                                |
| 2006 Almond                      | \$186.57   | -   | -                            | \$186.57                                |
| 2007 Almond                      | \$186.57   | -   | -                            | \$186.57                                |

| <b>Timbercorp Olive Project</b> | <b>Fenceport Compromise entitlement per lot</b> | <b>BB Olives Compromise entitlement per lot</b> | <b>Total entitlement per lot</b> |
|---------------------------------|---|---|----------------------------------|
| 2000 Olive (Private Offer)      | \$163.81  | -   | \$163.81                         |
| 2001 Olive                      | \$163.81  | -   | \$163.81                         |
| 2002 Olive                      | \$163.81  | -   | \$163.81                         |
| 2003 Olive                      | \$163.81  | -   | \$163.81                         |
| 2004 Olive                      | \$163.81  | -   | \$163.81                         |
| 2006 Olive                      | -   | \$92.43   | \$92.43                          |
| 2007 Olive                      | -   | \$92.43   | \$92.43                          |
| 2008 Olive                      | -   | \$92.43   | \$92.43                          |

| <b>Timbercorp Citrus Project</b> | <b>Solora Compromise entitlement per lot</b> | <b>Total entitlement per lot</b> |
|----------------------------------|--|----------------------------------|
| 2005 Citrus                      | \$316.80                                     | \$316.80                         |

<sup>282</sup> Second Armstrong Liparoo and Yungera Affidavit at exhibit CJA-8, p 9.



142. The above tables indicate that the Growers' ultimate entitlements "per lot" vary from project to project. That is not a reflection of how much it is proposed under the Deeds of Compromise the Growers will obtain as a percentage of the amounts currently held in each Fund (being approximately 5%), but reflects the varying net sale proceeds (from the sale of the relevant assets) obtained in each case. Buyers paid differing amounts for the assets in each of the Timbercorp projects having regard to factors such as the location and value of the land, and the age of the trees<sup>283</sup>. The amount set aside for Growers from each sale transaction – the "entitlement per lot" – is then a function of the number of lots in each of the relevant projects.
143. It is to be noted that unlike the other Timbercorp schemes, Growers in the 2001 Almond Project owned the trees on their lot. The relevant project documents provided that Growers would be entitled to \$2,000 per lot for their trees when the trees were sold<sup>284</sup>.

#### **I. Court approval of the Deeds of Compromise: applicable principles**

144. As already stated, it is a condition precedent of the Deeds of Compromise that, on or before 31 December 2012, and pursuant to r 16.01(4) of the Rules, the Court approves each compromise and orders that it is binding on absent persons represented by the Representative Growers<sup>285</sup>.
145. Rule 16.01(4) of the Rules provides that:

Where a compromise of a proceeding is proposed and some of the persons who are interested in, or who may be affected by, the compromise are not parties (including unborn or unascertained persons) but –

- (a) ...
- (b) the absent persons are represented by a person appointed under paragraph [16.01](2) and the appointed person so assents –

the Court, if satisfied that the compromise is for the benefit of the absent persons, may approve the compromise and order that it shall be binding on the absent persons, and they shall be bound accordingly except where the order is obtained by fraud or non-disclosure of material facts.

<sup>283</sup> Second Armstrong Liparoo and Yungera Affidavit at exhibit CJA-8, p 10.

<sup>284</sup> Clauses 2.4 and 4.3 of the Licence and Joint Venture Agreement: Third Hinchin Liparoo and Yungera Affidavit at [21(g)], exhibit CCH-1, document 13.

<sup>285</sup> In the Almond Land Rights Appeal Proceeding, orders are to be made by the Court of Appeal dismissing the appeal, with no order as to costs: sch 3 of the Almond Land Rights Appeal Proceeding Deed of Compromise, exhibited to the Armstrong Almond Land Affidavit at exhibit CJA-1. In addition, the Liparoo and Yungera Compromise and the Solara Compromise are also subject to a condition precedent that, pursuant to rule 54.02 of the Rules, the Court approves OIM#2 and OIM#5 (in the case of the Liparoo and Yungera Compromise) and OIM#2 (in the case of the Solara Compromise) agreeing to the respective compromises.

146. The jurisdictional facts necessary to engage the Court’s power under r 16.01(4) are present in each of the Timbercorp Apportionment Proceedings:
- (a) a compromise of the proceedings has been proposed;
  - (b) there are Growers who are interested in, or who may be affected by, the relevant compromises;
  - (c) Growers who are “absent” (in the sense of not being a party to the proceedings) are represented by Representative Growers appointed under r 16.01(2) of the Rules; and
  - (d) for the reasons that follow, the Court can be satisfied that the Deeds of Compromise are, in each case, for the benefit of Growers (*qua* “absent persons”).
147. The principles relevant to determining whether, for the purposes of r 16.01(4), a compromise is “for the benefit” of absent persons, were recently identified and considered by Habersberger J in *Exxonmobil Superannuation Plan Pty Ltd v Esso Australia Pty Ltd*<sup>286</sup>. They can be summarised as follows:
- (a) In its ordinary meaning, something is “for the benefit of” a person if it is an advantage or profit for that person, or a gain for that person<sup>287</sup>.
  - (b) Although it is essential that the court applies the test in r 16.01(4), class action cases (in which court approval of a proposed settlement is required) provide useful guidance<sup>288</sup>. Relevant considerations identified in such cases include:
    - (i) the amount offered to each group member;
    - (ii) the prospects of success in the proceeding;
    - (iii) the likelihood of the group members obtaining judgment for an amount significantly in excess of the settlement offer;

---

<sup>286</sup> [2010] VSC 357.

<sup>287</sup> [2010] VSC 357 at [52], with references to *The Shorter Oxford English Dictionary on Historical Principles*, p.181 and *Butterworths Australian Legal Dictionary*, p.121.

<sup>288</sup> [2010] VSC 357 at [60]. In Victoria, approval is sought in accordance with the terms of s 33V of the *Supreme Court Act 1988* (Vic).

- (iv) the terms of any advice received from counsel and from any independent expert in relation to the issues which arise in the proceeding;
  - (v) the likely duration and cost of the proceeding if continued to judgment; and
  - (vi) the attitude of the group members to the settlement<sup>289</sup>.
- (c) The benefit received by absent persons from a settlement, whether it be little or large, has to be weighed against their prospects of success should the matter proceed to trial (or appeal, as the case may be)<sup>290</sup>. Thus:
- (i) if a settlement is considered to be appropriate or fair and reasonable when weighed against the chances of the absent person obtaining a better outcome at trial and the risks and potential burdens of litigation, then it can safely be concluded that it is “for the benefit of the absent persons” because it is in their best interests to accept what has been offered rather than reject it and run the risk of receiving nothing or substantially less;
  - (ii) but if the financial gain to the absent persons from a settlement is considered too low when weighed in this balancing exercise then it would not be correct to conclude that it was for their “benefit”<sup>291</sup>.
- (d) In the case of absent persons who receive nothing from a settlement because they have no chance of succeeding at trial, it can still be concluded that the settlement is for their benefit because it brings to an end litigation which was serving no valid purpose as far as they are concerned and might even be exposing them to a potential liability for costs<sup>292</sup>.
- (e) When weighing up the prospects of the parties obtaining a more favourable result at trial, it is important for the court to bear in mind that:

---

<sup>289</sup> [2010] VSC 357 at [60] quoting from *Williams v FAI Home Security Pty Ltd (No.4)* (2000) 180 ALR 149 at [19] per Goldberg J.

<sup>290</sup> [2010] VSC 357 at [56].

<sup>291</sup> [2010] VSC 357 at [62].

<sup>292</sup> [2010] VSC 357 at [62]. Court orders made on 16 December 2011 in the case of the Liparoo and Yungera Rights Proceeding, Solora Rights Proceeding and Fenceport Rights Proceeding, 22 March 2010 for BB Olives Rights Proceeding, and 22 December 2009 for Almond Land Rights Proceeding, provided that Grower Representatives would have their costs paid out of the respective Fund for the trial of each of the Timbercorp Apportionment Proceedings. This order did not extend to any appeal.

- (i) it is difficult for the court to know more about the actual risks of the litigation than the parties' legal advisers; and
  - (ii) the court looks to whether the settlement amount falls within a range that may be considered reasonable having regard to the respective strengths and weaknesses of the parties' position in the litigation, rather than deciding for itself whether the settlement provides what the court itself considers to be the most fair and reasonable outcome<sup>293</sup>.
- (f) A compromise may be "for the benefit of" someone who potentially stands to gain a financial benefit from the compromise, even though he or she does not eventually receive that benefit<sup>294</sup>.
148. It is evident from the reasons in *Exxonmobil* that four other considerations were relevant to Habersberger J's conclusion that the compromises in that case should be approved. First, the member representatives (appointed pursuant to r 16.02(2)) had all received legal and actuarial advice concerning the proposed deeds of compromise<sup>295</sup>. Secondly, the representatives had formed the view that it was in the best interests of the absent member to agree to the deeds of compromise and the proposed orders sought under them<sup>296</sup>. Thirdly, the evidence established that appropriate notification of the compromise and of the applications seeking approval had been provided to absent members<sup>297</sup>. And finally, any absent members' queries arising from the notification had been satisfactorily dealt with<sup>298</sup>.
149. Since the decision in *Exxonmobil*, there have been at least three further cases in this Court in which the principles relevant to class action settlement approvals have been considered. In *Wheelahan v City of Casey*<sup>299</sup>, Emerton J confirmed that the factors identified by Goldberg J in *Williams v FAI Home Security Pty Ltd (No.4)* and referred to by Habersberger J in *Exxonmobil* (see paragraph 147(b)(vi) above), provide useful guidance to the court in deciding whether to approve a compromise. However, her Honour also stated that every case must be dealt with on its merits, particularly if

---

<sup>293</sup> [2010] VSC 357 at [63], citing *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Limited* (No 2) (2006) 236 ALR 322 at [50] per Jessup J.

<sup>294</sup> [2010] VSC 357 at [80].

<sup>295</sup> [2010] VSC 357 at [49].

<sup>296</sup> [2010] VSC 357 at [49].

<sup>297</sup> [2010] VSC 357 at [50].

<sup>298</sup> [2010] VSC 357 at [50].

<sup>299</sup> [2011] VSC 215 at [56]-[64].

there are any *inter se* issues. This aspect of Emerton J's judgment was subsequently cited with approval by Beach J in *Thomas v Powercor Australia Limited*<sup>300</sup> and *Perry v Powercor Australia Ltd*<sup>301</sup>.

## **J. The Deeds of Compromise are for the benefit of Growers**

### Advice to and decision of Representative Growers

150. As referred to earlier in these submissions, between February 2012 and July 2012 negotiations about the terms of settlement took place between the parties and their legal advisers<sup>302</sup>. Clarendon Lawyers acted on behalf of the Representative Growers in each proceeding<sup>303</sup>.
151. Prior to entering into the Deeds of Compromise, the Representative Growers in each Timbercorp Apportionment Proceeding received formal written advice from counsel<sup>304</sup>. On 20 July 2012, a meeting was held and attended by counsel retained on behalf of the Representative Growers in each proceeding, legal representatives from Clarendons Lawyers, and Representative Growers in each proceeding. Counsel presented and discussed their written advice at the meeting, and answered questions from Representative Growers<sup>305</sup>.
152. Following the provision of counsel's advice, each of the Representative Growers formed the view that the terms of the Deeds of Compromise and the proposed orders sought under them were in the best interests of the Growers they represent in the respective proceedings<sup>306</sup>. Accordingly, on 25 July 2012, following the provision of the written advice and convening of the meeting, the Representative Growers signed the Deeds of Compromise in each of the Timbercorp Apportionment Proceedings.

---

<sup>300</sup> [2011] VSC 614 at [9]-16].

<sup>301</sup> [2012] VSC 113 at [9]-[21].

<sup>302</sup> See paragraph 120 above .

<sup>303</sup> First Armstrong Liparoo and Yungera Affidavit at [2]-[3].

<sup>304</sup> First Armstrong Liparoo and Yungera Affidavit at [5].

<sup>305</sup> First Armstrong Liparoo and Yungera Affidavit at [5].

<sup>306</sup> Eg. Fourth Armstrong Solara Affidavit at [25] to [29]; Answer to "frequently asked question" no. 20, exhibited to the Second Armstrong Affidavit in each proceeding, at exhibit CJA-8; Third Armstrong Affidavit at [16(g)]; Recital Q to the Liparoo and Yungera Deed of Compromise; Recital P to the Solara and Fenceport Deeds of Compromise; Recital O to the Almond Land Deed of Compromise; Recital N to the BB Olives Deed of Compromise.

153. Subsequently, counsel updated their written advice, although the substance of the earlier advice did not change. A copy of the updated advice was provided to the Representative Growers<sup>307</sup>.
154. On 29 August 2012, counsel prepared a supplementary memorandum of advice<sup>308</sup>, which was provided to the Representative Growers that same day<sup>309</sup>.
155. Copies of the advices have been made available to Growers<sup>310</sup> and filed in this proceeding as confidential exhibits CJA-1 to CJA-3 to the Second Affidavit of Celia Armstrong in each proceeding, which affidavits were sworn on 30 August 2012. The other parties to the proceedings have not been provided with copies of the advices.

#### Notice and assistance given to Growers

156. Shortly after execution of the Deeds of Compromise, and in accordance with clause 6 of those deeds, a letter and email was sent to all Growers (to their last known addresses) by Clarendon Lawyers informing them that a compromise in each of the Timbercorp Apportionment Proceedings had been reached, and an information notice had been uploaded onto the websites of Clarendon Lawyers, KordaMentha, and Arnold Bloch Leibler at certain specified URL addresses<sup>311</sup>. Growers were informed that the notice contained an explanation of the relevant proceeding, the compromise and proposed application for court approval, and how Growers could comment on, object to or obtain more information about the compromise and approval application. On 14 August 2012, an advertisement was placed in The Australian newspaper, to the same effect<sup>312</sup>.
157. Also uploaded onto the websites of Clarendon Lawyers, KordaMentha, and Arnold Bloch Leibler, were a list of frequently asked questions for each Timbercorp Apportionment Proceeding, and the answers to them<sup>313</sup>. Growers in each of the proceedings were informed of, among other things, how much money per lot (under each of the relevant compromises) was proposed to be set aside for Growers, when Growers would receive their entitlement under the compromise (if approved), and

---

<sup>307</sup> First Armstrong Liparoo and Yungera Affidavit at [5].

<sup>308</sup> First Armstrong Liparoo and Yungera Affidavit at [5].

<sup>309</sup> Third Armstrong Liparoo and Yungera Affidavit at [5].

<sup>310</sup> Second Armstrong Liparoo and Yungera Affidavit at [9].

<sup>311</sup> Second Armstrong Liparoo and Yungera Affidavit at [7(b)], [8(b)].

<sup>312</sup> Eg Second Armstrong Liparoo and Yungera Affidavit, exhibit CJA-7.

<sup>313</sup> Second Armstrong Liparoo and Yungera Affidavit at [9].

how this was to occur. Growers were also told why the Representative Growers agreed to the Deeds of Compromise, that copies of the advice provided by counsel could be obtained, and that any objections or queries could be directed to the Representative Growers by, in the first instance, contacting TSL on their behalf, or be raised with the Court as part of the compromise proceedings.

158. Copies of the letter to Growers, the newspaper advertisement, the notice, and frequently asked questions (with answers), are exhibited to the second affidavit of Celia Armstrong in each proceeding, sworn on 30 August 2012<sup>314</sup>.
159. In total, 20,338 letters and 11,528 emails were sent to Growers, compromising:
  - (a) in relation to the Liparoo and Yungera Rights Proceeding<sup>315</sup>:
    - (i) 4,646 letters (of which 206 were returned);
    - (ii) 2,855 emails (of which 345 “bounced back”);
  - (b) in relation to the Solora Rights Proceeding<sup>316</sup>:
    - (i) 312 letters (of which 13 were returned);
    - (ii) 177 emails (of which 18 “bounced back”);
  - (c) in relation to the Almond Land Rights Appeal Proceeding<sup>317</sup>:
    - (i) 9,487 letters (of which 418 were returned);
    - (ii) 5,157 emails (of which 601 “bounced back”);
  - (d) in relation to the BB Olives Rights Proceeding<sup>318</sup>:
    - (i) 3,163 letters (of which 128 were returned);
    - (ii) 1,635 emails (of which 189 “bounced back”);
  - (e) in relation to the Fenceport Rights Proceeding<sup>319</sup>:
    - (i) 2,730 letters (of which 117 were returned);
    - (ii) 1,704 emails (of which 258 “bounced back”).

---

<sup>314</sup> Exhibits CJA-5 to CJA-8.

<sup>315</sup> Korda Liparoo and Yungera Affidavit at [27].

<sup>316</sup> Korda Solora Affidavit at [25].

<sup>317</sup> Korda Almond Land Affidavit at [26].

<sup>318</sup> Korda BB Olives Affidavit at [24].

<sup>319</sup> Korda Fenceport Affidavit (19 September 2012) at [28].

160. Since notice of the Deeds of Compromise was provided to Growers in each of the Timbercorp Apportionment Proceedings, TSL has maintained a telephone hotline facility and email facility to enable Growers to, among other things, ask questions, make comments, and update personal information<sup>320</sup>.
161. A protocol was developed for those communicating with Growers through the telephone hotline and email facilities. The terms of the protocol were agreed with Clarendon Lawyers, acting on behalf of the Representative Growers<sup>321</sup>. A copy of the protocol is exhibited on a confidential basis to the affidavit of Mark Korda in each proceeding, sworn 18 September 2012<sup>322</sup>. Legal representatives from Arnold Bloch Leibler and Clarendon Lawyers also met with those communicating with Growers to provide them with, among other things, an understanding of the background to and the terms of the Deeds of Compromise and information which had been made available to Growers<sup>323</sup>.
162. During the course of each day over the period 14 August 2012 to date a report has been prepared summarising the number, type and nature of communications with Growers through the telephone hotline and email systems. The report was sent to Clarendons Lawyers on a daily basis<sup>324</sup>.
163. It was agreed between Clarendon Lawyers and TSL that, in accordance with clause 9(d) of the Deeds of Compromise, any comments, questions and objections raised in respect of which TSL was unable to respond would be referred to Clarendon Lawyers, acting on behalf of the Representative Growers<sup>325</sup>. Clarendon Lawyers then responded<sup>326</sup>.
164. Following the 20,338 letters and 11,528 emails sent to Growers, as well as the advertisements in The Australian, and information posted on the internet<sup>327</sup>:
- (a) 1,081 Growers made comments, questions or objections in relation to the Deeds of Compromise (of which only three appear to have made “objections”);

<sup>320</sup> Eg. Korda Liparoo and Yungera Affidavit at [29]-[36].

<sup>321</sup> Eg. Korda Liparoo and Yungera Affidavit at [32].

<sup>322</sup> Eg. Korda Liparoo and Yungera Affidavit at exhibit MAK-5.

<sup>323</sup> Eg. Korda Liparoo and Yungera Affidavit at [33].

<sup>324</sup> Eg. Korda Liparoo and Yungera Affidavit at MAK-6.

<sup>325</sup> Third Armstrong Affidavit at [13] and [16].

<sup>326</sup> Third Armstrong Affidavit at [13]-[17] and exhibit CJA-9.

<sup>327</sup> Third Armstrong Affidavit filed in each proceeding at [15] (combined totals).



- (b) 383 Growers requested a copy of the letter, the notice (posted on the internet), the frequently asked questions document, bank account nomination form (described below), or direction to pay form (also described below) to be emailed or posted to them;
  - (c) 183 Growers requested information in relation to the particulars of their investments, such as how many lots they had invested in or which scheme they had invested in;
  - (d) 153 Growers requested financial information, such as how much they were entitled to under the relevant Deed of Compromise or the extent of their TSL or TFL indebtedness;
  - (e) 420 Growers returned a bank account nomination form and/or direction to pay form;
  - (f) 67 Growers requested more information about the Deed of Compromise in general;
  - (g) 66 Growers provided change of address details;
  - (h) 54 Growers made queries or comments which required a response from Clarendons Lawyers, on behalf of the Representative Growers.
165. The “bank nomination form” referred to above was sought from Growers who had not previously provided TSL with a direct credit authorisation from a nominated bank account<sup>328</sup>. A nominated bank account is required for payments from the Funds, through TSL, to be made to Growers. The “direction to pay form” referred to above could be provided by Growers who wished to have their entitlement paid to reduce outstanding loans to Timbercorp Finance Pty Ltd (in liq) (**TFL**) or TSL<sup>329</sup>.

#### Prospects in the Timbercorp Apportionment Proceedings

166. An important and, to some extent, unique feature of the compromises sought to be approved in these proceedings, is that the parties and the Court have the benefit of the decision and reasons for judgment of Davies J in the Almond Land Rights Proceeding. As stated earlier, in that case, Davies J found that the secured creditors were entitled to the entire amount of the net sale proceeds the subject of that

<sup>328</sup> Second Armstrong Affidavit at CJA-8 at FAQ 7.

<sup>329</sup> Second Armstrong Affidavit at CJA-7, pp 11-14 and CJA-8, pp 3-4.

proceeding. Her Honour's decision was delivered after hearing submissions and evidence over 12 days in February and March 2011<sup>330</sup>. And prior to the trial commencing, the parties filed contentions in excess of 300 pages, 14 affidavits from 10 lay witnesses, 13 affidavits from five expert witnesses, and six joint expert reports<sup>331</sup>.

167. It is respectfully submitted that it is highly probable that, because there are a number of important issues of fact and law common to the Almond Land Rights Proceeding and the remaining Timbercorp Apportionment Proceedings, and because the issues that fall to be considered in each case weigh powerfully in favour of the secured creditors, the Growers will receive nothing if the proceedings go to trial (or are heard on appeal).

*Liparoo & Yungera Rights Proceeding*

168. The critical issues likely to be addressed at trial in the Liparoo and Yungera Rights Proceeding are:
- (a) what rights (if any) ANZ, OIM#2 and OIM#5 and the Growers have to a share of the net sale proceeds retained in the Fund (the **Rights Issue**); and
  - (b) assuming rights exist, what is the value of any such rights of ANZ, OIM#2 and OIM#5 and the Growers (the **Valuation Issue**)<sup>332</sup>.
169. As already described in paragraph 48 above, the same issues arose for determination in the Almond Land Rights Proceeding. And because, as already stated, Davies J found that the secured creditors were entitled to the entire amount of the net sale proceeds the subject of that proceeding, it is of particular significance that the facts and purpose of the Almond Land Rights Proceeding closely resemble those of the Liparoo and Yungera Rights Proceeding. For example, three of the Almond Projects the subject of the Liparoo and Yungera Proceeding were also the subject of the Almond Land Rights Proceeding, namely the 2002 Almond Project, the 2005 Almond Project and the 2002 Private Offer Project. Further, the constituent documents for the Almond Projects the subject of the Almond Land Rights Proceeding are similar in

---

<sup>330</sup> Third Hinchin Liparoo and Yungera Affidavit at [65].

<sup>331</sup> Third Hinchin Liparoo and Yungera Affidavit at [63].

<sup>332</sup> Third Hinchin Liparoo and Yungera Affidavit at [73].

content and form to the corresponding documents for the almond projects the subject of the Liparoo and Yungera Rights Proceeding<sup>333</sup>.

170. Thus, at any trial of the Liparoo and Yungera Rights Proceeding, it is respectfully submitted that the Court is likely to have careful regard to Davies J's reasons for judgment and her decision in the Almond Land Rights Proceeding.<sup>334</sup>
171. If Davies J's decision in the Almond Land Rights Proceeding were applied without modification to the known facts of the Liparoo and Yungera Rights Proceeding, then the likely findings on the key issues would be as follows:
  - (a) As to the Rights Issue:
    - (i) to share in the net sale proceeds, Growers would need to establish rights of a proprietary nature in and with respect to the almond assets that were converted into the Fund (Judgment at [30]);
    - (ii) Growers in the Almond Projects subject to licence and joint venture agreements, being the 2001 Almond Project, the 2002 Almond Project, the 2002 Private Offer Project and the 2003 Almond Project, will be found to have acquired rights of a contractual nature only and, therefore, found not to have obtained any entitlement to share in the net sale proceeds existing in the Fund (Judgment at [40]);
    - (iii) Growers in the Almond Projects subject to leases, being the 2004 Almond Project and the 2005 Almond Project, will be found to have held rights of a proprietary nature, under those leases, in the land, trees and capital works, but rights of a contractual nature in respect of the water licences (Judgment at [73]-[79]). On this basis, such Growers

---

<sup>333</sup> Third Hinchin Liparoo and Yungera Affidavit at [74].

<sup>334</sup> As appears below in Schedule B, if Davies J's reasoning in the Almond Land Rights Proceeding were applied in the Liparoo and Yungera Proceeding, it would result in the Growers being held to have no entitlement to any part of the Fund. However, should the present compromises not be approved, the secured creditors will further contend that Davies J's judgment ought to be affirmed on the ground that the Growers' leasehold interests in the land the subject of the 2005-2007 Almond Projects, and any entitlement under the leases to use or enjoy the almond trees or the capital works, were in the nature of encumbrances and did not form any part of the subject of the sale of assets to Olam. A subsidiary contention which will be advanced in this context is that, contrary to her Honour's finding (Judgment at [73(b)]), the Growers in the 2005, 2006 and 2007 Almond Projects did not have a proprietary interest in the almond trees or the capital works (Judgment at [73(b)]), just as they were found not to have proprietary interests in the water licences (Judgment at [72]). These matters are the subject of a notice of contention in the Almond Land Rights Appeal Proceeding (Exhibit CCH-2, Doc 23) and are developed in the outline of submissions of ANZ and BOSI filed in the Court of Appeal (Exhibit CCH-2, Doc 25 to the Third Hinchin Liparoo and Yungera Affidavit).

will be found to have a right to share in the net sale proceeds referable to those assets if and to the extent their proprietary rights were valuable immediately prior to their extinction<sup>335</sup>.

- (b) As to the Valuation Issue, even if it were assumed (contrary to Davies J's findings) that Growers in each of the Almond Projects had a right to share in the net sale proceeds to the extent that they held rights (whether contractual or proprietary) in respect of the assets sold, any such rights were, in any case, valueless prior to their extinguishment pursuant to court orders made 11 December 2009. This is because:
  - (i) in relation to three of the six Almond Projects the subject of the Liparoo and Yungera Proceeding, which were also the subject of the Almond Land Rights Proceeding (being the 2002 Almond Project, the 2005 Almond Project and the 2002 Private Offer Project), Davies J found that they were neither viable under the existing structures (Judgment at [83])<sup>336</sup> nor – based on the state of the evidence – capable of being restructured (Judgment at [137]). There was, in effect, no alternative to the schemes being brought to an immediate end, with a consequential and inevitable termination of the interests of the Growers.
  - (ii) in relation to the 2001 Almond Project, 2003 Almond Project and 2004 Almond Project, the evidence also supports the conclusion that they were mired in irremediable financial difficulties and therefore unviable under the then existing structures<sup>337</sup>, and on what evidence is available in relation to those projects (or what might be inferred from the available evidence<sup>338</sup>), not capable of being restructured, as there were no bids for the assets in the Almond Projects made or maintained which

---

<sup>335</sup> As noted in the preceding footnote, the secured creditors contend that the conclusion that the Growers enjoyed rights of a proprietary nature in respect of the assets which were sold does not suffice to afford them an entitlement to share in the proceeds of sale of the assets: specifically, it is contended that interests in the nature of an encumbrance do not give rise to any entitlement traceable into sale proceeds. If the present compromises were not approved and this argument were to succeed in the Court of Appeal, it would necessarily follow that the Growers had no entitlement to the Fund, and the Valuation Issue would not arise.

<sup>336</sup> This was supported by evidence that the Almond Projects had significant financial problems: Third Hinchin Liparoo and Yungera Affidavit at [81] and [84].

<sup>337</sup> Third Hinchin Liparoo and Yungera Affidavit at [87] to [89].

<sup>338</sup> Third Hinchin Liparoo and Yungera Affidavit at [90] to [93].

contemplated the continuation of those projects<sup>339</sup>. Again, then, the only avenue available was to bring an end to the projects.

172. It follows from the above analysis that the Growers would not be entitled to any part of the net sale proceeds from the assets of the Liparoo and Yungera Projects. ANZ, as the only secured creditor, would be entitled to so much of the net proceeds as necessary to satisfy its secured debt (with any surplus proceeds to be paid to OIM#2 and OIM#5).

### *Solara Rights Proceeding*

173. The Rights and Valuation Issues are likely to be the same two issues determinative of the outcome in the Solara Rights Proceeding, if it were to proceed to trial<sup>340</sup>.
174. As explained in paragraphs 93 and 94 above, the constituent documents for the Almond Projects the subject of the Almond Land Rights Proceeding are broadly similar in content and form to the corresponding documents for the Citrus Scheme the subject of the Solara Rights Proceeding. In this regard, it is important to note that the Growers in the Citrus Scheme enjoyed their tenure in their citruslots under licence agreements rather than leases. As such, the constituent documents for that project bear a greater resemblance to the constituent documents for the licence-based projects the subject of the Almond Land Rights Proceeding, namely, the 2002 Almond Project, and the 2002 Private Offer Project<sup>341</sup>.
175. It follows that, insofar as the Rights Issue is concerned, if the reasons of Davies J were applied to the Solara Rights Proceeding (without modification), the Growers in the Citrus Scheme would be found to have acquired rights of a contractual nature only and, therefore, found not to have obtained a proprietary interest in respect of the assets sold which could be traced into an entitlement to share in the net sale proceeds existing in the Fund. On this basis, subject to the amount of ANZ's secured debt (as referred to earlier), ANZ would be entitled to the full amount of the net sale proceeds held in the Fund and the Growers would receive nothing. As with the Growers in the 2002 Almond Project and the 2002 Private Offer Project the subject of the Almond

---

<sup>339</sup> Third Hinchin Liparoo and Yungera Affidavit at [93].

<sup>340</sup> Third Hinchin Solara Affidavit at [48].

<sup>341</sup> Third Hinchin Solara Affidavit at [56] and the Fourth Hinchin Solara Affidavit.

Land Rights Proceeding, the Valuation Issue would therefore not arise in respect of these Growers.

176. Even if it were assumed (contrary to the findings of Davies J) that contractual rights of the Growers in the Citrus Scheme afforded them an entitlement to share in the net sale proceeds, the resolution of the Valuation Issue would be the same. As with the Liparoo and Yungera Rights Proceeding discussed above, the available evidence indicates that the Citrus Scheme was neither viable under the existing structures nor capable of being restructured<sup>342</sup>. Again, in the absence of funds to continue the Citrus Scheme and no viable restructuring proposal, there was no alternative to the extinguishment of the Growers' rights in the project. It necessarily follows that the 'rights' of the Growers were valueless immediately prior to their extinguishment following orders of the Court made on 26 February 2010, giving them no entitlement to participate in the Fund constituted by the net proceeds of sale.
177. ANZ, as the only secured creditor, would be entitled to so much of the net proceeds as necessary to satisfy its secured debt (with any surplus proceeds to be paid to OIM#2).

*Almond Land Rights Appeal Proceeding*

178. As already indicated in paragraphs 48 and 53 to 64 above, two critical aspects of the Davies J's decision in Almond Land Rights Proceeding concerned the Rights Issue and the Valuation Issue. In relation to each of them, her Honour concluded that:
  - (a) As to the Rights Issue:
    - (i) to share in the relevant fund, growers needed to establish rights of a proprietary nature in, and with respect to, the almond assets that were converted into the fund constituted by the net sale proceeds (Judgment at [30]);
    - (ii) for the licence-based projects, the growers acquired rights of a contractual nature only and did not obtain a proprietary interest in the almond assets (Judgment at [48]) – so growers in those projects had no right to share in the fund;

---

<sup>342</sup> Third Hinchin Solara Affidavit at [62] to [68].

- (iii) for lease-based projects, the growers held rights of a proprietary nature in the land, trees and capital works (but of a contractual nature in the water licences) – so growers in those projects had a right to share in the fund if and to the extent their proprietary rights in those assets were valuable on extinction (Judgment at [73] and [79]);
  - (b) As to the Valuation Issue:
    - (i) if the (lease-based) projects in which growers held proprietary rights were not viable at the time those rights were extinguished by the Court (either in their existing form or, on the balance of probabilities, upon restructure including the replacement of the responsible entity), then no measure of value could be attributed to those rights (Judgment at [82] and [95]);
    - (ii) since there was no possibility other than a theoretical possibility that the projects would have continued if the growers' rights had not been extinguished, no value could be attributed to the growers' rights (Judgment at [137]).
179. On the basis of these findings, Davies J concluded that the securities held by the Banks over the assets sold to Olam entitled them to the entire amount of the net sale proceeds (as the amounts secured were greater than the net sale proceeds held in trust as at the date of judgment) (Judgment at [167]).
180. The Rights Issue and Valuation Issue (among others) fall to be considered by the Court of Appeal in the Almond Land Rights Appeal Proceeding. For the reasons given by Davies J in her Judgment, and the reasons advanced in paragraph 4 of Schedule B to these submissions, it is respectfully submitted that the appellants do not enjoy favourable prospects of success.
181. By comparison, the Banks had a clear entitlement to the relevant sale proceeds by reason of their securities over the assets sold, and the fact that their secured debt exceeded the sale proceeds<sup>343</sup>.

---

<sup>343</sup> Judgment at [167].

*BB Olives Rights Proceeding*

182. The Growers have filed contentions of fact and law in the BB Olives Rights Proceeding (**Growers' Olive Contentions**). As those submissions make clear, the critical issues likely to be addressed at trial in the BB Olives Rights Proceeding are, again, the Rights Issue and the Valuation Issue.
183. The key arguments advanced by the Growers' are as follows:
- (a) That the effect of Croft J's order on 12 November 2009 (being the equivalent of the Robson J Orders), was that claimants on the net sale proceeds of the BB Olives Rights Land SPD and BB Olives Rights Water SPD need not show a proprietary interest in the assets sold;<sup>344</sup>
  - (b) That the Growers had a right to use and capital works, olive trees and water licences appurtenant to the 2006-2008 Olive Schemes<sup>345</sup> and that:
    - (i) the right ought to be construed as a promise that touched and concerned the land;<sup>346</sup>
    - (ii) any interference with the right to use and enjoy the capital works and water licences would constitute a derogation from the grant;<sup>347</sup> and,
  - (c) the licence conferred upon the Growers in the 2008 Olive Project were "in reality a leasehold estate"<sup>348</sup> or alternatively, a licence coupled with a grant enforceable as a proprietary right in the nature of a profit a prendre.<sup>349</sup>
  - (d) The Growers' rights in the 2006-2008 Olive Schemes gave them an ability to stop the sale of the assets referable to those schemes. As a result, they have a right to any marriage value associate with the sale<sup>350</sup>.
184. The Judgment of Davies J will be highly persuasive in the resolution of the issues identified in paragraph 183(a) and (b) above.

---

<sup>344</sup> Paragraph 17(b), Growers Contentions of Fact and Law dated 7 October 2011 in the BB Olives Rights Proceeding (**Growers' Olive Contentions**) at 17(b).

<sup>345</sup> Growers' Olive Contentions at 38(b).

<sup>346</sup> Growers' Olive Contentions at 55.

<sup>347</sup> Growers' Olive Contentions at 61(b).

<sup>348</sup> Growers' Olive Contentions at 98.

<sup>349</sup> Growers' Olive Contentions at 121.

<sup>350</sup> Growers' Olive Contentions at 160.



185. Davies J found that the Robson J Orders did not in themselves create for the Growers any entitlement or any right to share in the net proceeds of the sale of the relevant assets in that case. Her Honour in particular found that:

Robson J could not create any interest for the growers in the net proceeds that they did not possess in law or equity. Order 7 explicitly reserved to the rights proceeding the determination of the question as to whether the growers had rights of a nature that entitled them to a share of the net proceeds. Orders 8 and 9 explicitly preserved the respective rights of the parties "only in so far as" each of them "have any rights to the assets the subject of the SPD"...The phrase "the assets the subject of the SPD" could only be, and was a clear reference to, the assets sold to Olam.<sup>351</sup>

The same analysis should apply in respect of the effect of the orders of Croft J made on 12 November 2009.

186. As the submissions above make clear, the rights conferred upon the Growers in the 2006-2007 Olive Projects were materially the same to those conferred upon the Growers in the 2005-2007 Almond Schemes. Applying the reasoning of Justice Davies, it is likely that the Growers in the 2006-2007 Olive Projects will be held to have:
- (a) an interest in the Water Licences of a contractual nature only<sup>352</sup>;
  - (b) a leasehold interest in the land, capital works and olive trees, entitling them to make a claim on the net proceeds of sale of the BB Olives Rights Land SPD and BB Olives Rights Water SPD, to be assessed by the value of those interests prior to their extinguishment<sup>353</sup>.
187. Importantly, if the Court were to apply Justice Davies' reasoning, the Growers could only claim to have an interest in value of the land the subject of the BB Olives Rights Proceeding (being \$2.036 million). Notwithstanding that, the Deed of Compromise provides that the Growers are to be paid \$1,185 million.
188. In relation to the 2008 Olive Scheme, the rights of the Growers in the 2008 Olive Scheme were of a contractual rather than proprietary nature, they were similar in material respects to the rights conferred upon the Growers in the 2002 Almond Scheme and 2002 Private Offer Project. Again, following Davies J's reasoning in

---

<sup>351</sup> Judgment at [29].

<sup>352</sup> Judgment at [73].

<sup>353</sup> Judgment at [79].

relation to in the 2002 Almond Scheme and the 2002 Private Offer Project, the Growers in the 2008 Olive Scheme would not be entitled to share in the net proceeds of the BB Olives Land SPD. The *new* arguments advanced by the Growers in the Growers' Olive Contentions (as identified in paragraph 183(c)) do not warrant a reclassification of those interests. Specifically:

- (a) The licence agreements in the 2008 Olive Scheme were not “in reality a leasehold estate”. Rather, the rights is explicitly characterised as a licence and expressly confers only a limited right to use and occupy the relevant lot for the sole purpose of the Grovelot Operations.<sup>354</sup> Further there is no objective intention to confer an exclusive right of occupation.<sup>355</sup>
- (b) For the reasons given by Young J in *Permanent Trustee Australia Ltd v Shand*<sup>356</sup>, the Growers' interests were not in the nature of a “right to remove a crop which does not require attention after initial planting”, thereby giving rise to a profit. In this regard, clearly orchard fruit such as that grown in the Timbercorp Olive Schemes is *fructus industriales* as opposed to *fructus naturales*: the olives are not naturally there – the tree has to be planted first and then, once planted, has to be tended by mankind before producing a crop. Accordingly, the Growers do not possess a profit a prendre.

189. Further, the marriage value submission is flawed for two principal reasons:

- (a) first, the Growers did not have an ability to stop the transaction in November 2009; and
- (b) secondly, there is no foundation in principle or authority for the Growers' marriage value thesis.

190. As in the case of the Almond Schemes, the Olive Schemes were at risk of imminent and inevitable termination<sup>357</sup>.

191. Further, there were insuperable hurdles which faced any proposal for a continuation of the projects, apply with equal force to the Olive Projects. Importantly, as at 28 August 2009, no party had offered to take on the role of replacement RE of the Olive

<sup>354</sup> Clause 3.1(a), 2008 Olive Scheme Licence Agreements.

<sup>355</sup> See, for example: Bradbrook, Croft and Hay *Commercial Tenancy Law* (3<sup>rd</sup> edition) at [1.3].

<sup>356</sup> (1992) 27 NSWLR 426 at 432. See also *Clos Farming Estates Pty Ltd v Easton* [2001] NSWSC 525 at [54]-[70] per Bryson J, affirmed on appeal at [2002] NSWCA 389 at [62] per Santow JA (Mason P and Beazley JA agreeing).

<sup>357</sup> See paragraph 26 above.

Projects on an unconditional and binding basis, and substantial further capital expenditure was required. In these circumstances, it is likely that the conclusion reached by Davies J that the Growers rights had no value in the Almond Land Rights Proceeding would also be reached by a court examining the value of the Growers' rights in the 2006-2008 Olive Schemes.

192. In light of the decision in *Re Willmott Forests Limited*, there can be no doubt that the liquidators of BB Olives and Almond Land could have disclaimed the head leases and similarly the liquidator of TSL, the sub-leases. If the Growers' rights had not been extinguished by acting on the power given to the liquidators given under the Constitutions of the 2006-2008 Olive Schemes, the liquidators would have been entitled to disclaim the leases, thereby extinguishing the Growers' rights by a different means. Given the unviable state of the 2006-2008 Olive Schemes, it is most unlikely that the Growers could have successfully challenged the disclaimer of the leases.
193. As set out in paragraphs 118 and 119 above, BOSI is the sole secured creditor making a claim upon the sale proceeds.

#### *Fenceport Rights Proceedings*

194. As paragraphs 96 to 105 above make clear, the critical issues likely to be addressed at trial in the Fenceport Rights Proceeding are, again, the Rights Issue and the Valuation Issue.
195. The reasoning of Davies J will be highly determinative in the resolution of those issues. As the submissions above make clear, in relation to the Rights Issue:
  - (a) it is likely that the Growers in the 2000 Olives Private Offer Project, the 2001 Olives Scheme and the 2002 Olives Scheme will be held to have acquired rights of a contractual nature only.
  - (b) it is likely that the Growers in the 2003 Olives Scheme and the 2004 Olives Scheme will be held to have:
    - (i) an interest in the Water Licences of a contractual nature only<sup>358</sup>; and

---

<sup>358</sup> Judgment at [73].

- (ii) a leasehold interest in the land, capital works and olive trees, entitling them to make a claim on the net proceeds of sale of the Boort SPD and Boort Water SPD referable to those assets, to be assessed by the value of those interests prior to their extinguishment<sup>359</sup>.

196. In relation to the Valuation Issue, as the submissions above illustrate, the same considerations apposite to Davies J's reasoning will be enlivened in the Fenceport Rights Proceeding.
197. Fenceport, as the only secured creditor, is therefore entitled to the net sale proceeds. To the extent that there are net sale proceeds in excess of the debt owing to Fenceport, then Olivecorp Land, as landowner, is entitled to the balance.

Amounts offered under Deeds of Compromise and payment structures

198. The method for allocation and distribution of the Funds in each proceeding is set out in paragraphs 131 to 143 above. Save for the particular circumstances of the 2001 Almond Project, each Grower's entitlement is a product of:
- (a) the gross proceeds obtained upon sale of the relevant land (and related assets) on which the project in which they were a Grower was conducted;
  - (b) an allocation of approximately 5% of those sale proceeds for distribution amongst the Growers in each project conducted on that land;
  - (c) that sum being apportioned between Growers in each project conducted on that land based on a rateable distribution of that sum in accordance with the number of lots in each such project..
199. If a Grower remains indebted to TFL or TSL, the Grower's entitlement may, with its consent, be used to reduce the extent of that indebtedness. This depends on whether a Grower remains indebted to only TFL or TSL (or both)<sup>360</sup>.

---

<sup>359</sup> Judgment at [79].

<sup>360</sup> See cl 4 of the Deeds of Compromise. See also, for example, the Third Hinchin Liparoo and Yungera Affidavit at [102(g)-(l)]. In the case of a Grower who has not authorised a claimed indebtedness to *TFL* to be set off against that Grower's entitlement to a share of the settlement sum, no reduction from the Grower's entitlement is made in respect of that claimed TFL indebtedness. Rather, the Grower's share will be retained on trust by TSL pending determination of the issue. In the case of a claimed indebtedness to *TSL* which has not been the subject of an explicit set-off authorisation by a Grower in this way, the funds will be paid to the Grower without reduction (again, unless that Grower is also a TFL debtor who has not authorised set-off against that Grower's entitlement). See for example cl 4(c) and (d) of the Liparoo and Yungera Deed of Compromise.

200. The proposed compromise payments are fair and equitable to and among Growers in that they provide for a uniform approach to the calculation of entitlements across all of the schemes according to each Grower's respective interest in each of the projects (ie. by reference to the number of lots held by each Grower). Further, the Grower entitlements have due regard to the potential risks for the Growers in having the Timbercorp Apportionment Proceedings taken to trial (or heard on appeal) in light of the prospects of success in each case, and the costs that will be incurred in conducting those proceedings with the effect of diminishing the net proceeds available for distribution.

Likelihood of obtaining judgment significantly in excess of amounts offered

201. As Habersberger J observed in *Exxonmobil*, the role of the Court in deciding whether to approve a compromise does not involve the Court "deciding for itself whether the settlement provides what the court itself considers to be the most fair and reasonable outcome"<sup>361</sup>. The Court, in weighing up the prospects of obtaining a more favourable result at trial (or on appeal) must bear in mind that the parties' legal advisers are likely to be better placed to know about the risks of litigation. For the reasons set out above, and in light of the confidential advices prepared by counsel for the Representative Growers and filed in this proceeding (supporting the proposed compromises), the entitlements of the Growers under the Deeds of Compromise should be considered fair and reasonable. There is little realistic prospect of the Growers obtaining judgment significantly in excess of the amounts offered under the Deeds of Compromise.

Likely duration and cost of Timbercorp Apportionment Proceedings

202. The Almond Land Rights Proceeding, currently on appeal, is not likely to be heard until 2013<sup>362</sup>.
203. Because of the commonality of issues between the Almond Land Rights Appeal Proceeding and aspects of the other proceedings<sup>363</sup>, it may be difficult, or at least inefficient and unnecessarily costly, for those other proceedings to be progressed

---

<sup>361</sup> [2010] VSC 357 at [63], citing *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Limited* (No 2) (2006) 236 ALR 322 at [50] per Jessup J.

<sup>362</sup> Third Hinchin Liparoo and Yungera Affidavit at [72].

<sup>363</sup> Third Hinchin Liparoo and Yungera Affidavit at [73]; Third Hinchin Solara Affidavit at [55]; Second McClymont Affidavit at [64]; Sheridan Fenceport Affidavit at [73]-[74].

substantively until the final determination of the Almond Land Rights Appeal Proceeding. To that extent, it may be some years before all the Timbercorp Apportionment Proceedings are finally determined.

204. Based on the conduct of the Almond Land Rights Proceeding, each of the other Timbercorp Apportionment Proceedings is likely to give rise to numerous issues and the prospect of a lengthy trial and associated costs, thereby reducing the funds available for distribution<sup>364</sup>. Although lessons learned through the conduct of the Almond Land Rights Proceeding may be used to avoid unnecessary costs being incurred in the remaining proceedings, significant work still needs to be undertaken by the parties to the Liparoo and Yungera Rights Proceeding, the Solara Rights Proceeding, BB Olives Rights Proceeding and Fenceport Rights Proceeding to have those proceedings ready for trial, particularly as the parties have not yet taken any substantive steps in the proceedings (save for service of the Growers' Olive Contentions and other than in connection with this approval application).
205. Already in the Almond Land Rights Appeal Proceeding, the appellants have spent \$225,000 in preparing that case for hearing<sup>365</sup>. Those costs are not being funded from the net sale proceeds.

#### Accrual of default interest

206. The sale process the subject of each of the Timbercorp Apportionment Proceedings has completed and there are currently substantial funds awaiting distribution to the relevant interested parties subject to court approval in each case. If each of the Deeds of Compromise is approved, disbursement of those funds to the interested parties can be effected immediately.
207. In the meantime, default interest is continuing to accrue in respect of the secured debt in relation to the Funds the subject of all proceedings<sup>366</sup> and, to the extent that there will be a surplus of net sale proceeds available after repayment of the secured debt in

---

<sup>364</sup> Eg. Third Hinchin Liparoo and Yungera Affidavit at [30]; Third Hinchin Solara Affidavit at [26].

<sup>365</sup> Second Fernon Almond Land Affidavit at [33].

<sup>366</sup> In respect of the Almond Land Rights Appeal Proceeding, default interest is continuing to accrue on the outstanding debts due to ANZ (by Almond Land) and BOSI (by Timbercorp) in light of ANZ's and BOSI's respective status as beneficiaries of a number of guarantees from other Timbercorp entities in respect of these debts.

the proceedings, the potential entitlement of any unsecured creditors to that surplus is being eroded<sup>367</sup>.

#### Attitude of Growers to proposed compromises

208. To date only one affidavit has been filed by a Grower objecting to the court approval of any of the Deeds of Compromise. By her affidavit sworn on 18 September 2012, Kerree Anne Bezençon appears to object to the approval of the Deeds of Compromise in the Fenceport Rights Proceeding, BB Olives Rights Proceeding and the Solora Rights Proceeding. Of the matters raised in Ms Bezençon's affidavit, there are four in particular which require addressing.
209. First, Ms Bezençon suggests (at [10] and [11]) that at least some of the Representative Growers are not truly representative of the Growers, and they therefore do not reflect the sentiments of all Growers. There are least two difficulties attending this argument. First, the Representative Growers in each of the Timbercorp Apportionment Proceedings were appointed by court order pursuant to r 16.01(2)<sup>368</sup>. Ms Bezençon appeared in Court on 16 December 2011, objecting to the appointments of the Representative Growers in the Fenceport and Solora Rights Proceedings. Her submissions were considered by Davies J, but rejected. Ms Bezençon relies on no new evidence to support the argument she now makes and it should, accordingly, be given no weight in determining whether the Deeds of Compromise should be approved. Further, the fact that Representative Growers have agreed to the Deeds of Compromise does not prevent any other Grower participating in the approval process, or making any objections known to the Court, as Ms Bezençon has done.
210. Secondly, Ms Bezençon contends (at [24]-[30], [49]-[52]) that there has been a lack of, or difficulty in obtaining, information about the Deeds of Compromise. For the reasons set out in paragraphs 156 to 165 above, this argument should be rejected. Growers have been clearly and adequately notified of the proposed compromises and court approval process. They have been provided with the opportunity to read,

---

<sup>367</sup> For example, in relation to Liparoo and Yungera, the total value of the net sale proceeds as at 14 September 2012 was \$167,938,000, the total proposed amount of the Growers' entitlement is \$8 million, and as at 31 August 2012, ANZ remained indebted in the amount of \$125,147,174.24 (with default interest continuing to accrue). Without taking into account the money to be disbursed from the Fund for the receivers' costs, the balance of the Fund from around early to mid September 2012 stood at approximately \$34 million. See Third Hinchin Liparoo and Yungera Affidavit at [28], [30], [41] and [102(b)].

<sup>368</sup> See the Fourth Armstrong Affidavit at [15]-[29].

consider and discuss the documents which have been made available to them. Any questions, comments or objections have been noted and, where sought and appropriate, provided with a detailed and timely response.

211. Thirdly, Ms Bezençon suggests (at [34]-44]) that it is inappropriate for Growers to be allocated 5% of the proceeds of sale held in the constituent Funds because of differences between, among other things, the farm locations, types of properties, types of trees and project documents. Although Ms Bezençon does not provide any detail about the differences she refers to, the issue for the Court is whether any of those differences as stated are material insofar as they may affect the outcome of the proceedings in which the Growers' rights will be determined. For the reasons identified in paragraphs 166 to 197, the answer to this question is 'no'.
212. Finally, Ms Bezençon contends (at [53]) that there is no urgency in determination of the Fenceport Rights Proceeding, the Solara Rights Proceeding and the BB Olives Rights Proceeding. However, in light of:
  - (a) the cross-conditionality of all of the Deeds of Compromise;
  - (b) the date for satisfaction of conditions precedent in each of the Deeds of Compromise, of 31 December 2012;
  - (c) the default interest which continues to accrue on outstanding loan facilities, which in turn reduces any remaining balances of the Funds;
  - (d) the costs that will be incurred if the Deeds of Compromise are not approved and the Timbercorp Apportionment Proceedings proceed to trial (or appeal);
  - (e) the fact that the parties as well as other Growers have an opportunity to be paid amounts of the constituent Funds now;
  - (f) the fact that neither Ms Bezençon or anyone else has pointed to the existence of any additional facts which could materially alter the likely outcome of the Timbercorp Apportionment Proceedings or change the parties' assessment of their respective entitlements to the Funds;
  - (g) subject to the observations in the following paragraph, the fact, implicit in the dearth of other objections emerging through the comprehensive grower notification process, that the vast majority of Growers do not have any objection to the proposed settlement;



(h) the very real prospect that Growers will get nothing at all if the Timbercorp Apportionment Proceedings proceed to judgment;

it is appropriate that there be no further delay in the Court's consideration of the approval applications now made.

213. Apart from Ms Bezençon, the only other objections to the Deeds of Compromise of which the secured creditors are aware are detailed in paragraph 16 of the third affidavit of Celia Armstrong, sworn in each of the proceedings. The small number of objections there identified comprise persons disappointed with the proposed settlement outcome, persons who found the correspondence or some of the documents difficult to understand, and persons who were concerned that, even after distribution of their entitlement, they would remain indebted to TSL or TFL. Of those objections, a number appear not to be pressed by the relevant Grower (following further communication from Clarendon Lawyers). Of those remaining, neither the quantum of the Growers' entitlement (for the reasons identified in paragraphs 156 to 165 above), nor the quality of the communication with Growers about the Deeds of Compromise (for the reasons identified in paragraphs 166 to 197 above), provide a sufficient basis to support a conclusion that the Deeds of Compromise are not for the benefit of Growers.
214. It should also be noted that of the 20 questions, comments or objections elevated from TSL to Clarendon Lawyers, four of them were from Growers who in fact *supported* court approval of the Deeds of Compromise<sup>369</sup>.
215. Finally, it is also relevant to the Court's consideration that of the large number of Growers affected by the Deeds of Compromise, only one of them has filed an affidavit objecting to the compromises, and only a handful more have raised and maintained an objection with TSL and Clarendon Lawyers.
216. In *Perry v Powercor Australia Limited*, Beach J stated that "the absence of objection to the proposed settlement (which settlement has been extensively advertised) is a relevant factor to be taken into account in favour of approval"<sup>370</sup>. Although in that case there were no objections to the proposed settlement, Beach J's observations are

---

<sup>369</sup> See Third Armstrong Affidavit at [16(e), (f), (i) and (n)].

<sup>370</sup> [2012] VSC 113 at [15].

of relevance to these proceedings because of the extremely large number of Growers involved and the comparatively small number of objections received.

## **K. Conclusion**

217. The proposed global resolution comprised in the Deeds of Compromise provides an efficacious, fair, and final resolution of the Timbercorp Apportionment Proceedings.

218. It is respectfully submitted that the Court should approve the Deeds of Compromise in each proceeding, and make the orders sought under each of the deeds. As the foregoing submissions reveal, the proposed compromises are ‘for the benefit of absent persons’ (here, the represented Growers) in light of considerations including:

- (a) the legal advice given to Representative Growers (and made available to any other Grower) and the decision of those representatives to agree to the terms of the deeds after considering what was in all Growers’ best interests;
- (b) the extensive notification process established to inform Growers of the proposed compromises, the court approval process and the Growers’ rights in relation to that process;
- (c) the assistance given to Growers in relation to any questions, queries or comments they had about the Deeds of Compromise, the court approval process and the Growers’ rights in relation to that process;
- (d) in light of Davies J’s Judgment and the issues that fall to be considered in each of the Timbercorp Apportionment Proceedings:
  - (i) it is highly probable that the Growers will receive nothing if the proceedings go to trial (or heard on appeal);
  - (ii) there is little realistic prospect of the Growers obtaining judgment significantly in excess of the amounts offered under the Deeds of Compromise; and
  - (iii) by contrast, the Deeds of Compromise provide certainty of the Growers receiving an entitlement now;
- (e) the proposed compromise payments being fair and equitable to and among Growers following from the uniform approach taken to calculation of the entitlements across all the schemes;

- (f) the fact that significant amounts of money will be incurred in litigating each proceeding while default interest continues to accrue, thereby reducing the balance of the Funds available for distribution; and
- (g) the very small number, and the nature, of objections received to the proposed compromises, balanced against the number of Growers involved (including Growers who have voiced their support in favour of the compromises being approved by the Court).

**Dated:** 28 September 2012

**P E Anastassiou**

**W A Harris**

**O Bigos**

**R G Craig**

**M D Rush**

.....  
**Ashurst Australia**  
 Solicitors for BOSI

.....  
**Allens**  
 Solicitors for ANZ

.....  
**Arnold Bloch Leibler**  
 Solicitors for Fenceport

**Schedule A – Table of Affidavits as at 28 September 2012**

| <b>NO</b>  | <b>AFFIDAVIT</b>  | <b>DEFINITION</b>                                     |
|--|---|---|
| <b>Supreme Court of Victoria Proceeding No. S CI 2011 6604 (Liparoo and Yungera Rights Proceeding)</b> |   |   |
| 1.   | Affidavit of Clinton Charles Hinchin sworn on 5 December 2011   | <b>Hinchin Liparoo and Yungera Affidavit</b>          |
| 2.   | Affidavit of Clinton Charles Hinchin sworn on 27 August 2012    | <b>Second Hinchin Liparoo and Yungera Affidavit</b>   |
| 3.   | Affidavit of Celia Jane Armstrong sworn on 30 August 2012       | <b>First Armstrong Liparoo and Yungera Affidavit</b>  |
| 4.   | Affidavit of Celia Jane Armstrong sworn on 30 August 2012       | <b>Second Armstrong Liparoo and Yungera Affidavit</b> |
| 5.   | Affidavit of Philip Grant Jones sworn 30 August 2012            | <b>Jones Liparoo and Yungera Affidavit</b>            |
| 6.   | Affidavit of Clinton Charles Hinchin sworn on 19 September 2012 | <b>Third Hinchin Liparoo and Yungera Affidavit</b>    |
| 7.   | Affidavit of Mark Anthony Korda sworn on 19 September 2012      | <b>Korda Liparoo and Yungera Affidavit</b>            |
| 8.   | Affidavit of Celia Jane Armstrong sworn on 19 September 2012    | <b>Third Armstrong Liparoo and Yungera Affidavit</b>  |
| 9.   | Affidavit of Alan David Fisher sworn 20 September 2012          | <b>Fisher Liparoo and Yungera Affidavit</b>           |
| <b>Supreme Court of Victoria Proceeding No. S CI 2011 6606 (Solara Rights Proceeding)</b>              |   |   |
| 10.  | Affidavit of Clinton Charles Hinchin sworn on 5 December 2011   | <b>Hinchin Solara Affidavit</b>                       |
| 11.  | Affidavit of Clinton Charles Hinchin sworn on 27 August 2012    | <b>Second Hinchin Solara Affidavit</b>                |
| 12.  | Affidavit of Celia Jane Armstrong sworn on 30 August 2012       | <b>First Armstrong Solara Affidavit</b>               |

| NO   | AFFIDAVIT   | DEFINITION                                  |
|--|---|---|
| 13.  | Affidavit of Celia Jane Armstrong sworn on 30 August 2012       | <b>Second Armstrong Solora Affidavit</b>    |
| 14.  | Affidavit of Philip Grant Jones sworn 30 August 2012            | <b>Jones Solora Affidavit</b>               |
| 15.  | Affidavit of Kerree Anne Bezençon sworn on 18 September 2012    | <b>Bezençon Affidavit</b>                   |
| 16.  | Affidavit of Clinton Charles Hinchin sworn on 19 September 2012 | <b>Third Hinchin Solora Affidavit</b>       |
| 17.  | Affidavit of Mark Anthony Korda sworn on 19 September 2012      | <b>Korda Solora Affidavit</b>               |
| 18.  | Affidavit of Celia Jane Armstrong sworn on 19 September 2012    | <b>Third Armstrong Solora Affidavit</b>     |
| 19.  | Affidavit of Celia Jane Armstrong sworn on 25 September 2012    | <b>Fourth Armstrong Solora Affidavit</b>    |
| 20.  | Affidavit of Clinton Charles Hinchin sworn 28 September 2012    | <b>Fourth Hinchin Solora Affidavit</b>      |
| 21.  | Affidavit of Clinton Charles Hinchin sworn 28 September 2012    | <b>Fifth Hinchin Solora Affidavit</b>       |
| <b>Supreme Court of Victoria Proceeding No. S CI 2010 1354 (BB Olives Rights Proceeding)</b> |   |   |
| 22.  | Affidavit of Ross Whyte McClymont sworn on 16 March 2010        | <b>McClymont BB Olives Affidavit</b>        |
| 23.  | Affidavit of Michael Joseph Fernon sworn on 16 March 2010       | <b>Fernon BB Olives Affidavit</b>           |
| 24.  | Affidavit of Ross Whyte McClymont affirmed on 27 August 2012    | <b>Second McClymont BB Olives Affidavit</b> |
| 25.  | Affidavit of Celia Jane Armstrong sworn on 30 August 2012       | <b>First Armstrong BB Olives Affidavit</b>  |
| 26.  | Affidavit of Celia Jane Armstrong sworn on 30 August 2012       | <b>Second Armstrong BB Olives Affidavit</b> |
| 27.  | Affidavit of Mark Anthony Korda sworn on 18 September 2012      | <b>Korda BB Olives Affidavit</b>            |

| NO  | AFFIDAVIT   | DEFINITION                                  |
|---|---|---|
| 28.   | Affidavit of Kerree Anne Bezençon sworn on 18 September 2012    | <b>Bezençon Affidavit</b>                   |
| 29.   | Affidavit of Celia Jane Armstrong sworn on 19 September 2012    | <b>Third Armstrong BB Olives Affidavit</b>  |
| 30.   | Affidavit of Ross Whyte McClymont affirmed on 20 September 2012 | <b>Third McClymont BB Olives Affidavit</b>  |
| 31.   | Affidavit of Celia Jane Armstrong sworn on 25 September 2012    | <b>Fourth Armstrong BB Olives Affidavit</b> |
| <b>Supreme Court of Victoria Proceeding No. S CI 2011 6777 (Fenceport Rights Proceeding)</b>  |   |   |
| 32.   | Affidavit of Mark Anthony Korda sworn on 13 December 2011       | <b>Korda Fenceport Affidavit</b>            |
| 33.   | Affidavit of Jane Chalmers Sheridan sworn on 27 August 2012     | <b>Sheridan Fenceport Affidavit</b>         |
| 34.   | Affidavit of Celia Jane Armstrong sworn on 30 August 2012       | <b>First Armstrong Fenceport Affidavit</b>  |
| 35.   | Affidavit of Celia Jane Armstrong sworn on 30 August 2012       | <b>Second Armstrong Fenceport Affidavit</b> |
| 36.   | Affidavit of Mark Anthony Korda sworn on 18 September 2012      | <b>Korda Fenceport Affidavit</b>            |
| 37.   | Affidavit of Kerree Anne Bezençon sworn on 18 September 2012    | <b>Bezençon Affidavit</b>                   |
| 38.   | Affidavit of Jane Chalmers Sheridan sworn on 19 September 2012  | <b>Second Sheridan Fenceport Affidavit</b>  |
| 39.   | Affidavit of Celia Jane Armstrong sworn on 19 September 2012    | <b>Third Armstrong Fenceport Affidavit</b>  |
| 40.   | Affidavit of Celia Jane Armstrong sworn on 25 September 2012    | <b>Fourth Armstrong Fenceport Affidavit</b> |
| <b>Court of Appeal Proceeding No. S APCI 2011 0103 (Almond Land Rights Appeal Proceeding)</b> |   |   |
| 41.   | Affidavit of Michael Joseph Fernon sworn on 27 July 2011        | <b>Fernon Almond Land Affidavit</b>         |

| NO  | AFFIDAVIT   | DEFINITION                                     |
|-----|---|--|
| 42. | Affidavit of Chris Marsden Fenwick affirmed on 6 October 2011   | <b>Fenwick Almond Land Affidavit</b>           |
| 43. | Affidavit of Ross Whyte McClymont affirmed on 15 August 2012    | <b>McClymont Almond Land Affidavit</b>         |
| 44. | Affidavit of Ross Whyte McClymont affirmed on 27 August 2012    | <b>Second McClymont Almond Land Affidavit</b>  |
| 45. | Affidavit of Celia Jane Armstrong sworn on 30 August 2012       | <b>Armstrong Almond Land Affidavit</b>         |
| 46. | Affidavit of Celia Jane Armstrong sworn on 30 August 2012       | <b>Second Armstrong Almond Land Affidavit</b>  |
| 47. | Affidavit of Mark Anthony Korda sworn on 18 September 2012      | <b>Korda Almond Land Affidavit</b>             |
| 48. | Affidavit of Celia Jane Armstrong sworn on 19 September 2012    | <b>Third Armstrong Almond Land Affidavit</b>   |
| 49. | Affidavit of Ross Whyte McClymont affirmed on 19 September 2012 | <b>Third McClymont Almond Land Affidavit</b>   |
| 50. | Affidavit of Eli Goldfinger sworn on 19 September 2012          | <b>Goldfinger Almond Land Affidavit</b>        |
| 51. | Affidavit of Michael Joesph Fernon sworn on 19 September 2012   | <b>Second Fernon Almond Land Affidavit</b>     |
| 52. | Affidavit of Eli Goldfinger sworn on 19 September 2012          | <b>Second Goldfinger Almond Land Affidavit</b> |

## **Schedule B – Outline of Submissions in Almond Land Rights Appeal Proceeding**

1. The Growers in the Almond Land Rights Proceeding have appealed Justice Davies' orders. BOSI is the first respondent to the appeal. ANZ is the second respondent to the appeal. The third, fourth and fifth respondents to the appeal are, respectively, Almond Land and its two liquidators, Mr Korda and Ms Chesser. By paragraph 1 of the orders made by Associate Justice Landsdowne on 29 September 2011 in the Almond Land Rights Appeal Proceeding, the third, fourth and fifth respondents were excused from taking any steps in the appeal, including court appearances, but may do so<sup>371</sup>.
2. The following documents have been filed with the Court of Appeal in the Almond Land Rights Appeal Proceeding:
  - (a) the appellants' (Growers') notice of appeal dated 11 July 2011<sup>372</sup>;
  - (b) the notice of contention of the first and second respondents dated 23 November 2011<sup>373</sup>;
  - (c) the agreed summary for the Court of Appeal dated 12 December 2011 filed by the parties in accordance with Practice Statement CA 2 of 1995<sup>374</sup>;
  - (d) the appellants' outline of submissions dated 28 February 2012<sup>375</sup>;
  - (e) the respondents' (ANZ's and BOSI's) joint outline of submissions dated 13 March 2012<sup>376</sup>; and
  - (f) the appellants' reply submissions dated 20 March 2012<sup>377</sup>.
3. The Representative Growers' Notice of Appeal and supporting outline of submissions contend *inter alia* that Davies J erred in finding that:
  - (a) the Growers needed to establish that they held rights of a proprietary nature in and with respect to the Almond Assets that were converted into the Fund<sup>378</sup>;

---

<sup>371</sup> Hinchin Third Liparoo and Yungera Affidavit at exhibit CCH-2, document 21.

<sup>372</sup> Hinchin Third Liparoo and Yungera Affidavit at exhibit CCH-2, document 22.

<sup>373</sup> Hinchin Third Liparoo and Yungera Affidavit at exhibit CCH-2, document 23.

<sup>374</sup> Hinchin Third Liparoo and Yungera Affidavit at exhibit CCH-2, document 17.

<sup>375</sup> Hinchin Third Liparoo and Yungera Affidavit at exhibit CCH-2, document 24.

<sup>376</sup> Hinchin Third Liparoo and Yungera Affidavit at exhibit CCH-2, document 25.

<sup>377</sup> Hinchin Third Liparoo and Yungera Affidavit at exhibit CCH-2, document 26.

<sup>378</sup> Ground 1(a), Notice of Appeal.



- (b) in making the Robson J Order, Justice Robson intended to refer only to proprietary rights<sup>379</sup>;
- (c) that the Growers in the 2002 Projects had no claim on the Fund<sup>380</sup>;
- (d) that the Growers in the 2005-2007 Projects had no claim on the Fund in respect of their right to use and exploit the water licences<sup>381</sup>;
- (e) that there was no demise of water rights under the head leases and sub-lease<sup>382</sup>;
- (f) that it would not be a derogation from the grant by Almond Land or TSL to interfere with or to deny the Growers access to the land, trees, capital works and water licences<sup>383</sup>;
- (g) that the promise of rights to use and enjoy the land, trees, capital works and water licences was not a promise that touched and concerned the land<sup>384</sup>;
- (h) that the land and orchards subject to the Growers rights in the 2005-2007 Almond Schemes had to be sold to a new entity before any such value could be established<sup>385</sup>;
- (i) that there was no evidential foundation for the Court to evaluate the chance of a restructure<sup>386</sup>;
- (j) that the absence of a restructure proposal foreclosed valuation of the chance of restructure<sup>387</sup>;
- (k) that there was no possibility, other than a theoretical possibility, that the projects would have continued if the Growers' rights had not been extinguished<sup>388</sup>;

---

<sup>379</sup> Ground 1(b), Notice of Appeal.

<sup>380</sup> Ground 1(c), Notice of Appeal.

<sup>381</sup> Ground 1(d), Notice of Appeal.

<sup>382</sup> Ground 2(a)(i), Notice of Appeal.

<sup>383</sup> Ground 2(a)(ii), Notice of Appeal.

<sup>384</sup> Ground 2(a)(iii), Notice of Appeal.

<sup>385</sup> Ground 3(a), Notice of Appeal.

<sup>386</sup> Ground 3(b), Notice of Appeal.

<sup>387</sup> Ground 3(c), Notice of Appeal.

<sup>388</sup> Ground 3(d), Notice of Appeal.

- (l) that the finding that the Almond Schemes “were at risk of imminent and inevitable termination” was contrary to the evidence and the weight of the evidence<sup>389</sup>;
  - (m) that her Honour erred in finding that the Growers’ counterfactual was purely speculative when the Growers had (until extinguishment pursuant to the Order) both the right and the commercial opportunity to keep Almond Land out of possession of the land upon which the Almond Schemes had been carried on<sup>390</sup>;
  - (n) that the Court was not obliged to consider the question of “marriage value”<sup>391</sup>; and
  - (o) that the possibility that HML would have consented to act as RE could not be made out, when such a finding was contrary to the evidence and the weight of the evidence<sup>392</sup>.
4. The Banks have filed an outline of submissions in reply<sup>393</sup> together with a Notice of Contention<sup>394</sup>, pursuant to which they have advanced, *inter alia*, the following submissions:
- (a) The Growers’ first ground of appeal rests on the incorrect premise that Robson J’s orders did something more, namely, create in the Growers a right to the net proceeds of sale which otherwise did not exist. This was neither the intent nor the effect of Robson J’s orders. So much is clear from the proviso in paragraph 9 of his orders: “insofar as the Growers have any rights to the assets the subject of the [proposed sale]” (the Banks’ emphasis) those rights would not be prejudiced as a result of the sale.
  - (b) For the reasons set out in the Banks’ Notice of Contention (see subparagraph (j) below), Davies J ought to have held:
    - (i) that the proprietary rights of the Growers in the 2005-2007 Almond Projects were of a more limited kind; and

---

<sup>389</sup> Ground 4, Notice of Appeal.

<sup>390</sup> Ground 5, Notice of Appeal.

<sup>391</sup> Ground 6(a), Notice of Appeal.

<sup>392</sup> Ground 7, Notice of Appeal.

<sup>393</sup> RWM-28 to the Third McClymont Almond Land Affidavit.

<sup>394</sup> RWM-25 to the Third McClymont Almond Land Affidavit.

- (ii) in particular, that those rights were not of a character which could afford the Growers any right to share in the Fund.
- (c) It is not now open to the Growers to submit that Growers in the 2002 Private Offer Project and 2002 Almond Project held rights which were proprietary in nature. The Growers conceded at trial that any rights of the Growers in these projects were contractual in nature only, and did not confer a proprietary interest.
- (d) Similarly, the Growers should not be permitted to argue before the Court of Appeal that they possessed rights of a proprietary interest in the nature of a profit à prendre or profit à rendre. The Growers remain bound by their decision at trial not to rely on or establish a possible equitable entitlement to the assets in the nature of a profit à prendre or profit à rendre. In any event, this submission should be rejected on the additional bases that:
  - (i) for the reasons given by Young J in *Permanent Trustee Australia Ltd v Shand*,<sup>395</sup> the Growers' interests were not in the nature of a "right to remove a crop which does not require attention after initial planting", thereby giving rise to a profit; and
  - (ii) there was no evidence that the Growers had registered any such interest at the time of the sale of the Almond Land assets (even assuming a profit can be created in respect of Torrens land<sup>396</sup>).
- (e) In contending that the water rights are proprietary in nature, the Growers submit that the grant of an Almondlot to Growers included "an interest in the water licences as a promise separate and distinct from Almond Land's promise in clause 3.1(a) and the grant of an interest in the Water Licences to TSL through its Head Leases". However, this argument fails to recognise that TSL could not grant to the Growers an interest it did not have. As Davies J recognised, "the head leases did not include the water licences as part of the demises"– nor could they have done so, since the head lessor, Almond Land, was a mere licensee itself. TSL did not have a proprietary interest in the water

---

<sup>395</sup> (1992) 27 NSWLR 426 at 432. See also *Clos Farming Estates Pty Ltd v Easton* [2001] NSWSC 525 at [54]-[70] per Bryson J, affirmed on appeal at [2002] NSWCA 389 at [62] per Santow JA (Mason P and Beazley JA agreeing).

<sup>396</sup> See Bradbrook et al, *Australian Real Property Law* (5<sup>th</sup> ed, 2011) at [17.515], who express "genuine doubt".

licences, and so could not grant a proprietary interest in the water licences to the Growers.

- (f) The Growers now rely on a different argument that they “had the ability to stop the transaction in October 2009” and that some value should be attributed to that fact<sup>397</sup>. For the reasons given by the Court of Appeal in *Chen v Chan*<sup>398</sup>, the Growers should not be entitled to advance this submission on appeal.
- (g) In any event, the premise of the Growers’ argument – that they “had the ability to stop the transaction” – is wrong. As the Banks contended at trial<sup>399</sup>:
  - (i) after the constitutions to the various Almond Projects were amended, with the Court’s imprimatur, in August 2009 to give the liquidators the power to terminate the Growers’ interests in the Project Documents in order to facilitate an unencumbered sale of Almond Land’s assets, the Growers’ interests were liable to be terminated against their will;
  - (ii) in the circumstances which prevailed in October 2009, and given the evidence before the Court from the liquidators of TSL and AMPL about the absence of any alternative to termination of the schemes and the Grower interests, it was inevitable that directions would be given that they were justified in taking that course.
- (h) The Growers’ argument on marriage value proceeds on the footing that:
  - (i) the Banks and the Growers had an equal ability to stop the sale to Olam<sup>400</sup>;
  - (ii) there was no evidence of the value of the Banks’ interests and the Court found the Growers’ rights had no value<sup>401</sup>; and
  - (iii) the whole of the Fund should therefore be shared between the Banks and the Growers<sup>402</sup>.
- (i) This submission is flawed as a matter of logic, principle and fact:

---

<sup>397</sup> Growers’ Submissions at [45].

<sup>398</sup> [2008] VSCA 280 at [36] (Maxwell P, Redlich JA and Forrest AJA). See also: *Findlay v Victoria* [2009] VSCA 294 at [6] (Maxwell P), [163]-[168] per Ashley JA and Hollingworth AJA.

<sup>399</sup> See, eg, Banks’ Outline of Facts, Issues and Contentions on Valuation at [7], [42]-[43], [157]-[164].

<sup>400</sup> Growers’ Submissions at [48].

<sup>401</sup> Growers’ Submissions at [49] and [50].

<sup>402</sup> Growers’ Submissions at [50].

- (i) First, and contrary to the predicate of the Growers’ “marriage value” submission, the Growers did not have an “ability to stop the transaction in October 2009”,<sup>403</sup>.
- (ii) Secondly, there was not only evidence of and submissions as to the value of the Banks’ interests<sup>404</sup> but the value of their interests was accepted by the Court<sup>405</sup>.
- (iii) Thirdly, there is no foundation in principle or authority for the Growers’ marriage value thesis. The Growers did not at trial, and do not now, cite any authority in support of their submission that any entitlements to the Fund could be valued on ‘marriage value’ principles<sup>406</sup>. Rather, the Growers simply submit that a 50-50 split “seems fair”,<sup>407</sup>.
- (iv) Fourthly, the way in which the Growers’ marriage value contention is now put differs from their case at trial. At trial, the Growers put their case on value, and adduced evidence in support, consistently with a “loss of opportunity” theory of the case<sup>408</sup>, not a marriage value theory founded on there being no evidence of the value of the interests of either the Banks or the Growers.
- (j) The Banks also contend that Davies J’s conclusion<sup>409</sup> that the Growers were not entitled to share in the net proceeds of sale should be affirmed, but on an additional or alternative ground. In relation to the Growers in the 2005-2007 Almond Projects, Davies J correctly held that they had no proprietary interest in the water licences<sup>410</sup>, but should have also have found:
  - (i) that the Growers in those projects had no proprietary interest in the almond trees or capital works<sup>411</sup>;

---

<sup>403</sup> Growers’ Submissions at [48].

<sup>404</sup> See the Banks’ Trial Submissions on Rights Issues at [93]&ff.

<sup>405</sup> Judgment at [167].

<sup>406</sup> Growers’ Closing Submissions at [6.5].

<sup>407</sup> Growers’ Trial Submissions at [6.6]-[6.9].

<sup>408</sup> Although the Growers sought to distance themselves from the “loss of opportunity” label, Davies J concluded that their case theory in relation to valuation was “analogous to a loss of opportunity claim”: Davies J Judgment at [93].

<sup>409</sup> Judgment at [167].

<sup>410</sup> Judgment at [72].

<sup>411</sup> Cf Judgment at [73(a)].

- (ii) that further and in any event the Growers' leasehold interests in the land and any entitlement under the leases to use or enjoy the almond trees or capital works were in the nature of encumbrances, did not form any part of the subject matter of the sale under the SPD, and were not interests of a kind which founded any entitlement to share in the proceeds of sale of the assets.