

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

LIST B
S CI 2013 01477
S CI 2013 01478

BETWEEN:

THE TRUST COMPANY (NOMINEES) LIMITED
(ACN 000 154 441)

Plaintiff

- and -

MICHAEL FUNG IN HIS CAPACITY AS RECEIVER AND
MANAGER OF ALIGN FUNDS MANAGEMENT LIMITED
(RECEIVER AND MANAGER APPOINTED) (ACN 105 684
231) IN ITS CAPACITY AS THE RESPONSIBLE ENTITY
OF THE TIMBERCORP ORCHARD TRUST & OTHERS
(ACCORDING TO THE SCHEDULE)

Defendants

PLAINTIFF'S SUBMISSIONS

(BELLA VISTA & KANGARA RIGHTS PROCEEDINGS)

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1. These submissions are filed on behalf of the plaintiff (**The Trust Company**) in proceeding S CI 2013 01477 (the **Bella Vista Rights Proceeding**) and proceeding S CI 2013 01478 (the **Kangara Rights Proceeding**).
2. By summonses dated 12 March 2014,¹ The Trust Company seeks orders pursuant to r 16.01(4) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) (the **Rules**) approving the compromises made in the Bella Vista and Kangara Rights

¹ BV1:16; K1:16. In the footnotes in these submissions "BV" means the Court Book for the Bella Vista Rights Proceeding, followed by the applicable volume number, and then the relevant page number. "K" means the Court Book for the Kangara Rights Proceeding, followed by the applicable volume number, and then the relevant page number.

Proceedings, with binding effect on absent persons represented by the second and third defendants in each case (the **Representative Growers**).²

3. The compromises were the subject of deeds executed on 14 January 2014 by each of the parties to the proceedings, as well as Align Funds Management Limited (receivers and managers appointed) in its capacity as the responsible entity of the Timbercorp Orchard Trust (**Align**), and Timbercorp Securities Limited (in liquidation) (**TSL**) (the **Deeds of Compromise**).³
4. The Deeds of Compromise contain conditions precedent requiring court approval to be obtained, in each proceeding, by no later than 30 June 2014.⁴ The Deeds of Compromise are, therefore, cross-conditional and subject to a time constraint; neither can take effect until both are approved, and both must be approved by 30 June 2014.
5. For the reasons detailed later in these submissions, it is respectfully submitted that the Court should approve the Deeds of Compromise and make orders in the terms set out in Schedule 2 of each deed.⁵
6. By way of overview, the issues and topics considered in these submissions are as follows:
 - (a) a list of the relevant affidavits filed in each proceeding (heading A);
 - (b) identification of the parties to the proceeding (heading B);
 - (c) discussion of the decision of this Court in *In re Timbercorp Securities Ltd (Applications for the approval of compromises)* [2012] VSC 590, in which the Court approved compromises in five related proceedings arising from the collapse of the Timbercorp group (heading C);
 - (d) identification of relevant aspects of the factual background to the Bella Vista and Kangara Rights Proceedings (heading D);
 - (e) a summary of the terms of the Deeds of Compromise in each proceeding (heading E);

² In the Bella Vista Rights Proceeding, the Representative Growers are Anthony Cormick (2004 Timbercorp Table Grape Project), and Jeyarasa and Anne Rasiah (2005 Timbercorp Table Grape Project): BV1:7. In the Kangara Rights Proceeding, the Representative Growers are Gregory Westaway (2004 Timbercorp Citrus Project) and Robert and Elizabeth Bugden (2005 Timbercorp Citrus Project): K1:12.

³ BV1:40; K1:40.

⁴ See cl 3.2: BV1:44; K1:44.

⁵ BV1:56; K1:56.

- (f) a statement of the relevant legal principles to be applied in determining whether to approve the Deeds of Compromise pursuant to r 16.01(4) of the Rules (heading F);
- (g) application of the relevant legal principles to the facts of the present proceedings, which reveals a number of compelling reasons why the Deeds of Compromise should be approved (headings G to I); and
- (h) a summary of the reasons in support of the orders sought, together with a copy of draft orders in each proceeding (heading J, and annexure).

A. Affidavits filed in support of the orders sought

- 7. For the purposes of the approval application in the Bella Vista Rights Proceeding, the following supporting affidavits have been filed:
 - (a) Second Affidavit of Clinton Hinchin (12 March 2014);
 - (b) Third Affidavit of Clinton Hinchin (21 March 2014);
 - (c) Second Affidavit of Yu-chiao Hsueh (25 March 2014);
 - (d) Affidavit of Leanne Chessier (27 March 2014);
 - (e) Third Affidavit of Yu-chiao Hsueh (17 April 2014);
 - (f) Fourth Affidavit of Yu-chiao Hsueh (7 May 2014); and
 - (g) Second Affidavit of Leanne Chessier (8 May 2014).
- 8. For the purposes of the approval application in the Kangara Rights Proceeding, the following supporting affidavits have been filed:
 - (a) Third Affidavit of Clinton Hinchin (12 March 2014);
 - (b) Fourth Affidavit of Clinton Hinchin (21 March 2014);
 - (c) Affidavit of Yu-chiao Hsueh (25 March 2014);
 - (d) Affidavit of Leanne Chessier (27 March 2014);
 - (e) Second Affidavit of Yu-chiao Hsueh (17 April 2014);
 - (f) Fifth Affidavit of Clinton Hinchin (1 May 2014);
 - (g) Third Affidavit of Yu-chiao Hsueh (7 May 2014); and

(h) Second Affidavit of Leanne Chesser (8 May 2014).

9. The affidavits and exhibits are contained in court books which have been filed in each proceeding. For ease of reference, a page number has been stamped on the bottom of each page of the court books.
10. As at the date of these submissions no affidavit has been filed by any person represented by one or more of the Representative Growers, or any other person or organisation with an interest in the outcome of the proceedings. Correspondence received from Ms Bezencon has been exhibited to affidavits filed on behalf of the Representative Growers and The Trust Company in the Kangara Rights Proceeding.⁶ ASIC has indicated that it does not intend to participate in the approval applications.⁷

B. The parties to the proceedings

B.1 The plaintiff

11. The plaintiff in each of the Bella Vista and Kangara Rights Proceedings is The Trust Company. The Trust Company is the trustee for the holders of debentures issued by Align for the purpose of raising funds to purchase properties and water rights in furtherance of various agribusiness managed investment schemes conducted by Timbercorp Limited (in liquidation) (**Timbercorp**) and its subsidiaries.⁸ The debenture holders were secured lenders: fixed and floating charges and real property mortgages were granted in favour of The Trust Company (which were held for the benefit of the debenture holders).⁹ Following the collapse of the Timbercorp group and subsequent sale of assets forming part of the relevant schemes, The Trust Company commenced the Bella Vista and Kangara Rights Proceedings for the purpose of determining its (and any other person's) rights to the net sale proceeds, including the value of those rights. In both proceedings, The Trust Company is the sole secured lender.¹⁰
12. Further background facts concerning The Trust Company are set out under heading D, below.

⁶ This correspondence is referred to later in the submissions.

⁷ BV1:134 at [98].

⁸ BV1:20 at [5]; BV1:100 at [21]-[22].

⁹ BV1:100 at [22]-[23].

¹⁰ BV1:107 at [40]; K1:107 at [46].

B.2 The first defendant

13. The first defendant in each of the Bella Vista and Kangara Rights Proceedings is Michael Fung (in his capacity as receiver and manager of assets over which The Trust Company held security).¹¹ By orders made on 19 July 2013, Mr Fung was excused from taking any substantive part in the proceedings.¹²
14. The circumstances in which receivers and managers were appointed by The Trust Company, and their role in the sale of various assets, are described under heading D, below.

B.3 The second and third defendants

15. The second and third defendants in the Bella Vista and Kangara Rights Proceedings are the Representative Growers.
16. The Representative Growers in the Bella Vista Rights Proceeding are Anthony Cormick (2004 Timbercorp Table Grape Project) and Jeyarasa and Anne Rasiah (2005 Timbercorp Table Grape Project).¹³
17. The Representative Growers in the Kangara Rights Proceeding are Gregory Westaway (2004 Timbercorp Citrus Project) and Robert and Elizabeth Bugden (2005 Timbercorp Citrus Project).¹⁴
18. The Representative Growers were appointed by the Court on 19 July 2013 as representatives of all investors in the relevant projects for the purposes of these proceedings.¹⁵ The investors, or members, in the relevant projects are referred to in the project documents as “**Growers**”, and that same terminology is adopted in these submissions. The number of Growers who invested in each project are as follows:
 - (a) 207 Growers invested in the 2004 Timbercorp Table Grape Project;¹⁶
 - (b) 302 Growers invested in the 2005 Timbercorp Table Grape Project;¹⁷
 - (c) 80 Growers invested in the 2004 Timbercorp Citrus Project;¹⁸ and

¹¹ BV1:107 at [41]; K1:107 at [47].

¹² BV1:31 at [8]; K1:31 at [8].

¹³ BV1:7.

¹⁴ K1:12.

¹⁵ BV1:30 at [3]; K1:30 at [3].

¹⁶ BV1:108 at [43(a)].

¹⁷ BV1:108 at [43(b)].

- (d) 160 Growers invested in the 2005 Timbercorp Citrus Project.¹⁹

C. Related approval applications in this Court

19. In 2012, the Court heard and determined approval applications in five related proceedings: *In re Timbercorp Securities Ltd (Applications for the approval of compromises)* [2012] VSC 590 (the **Resolved Timbercorp Apportionment Proceedings**). There are close parallels between the circumstances of those proceedings and the approval applications made in each of them, and the current proceedings and approval applications now made. By way of summary, those similarities include the following:
- (a) The proceedings arose out of the collapse of the Timbercorp group of companies in 2009.²⁰
 - (b) Timbercorp was the parent entity in a group comprising 40 corporate entities involved in the establishment, development, marketing and management of primary industry based managed investment schemes.²¹
 - (c) On 23 April 2009, voluntary administrators were appointed to each of the companies in the group, and on 29 June 2009 the creditors resolved to wind-up the group. Liquidators were appointed over companies including Timbercorp and TSL.²²
 - (d) Court approval was sought and obtained to sell assets the subject of the various projects, with the net sale proceeds to be held on trust pending determination of who was entitled to those proceeds and in what amounts.²³
 - (e) One proceeding, known as the Almond Land Rights Proceeding, went to trial in 2011.²⁴ It was, in effect, a test case to ascertain what rights, if any, various interested parties had to the net sale proceeds (the subject of that proceeding), and the value of those rights. Those proceeds derived from the sale of assets used in various almond-growing schemes operated by Timbercorp (the

¹⁸ K1:108 at [49(a)].

¹⁹ K1:108 at [49(b)].

²⁰ BV3:1506-11 at [1]-[18]; BV1:20 at [5]-[7]; K1:20 at [5]-[7].

²¹ BV3:1506 at [4].

²² BV3:1507 at [6].

²³ BV3:1508-10 at [11]-[15]; BV1:103-5 at [33]-[38]; K1:102-4 at [36]-[39].

²⁴ BV3:1511-15 at [19]-[27].

Almond Projects). The trial judge, Davies J, concluded (for reasons set out in further detail below) that the Growers in the relevant projects had either no proprietary interest in the net sale proceeds or, if they had such an interest, they were of no value.²⁵

- (f) Deeds of compromise were entered into in the Resolved Timbercorp Apportionment Proceedings.²⁶ They contain substantially similar terms to the Deeds of Compromise in the current proceedings,²⁷ and (like the Deeds of Compromise) provide for approximately 5% of the relevant gross sale proceeds being held on trust by TSL for distribution to and on behalf of Growers in accordance with their entitlement under the respective deeds.²⁸
 - (g) As in the current proceedings, applications were made in the Resolved Timbercorp Apportionment Proceedings under r 16.01(4) of the Rules for approval of the compromises.²⁹ And, as in the current proceedings, notices were provided to Growers about the approval process, an information hotline was established, a document answering frequently asked questions was prepared and made available, and Grower feedback was obtained and recorded.³⁰
 - (h) The relevant legal principles for determining whether, in the current proceedings, the Court should approve the Deeds of Compromise, are the same as those applied in the Resolved Timbercorp Apportionment Proceedings.³¹ They are primarily those set out in the decision of Habersberger J in *Exxonmobil Superannuation Plan Pty Ltd v Esso Australia Pty Ltd* (2010) 29 VR 356; [2010] VSC 357.³²
20. One further, important parallel is to be observed about the Kangara Rights Proceeding and the Solora Rights Proceeding (one of the five Resolved Timbercorp Apportionment Proceedings). In the reasons for judgment in *In re Timbercorp*

²⁵ BV3:1512-15 at [23]-[27].

²⁶ BV3:1506 at [2].

²⁷ BV1:40; K1:40.

²⁸ BV3:1516 at [35]; BV3:1570 at [19]; K3:1348 at [19].

²⁹ BV3:1506 at [1].

³⁰ BV3:1528-33 at [71]-[87].

³¹ BV3:1525-28 at [62]-[70].

³² BV3:1525 at [62].

Securities Ltd,³³ the Court considered, in the context of the compromise of the Solara Rights Proceeding, the viability of the 2005 Timbercorp Citrus Project and whether the compromise concerning that project should be approved. That one project was conducted on land the subject of the Solara Rights Proceeding and land the subject of the current Kangara Rights Proceeding.³⁴ Thus, in considering the viability of the 2005 Timbercorp Citrus Project (for the purposes of determining whether to approve the Deed of Compromise in the Kangara Rights Proceeding), the Court will need to have regard to the findings already made in *In re Timbercorp Securities Ltd*. This aspect is addressed further later in these submissions.

21. Although there are a number of similarities between the present proceedings and the Resolved Timbercorp Apportionment Proceedings, The Trust Company does not submit that the decision in *In re Timbercorp Securities Ltd* is, without more, determinative of the current approval applications. Each of the present applications must be considered on its merits, having regard to matters including the circumstances leading to the commencement of the proceedings, similarities (or differences) between the proceedings and the facts in issue in the Almond Land Rights Proceeding (the subject of the decision by Davies J), the terms of the Deeds of Compromise, and the process by which Growers have been informed of and responded to the approval applications. For these reasons (among others), the following submissions set out relevant background facts and show why, in each case, it is respectfully submitted that the approval applications should be granted.

D. Factual background

D.1 Bella Vista Rights Proceeding

22. The Bella Vista Rights Proceeding concerns two table-grape agribusiness schemes: the 2004 Table Grape Project and the 2005 Table Grape Project (the **Table Grape Projects**).³⁵ The purpose of the Table Grape Projects was the cultivation of fresh table grapes for commercial sale.³⁶ Each of the projects was a managed investment scheme, and TSL was the responsible entity of each project.³⁷ The Table Grape Projects were

³³ [2012] VSC 590; see K3:1258.

³⁴ K1:106 at [41]-[45].

³⁵ BV1:94 at [6].

³⁶ BV1:98 at [15].

³⁷ BV1:98 at [18].

governed by a suite of documents including a constitution, leases, underleases and licence agreements.³⁸

23. The Table Grape Projects were conducted on land in New South Wales, known as “Costa’s Crest” and “Bella Vista”.³⁹ They are referred to collectively as the **Bella Vista Property**.
24. The Bella Vista Property was owned by Align (in its capacity as the responsible entity of the Timbercorp Orchard Trust).⁴⁰ Approximately 42% of the Bella Vista Property was planted with vineyards, representing a total of about 418,260 vines.⁴¹ In its capacity as responsible entity, Align also held water access rights under licence and water share arrangements (**Bella Vista Water Rights**).⁴²
25. Align raised funds to purchase the Bella Vista Property and Water Rights through the issue of debentures in 2003 and 2005.⁴³ As earlier stated, The Trust Company is the trustee for the holders of the debentures issued by Align. The Trust Company, on behalf of the debenture holders, took security over the Bella Vista Property (in the form of two real property mortgages) and the assets of the Timbercorp Orchard Trust (by way of a registered charge).⁴⁴
26. As at 29 June 2009, the combined amount of the secured debt owing to The Trust Company in relation to the 2004 and 2005 Table Grape Projects and the 2004 and 2005 Citrus Projects (referred to below) was \$56,773,700 (with interest continuing to accrue from that date).⁴⁵ The Trust Company was the only secured creditor of Align (in its capacity as the responsible entity of the Timbercorp Orchard Trust).⁴⁶
27. On 22 October 2009, following the collapse of the Timbercorp group, The Trust Company appointed receivers and managers (Messrs Longley and Kirk) over the

³⁸ BV1:97, 99 at [13], [20]. Copies of the project documents are exhibited to the Third Affidavit of Clinton Hinchey at K1:138-K2:882.

³⁹ BV1:98 at [16]; BV2:888 at [6]-[7].

⁴⁰ BV1:98 at [17]. The role of the Timbercorp Orchard Trust is described in further detail in the affidavit of Paul Kirk at K2:887-91 at [5]-[19].

⁴¹ BV2:888 at [7].

⁴² BV1:98-9 at [19]. Align also issued unsecured annuity bonds to bondholders, which Sandhurst Trustees Limited holds on trust for the bondholders. Sandhurst does not intend to take any part in this proceeding, and has not been joined as a defendant, because there is no prospect of any surplus payment being made to the bondholders: BV1:109-10 at [48]; K1:109 at [54]-[55]. For the same reason, Align does not have any interest in the outcome of the proceeding: BV1:109 at [47]; K1:108-9 at [53].

⁴³ BV1:100 at [21].

⁴⁴ BV1:100 at [23].

⁴⁵ BV1:102 at [30(a)]; K1:101 at [32(a)].

⁴⁶ BV1:102 at [31]; K1:101 at [33].

charged property of Align, including the Bella Vista Property and Water Rights.⁴⁷ Mr Fung, the first defendant, is the current receiver and manager.⁴⁸ Mr Fung, and his predecessors, are referred to collectively in these submissions as the **Receivers**.

28. In October and November 2009, the Receivers engaged in a sale process in relation to the Bella Vista Property and Water Rights. The details of that sale process are deposed to in an affidavit sworn by one of the former Receivers, Mr Kirk.⁴⁹ Seven offers were received from five prospective purchasers.⁵⁰ Ultimately, contracts of sale were entered into with Costa Holdings Investments Pty Ltd in relation to the Bella Vista Property and associated assets (on 23 July 2010), and contracts for the sale of Bella Vista Water Rights were entered into with Vicsuper Ecosystem Services Pty Ltd and Tandou Ltd on 22 December 2010 (**Bella Vista Sale Contracts**).⁵¹
29. A condition precedent to completion of the Bella Vista Sale Contracts was the obtaining of directions and orders from the Court that the liquidators of TSL were justified in extinguishing the rights of Growers in relation to the property the subject of the Bella Vista Sale Contracts, and that the net sale proceeds be held on trust pending determination by the Court of what rights, if any, the Growers and The Trust Company had to those proceeds.⁵² On 7 February 2011, Davies J made orders which permitted the sale of the Bella Vista Property and Water Rights to proceed, required the net sale proceeds to be held on trust until further order of the court, and expressly preserved the rights of The Trust Company and the Growers to assert an interest in those net sale proceeds.⁵³
30. Following the settlement of the Bella Vista Sale Contracts, and distributions for payment of the Receivers' costs and other expenses,⁵⁴ the total value of the Bella Vista net sale proceeds (as at 19 March 2014) was \$5,899,837.70.⁵⁵ This, together with sums recovered from the sale of the Kangara Property and Water Rights (referred

⁴⁷ BV1:100-1 at [24]-[26].

⁴⁸ BV1:101 at [26].

⁴⁹ BV2:891-919 at [20]-[104].

⁵⁰ BV2:896 at [35].

⁵¹ BV2:101 at [27]-[28].

⁵² BV1:102-3 at [32]-[34].

⁵³ BV1:104-5 at [37]-[38].

⁵⁴ BV1:104 at [38].

⁵⁵ BV1:105-7 at [39].

to below at [39]) represents a shortfall of more than \$30 million on the principal sum still owing to The Trust Company.⁵⁶

31. On 25 March 2013, the Bella Vista Rights Proceeding was commenced by The Trust Company to determine how the Bella Vista net sale proceeds should be apportioned (if at all) between The Trust Company, the Growers, and any other parties claiming an interest in those proceeds.⁵⁷

D.2 Kangara Rights Proceeding

32. The Kangara Rights Proceeding concerns two citrus-related agribusiness schemes: the 2004 Timbercorp Citrus Project and the 2005 Timbercorp Citrus Project (the **Citrus Projects**).⁵⁸ The purpose of the Citrus Projects was to cultivate citrus fruit (oranges, mandarins, lemons, limes and grapefruit) for commercial sale.⁵⁹ Each of them was a managed investment scheme and TSL was the responsible entity of each project.⁶⁰ Each of the Citrus Projects was governed by a suite of documents including a constitution, licence agreement, head lease and sub-lease.⁶¹
33. The 2004 Citrus Project was conducted on land in Murtho, South Australia, known as the Kangara Property.⁶² The 2005 Citrus Project was conducted on the **Kangara Property** and land known as the Solora Property.⁶³ The sale of the Solora Property, and distribution of proceeds from that sale, was the subject of the Solora Rights Proceeding (one of the Resolved Timbercorp Apportionment Proceedings the subject of *In re Timbercorp Securities Ltd*,⁶⁴ referred to above).⁶⁵ The Kangara Rights Proceeding concerns the proceeds from the sale of the Kangara Property (and related assets).

⁵⁶ See paragraph 26 above.

⁵⁷ BV1:20-21 at [7].

⁵⁸ K1:93 at [6].

⁵⁹ K1:97 at [15].

⁶⁰ K1:98 at [19].

⁶¹ K1:97-9 at [13], [22]. Copies of the project documents are exhibited to the Fourth Affidavit of Clinton Hinchey at K1:136-K2:616.

⁶² K1:97 at [16]; K2:622 at [6]-[7].

⁶³ K1:97 at [17].

⁶⁴ [2012] VSC 590 – see K3:1258.

⁶⁵ K1:106 at [41]-[45].

34. The Kangara Property was owned by Align (in its capacity as the responsible entity of the Timbercorp Orchard Trust).⁶⁶ The property included citrus orchards and wine grape vineyards (although the vineyards were not part of the Citrus Projects or any other managed investment scheme). In its capacity as responsible entity, Align also held rights to 8,861.5 mega litres of water per annum, under a water licence (**Kangara Water Rights**).⁶⁷
35. Align raised funds to purchase the Kangara Property and Water Rights through the same debenture issues in 2003 and 2005⁶⁸ as those which had funded the purchase of the Bella Vista Property and Water Rights.⁶⁹ As stated earlier, The Trust Company is the trustee for the holders of those debentures. The Trust Company, on behalf of the debenture holders, took security over the Kangara Property (in the form of a real property mortgage) and the assets of the Timbercorp Orchard Trust (by way of a registered charge).⁷⁰
36. On 22 October 2009, The Trust Company appointed the same Receivers (as those appointed in respect of the Bella Vista Property) over the charged property of Align, including the Kangara Property and Water Rights.⁷¹
37. From November 2009 until about January 2011, the Receivers engaged in a sale process in relation to the Kangara Property and Water Rights. The details of that extensive sale process are deposed to in an affidavit sworn by Mr Kirk.⁷² In summary, the Receivers engaged in numerous discussions with various parties who expressed an interest in either purchasing the Kangara Property, a recapitalisation of the Timbercorp Orchard Trust, or becoming a replacement responsible entity of the Citrus Projects.⁷³ Ultimately, a decision was made to split the assets: a contract for the sale of the Kangara Property and associated assets was entered into with Agriproperty Pty Ltd and Kingston Vineyards Pty Ltd (on 3 December 2010), and a contract for the

⁶⁶ K197-8 [18]. The role of the Timbercorp Orchard Trust is described in further detail in the affidavit of Paul Kirk at K2:621-4 at [5]-[8], [10]-[13].

⁶⁷ K1:98 at [20].

⁶⁸ K1:99 at [23].

⁶⁹ BV2:948.

⁷⁰ K1:99 at [25].

⁷¹ K1:99-100 at [26]-[28].

⁷² K2:626-76 at [19]-[204].

⁷³ K2:625 at [19].

sale of the Kangara Water Rights to the Commonwealth was executed on 4 January 2011 (**Kangara Sale Contracts**).⁷⁴

38. As with the Bella Vista Property and Water Rights, a condition precedent to completion of the Kangara Sale Contracts was the obtaining of directions and orders from the Court that the liquidators of TSL were justified in extinguishing the rights of Growers in relation to the property the subject of the Kangara Sale Contracts, and that the net sale proceeds be held on trust pending determination by the Court of what rights, if any, the Growers and The Trust Company had to those proceeds.⁷⁵ On 15 March 2011, Judd J made orders which permitted the sale of the Kangara Property and Water Rights to proceed, required the net sale proceeds to be held on trust until further order of the Court, and expressly preserved the rights of The Trust Company and the Growers to assert an interest in those net sale proceeds.⁷⁶
39. Following the settlement of the Kangara Sale Contracts, and distributions for payment of the Receivers' costs and other expenses,⁷⁷ the total value of the Kangara net sale proceeds (as at 19 March 2014) was \$20,336,356.45.⁷⁸ As stated above, when combined with the Bella Vista net sale proceeds, this represents a shortfall of more than \$30 million on the principal sum still owing to The Trust Company.
40. On 25 March 2013, the Kangara Rights Proceeding was commenced by The Trust Company to determine who was entitled to the Kangara net sale proceeds and what the quantum of that entitlement was.⁷⁹

E. Deeds of Compromise

41. On 1 October 2013, The Trust Company made a without prejudice settlement proposal in relation to the Bella Vista and Kangara Rights Proceedings. Ultimately, following negotiations between the parties, the Deeds of Compromise were executed by the parties to the proceeding on 14 January 2014.⁸⁰

⁷⁴ K1:100 at [29]-[30]; K2:625 at [20].

⁷⁵ K1:101-2 at [34]-[35].

⁷⁶ K1:102-4 at [37]-[39].

⁷⁷ K1:103 at [39].

⁷⁸ K1:104-6 at [40].

⁷⁹ K1:20-1 at [7]-[8].

⁸⁰ BV1:126-27 at [85]-[86]; K1:126-7 at [92]-[93].

42. Clauses 2, 4 and 5 are central to the Deeds of Compromise. In summary, they address the parties' respective entitlements to the "Fund"⁸¹ 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 Growers⁸²) will give mutual releases to one another in relation to their entitlements to each such Fund.
43. Before turning to some of the detail of how it is proposed each Fund will be allocated, four other features of the Deeds of Compromise bear noting.
44. First, each Deed of Compromise only takes effect if there is court approval of the other Deed of Compromise pursuant to r 16.01(4) of the Rules.⁸³ Accordingly, if either of the Deeds of Compromise does not receive court approval, neither will be effective; this reflects the intended objective of a global (cf piecemeal) settlement of the Bella Vista and Kangara Rights Proceedings. Further, court approval must be obtained before 30 June 2014.
45. Secondly, each Deed of Compromise is subject to another condition precedent: by 7 March 2014, the holders of the debentures issued by Align must approve the Deeds of Compromise.⁸⁴ This has now occurred. On 28 February 2014, The Trust Company convened a meeting of the debenture holders; a quorum was present and the resolutions were passed.⁸⁵
46. Thirdly, the Deeds require notice to be given 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 Fund; the proposed approval process; and Growers' options in relation to the relevant Deed of Compromise and the approval process.⁸⁶ This material is required by the Deeds of Compromise 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. As outlined in further detail below, each of these steps has now been taken.

⁸¹ BV1:42, K1:42, defined in cl 1.1 of the Deed of Compromise.

⁸² BV1:43, K1:43 defined in cl 1.1 of the Deeds of Compromise as the "Participant Growers".

⁸³ BV1:44-5, K1:44-5, cl 3 of the Deeds of Compromise.

⁸⁴ BV1:22-3 at [10]; K1:22-3 at [10].

⁸⁵ BV1:23 at [11]; K1:23 at [11].

⁸⁶ BV1:48-51, K1:48-51, cl 6 of the Deeds of Compromise.

47. Fourthly, 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.⁸⁷
48. The mechanism for allocation and distribution of the Fund in each proceeding is in clause 4 of the Deeds of Compromise.⁸⁸ It provides, in substance, that the following payments are to be made from each Fund following court approval of the Deeds of Compromise:
- (a) 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 Deeds of Compromise):
 - (i) \$385,000 (in the Bella Vista Rights Proceeding); and
 - (ii) \$1,043,321 (in the Kangara Rights Proceeding),
 being approximately 5% of the gross sale proceeds of the subject assets in each case,⁸⁹ to be apportioned between the Growers on a pro-rated basis according to the number of lots held by each Grower at the date on which the Growers' rights in the Table Grape Projects or the Citrus Projects (as the case may be) were extinguished pursuant to court order;⁹⁰
 - (c) the balance of the Fund to be paid to The Trust Company.
49. The amount payable per lot for the Table Grape Projects equates to \$93.93.⁹¹ The amount payable per lot for the Citrus Projects equates to \$271.98.⁹² The difference between the amounts payable reflects matters including the sale price obtained for the respective properties and water rights.

⁸⁷ BV1:52-3, K1:52-3, cl 9 of the Deeds of Compromise.

⁸⁸ BV1:45-8; K1:45-8.

⁸⁹ BV3:1516 at [35]; BV3:1570 at [19]; K3:1348 at [19].

⁹⁰ 2 March 2011 in the case of the Bella Vista Rights Proceeding, and 2 June 2011 in the case of the Kangara Rights Proceeding. See the definition of "Bella Vista Extinguishment Date" and "Kangara Extinguishment Date" in the Deeds of Compromise: BV1:42; K1:42

⁹¹ BV1:75, 89.

⁹² K1:73, 88.

50. As earlier stated, the Deeds of Compromise are in largely identical terms to the compromise deeds entered into in relation to the Resolved Timbercorp Apportionment Proceedings. A copy of the deed of compromise in relation to the Solora Proceeding is included in the Court Book, by way of example.⁹³

F. Court approval of the Deeds of Compromise: applicable legal principles

51. Rule 16.01(4) of the Rules provides:

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.

52. The jurisdictional facts necessary to engage the Court’s power under r 16.01(4) are present in each of the Bella Vista and Kangara Rights 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”).

53. The principles relevant to determining whether, for the purposes of r 16.01(4), a compromise is “for the benefit” of absent persons, were identified and considered by Habersberger J in *Exxonmobil Superannuation Plan Pty Ltd v Esso Australia Pty*

⁹³

K3:1112-40.

*Ltd*⁹⁴ and applied by this Court in the Resolved Timbercorp Apportionment Proceedings.⁹⁵ 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.⁹⁶
- (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.⁹⁷ 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;
 - (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.⁹⁸
- (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).⁹⁹ 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

⁹⁴ (2010) 29 VR 356.

⁹⁵ *In re Timbercorp Securities Limited (in liquidation)* [2012] VSC 590 at [62]-[107].

⁹⁶ (2010) 29 VR 356 at 368 [52], with references to *The Shorter Oxford English Dictionary on Historical Principles*, p181 and *Butterworths Australian Legal Dictionary*, p121.

⁹⁷ (2010) 29 VR 356 at 369-70 [60]. In Victoria, approval is sought in accordance with the terms of s 33V of the *Supreme Court Act 1986* (Vic).

⁹⁸ (2010) 29 VR 356 at 369-70 [60] quoting from *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459 at 465 [19] per Goldberg J.

⁹⁹ (2010) 29 VR 356 at 369 [56].

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”.¹⁰⁰
 - (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.¹⁰¹
 - (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:
 - (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.¹⁰²
 - (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.¹⁰³
54. 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

¹⁰⁰ (2010) 29 VR 356 at 320 [62].

¹⁰¹ (2010) 29 VR 356 at 320 [62]. Court orders made on 16 December 2011 in the case of the Liparoo and Yungera Rights Proceeding, Solara 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.

¹⁰² (2010) 29 VR 356 at 370-1 [63], citing *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Limited* (No 2) (2006) 236 ALR 322 at 339 [50] per Jessup J.

¹⁰³ (2010) 29 VR 356 at 374 [80].

received legal and actuarial advice concerning the proposed deeds of compromise.¹⁰⁴ Secondly, the representatives had formed the view that it was in the best interests of the absent members to agree to the deeds of compromise and the proposed orders sought under them.¹⁰⁵ Thirdly, the evidence established that appropriate notification of the compromise and of the applications seeking approval had been provided to absent members.¹⁰⁶ And finally, any absent members' queries arising from the notification had been satisfactorily dealt with.¹⁰⁷

55. Since the decision in *Exxonmobil*, there have been a number of cases in this Court in which the principles relevant to class action settlement approvals have been considered. In *Wheelahan v City of Casey*,¹⁰⁸ 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*¹⁰⁹ 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 there are any *inter se* issues.¹¹⁰ This aspect of Emerton J's judgment was subsequently cited with approval by Beach J in *Thomas v Powercor Australia Limited*¹¹¹ and *Perry v Powercor Australia Ltd*.¹¹² The decision in the Resolved Timbercorp Apportionment Proceedings has been cited by two subsequent cases concerning the approval of group proceeding settlements: *Matthews v SPI Electricity Pty Ltd (Ruling No 16)*,¹¹³ and *Place v Powercor Australia Ltd*.¹¹⁴

G. The Deeds of Compromise are for the benefit of Growers

56. Applying the principles in *Exxonmobil* to the facts of the present proceedings, The Trust Company submits that the Deeds of Compromise are for the benefit of Growers. The following matters are considered in turn: the prospects of success for Growers in light of the decision in the Almond Land Rights Proceeding and the similarity

¹⁰⁴ (2010) 29 VR 356 at 367 [49].

¹⁰⁵ (2010) 29 VR 356 at 367 [49].

¹⁰⁶ (2010) 29 VR 356 at 367 [50].

¹⁰⁷ (2010) 29 VR 356 at 367 [50].

¹⁰⁸ [2011] VSC 215 at [59]-[64].

¹⁰⁹ (2010) 29 VR 356 at 369-71 [56]-[64].

¹¹⁰ [2011] VSC 215 at [62].

¹¹¹ [2011] VSC 614 at [9]-16].

¹¹² [2012] VSC 113 at [9]-[16].

¹¹³ [2013] VSC 74 at [35].

¹¹⁴ [2013] VSC 6 at [10].

between the facts of that case with the present proceedings; the advice of senior and junior counsel for the Representative Growers which supports settlement based on the terms of the Deeds of Compromise; Growers have been provided with notice and detailed information about the Deeds of Compromise and the approval process, and have been given the opportunity to ask questions and raise any concerns; to date, Growers (other than Ms Bezencon, the subject of Part H of these submissions, below) have voiced no concern or objection to the Deeds of Compromise; and the cost and delay if the proceedings were to continue to trial.

G.1 Prospects of success in each proceeding

57. A unique feature of the present proceedings, as was the case with the Resolved Timbercorp Apportionment Proceedings, is that there exists a decision of a judge at first instance which provides a readily applicable basis for considering the likely outcome of these cases.¹¹⁵ The main and, for present purposes, relevant aspects of the decision of Davies J in the Almond Land Rights Proceeding was summarised by the Court in the Resolved Timbercorp Apportionment Proceedings.¹¹⁶ The relevant background and findings were, briefly, as follows.
58. On 15 June 2011, Justice Davies delivered her reasons for judgment in the Almond Land Rights Proceeding.¹¹⁷ The primary issues for determination in the Almond Land Rights Proceeding were identified at paragraph 9 of the judgment:

- “(a) the intent and effect of the orders of Robson J ... 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

¹¹⁵ [2012] VSC 590 at [102].

¹¹⁶ [2012] VSC 590 at [19]-[27].

¹¹⁷ *BOSI Security Services Ltd v Australia and New Zealand Banking Group Ltd* (2011) 84 ACSR 341.

(d) if so, the value to be ascribed to those rights.”¹¹⁸

59. The issues identified in each of these sub-paragraphs are referred to below as questions 1 to 4.

60. *Q.1. The intent and effect of the Robson J orders.* The Growers contended at trial that Robson J, by his orders permitting extinguishment of the Growers' rights upon sale of the assets of the Almond Projects and requiring the proceeds to be held on trust, in fact determined that the Growers had valuable rights traceable into the sale proceeds, and that the Almond Land Rights Proceeding was confined to the valuation of both the Growers' and secured creditors' (the **Banks**) pre-extinguishment rights.¹¹⁹ Davies J rejected this argument 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 para 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 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**

¹¹⁸ 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.

¹¹⁹ (2011) 84 ACSR 341 at 350-1 [25], [27].

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.)

61. 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.¹²⁰

62. *Q.2. Whether the projects conferred proprietary rights on the Growers.* In relation to two of the projects the subject of the Almond Land Rights Proceeding (the 2002 Private Offer Scheme and 2002 Almond Scheme), the Growers conceded that the rights conferred by the project documents were contractual in nature and did not confer a proprietary interest.¹²¹ This was because the Growers’ interest in their Almondlots was conferred by a licence (cf a sub-lease). As Davies J noted:¹²²

“[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”.

63. Her Honour thus concluded that, because their rights in respect of the assets sold were contractual only, the Growers in the licence-based 2002 Almond Scheme and the 2002 Private Offer Scheme had no entitlement to share in the net proceeds of sale.¹²³

64. Three of the other projects – the 2005-2007 Almond Schemes – were different in that Growers enjoyed sub-leases over the land rather than mere licences. In relation to these projects, Davies J 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

¹²⁰ (2011) 84 ACSR 341 at 352 [31].

¹²¹ (2011) 84 ACSR 341 at 356-7 [48], [52].

¹²² (2011) 84 ACSR 341 at 356 [47], footnote omitted.

¹²³ (2011) 84 ACSR 341 at 356-7 [48], [52].

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.¹²⁴ However, Davies J determined that the water licences were not the subject of the demise from Almond Land Pty Ltd (the owners of the relevant land and assets) 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 Pty Ltd.¹²⁵ Accordingly, the Growers' interest in the water licences was of a contractual nature only.¹²⁶

65. The effect of Davies J'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 reference to the value of those interests prior to their extinguishment.¹²⁷

66. *Q.3. Whether the Growers' rights held any value before extinguishment.* Davies J assessed the value of the Growers' proprietary rights by reference to the following questions:¹²⁸

- (a) first, were the relevant projects viable under the existing structures; and
- (b) secondly, were the projects viable if restructured?

67. In relation to the first question, Davies J held that the Almond Projects could not continue under their existing structures and were at risk of "imminent and inevitable" termination,¹²⁹ 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.

¹²⁴ (2011) 84 ACSR 341 at 361-2 [67]-[73].

¹²⁵ (2011) 84 ACSR 341 at 362 [72].

¹²⁶ (2011) 84 ACSR 341 at 362 [73].

¹²⁷ (2011) 84 ACSR 341 at 363-4 [79].

¹²⁸ (2011) 84 ACSR 341 at 364 [82].

¹²⁹ (2011) 84 ACSR 341 at 364 [83].

- [85] Second, 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] Third, 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.
- [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."

68. In answering the question as to whether the Almond Projects 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.)

69. Ultimately, Davies J concluded that there was no practical possibility of the Almond Schemes being restructured and thus continuing.¹³⁰ Her Honour reached this conclusion, by having regard to the following matters (among others):

- (a) a new responsible entity would need to have been appointed;¹³¹
- (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 responsible entity;¹³²
- (c) the orchards had to be sold to a new entity prepared to purchase the orchards subject to the rights of the Growers;¹³³

¹³⁰ (2011) 84 ACSR 341 at 379 [137].

¹³¹ (2011) 84 ACSR 341 at 367 [97].

¹³² (2011) 84 ACSR 341 at 371 [116]-[117].

- (d) a new manager would have to be located to replace TSL and/or Almond Management;¹³⁴
 - (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;¹³⁵
 - (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;¹³⁶
 - (g) the unchallenged and unequivocal evidence of Mr Knox (of HML) was that HML would not take on the role of permanent responsible entity without modifications to s 601FS and s 601FT of the *Corporations Act 2001* (Cth) – modifications which had been rejected by ASIC;¹³⁷ and
 - (h) any modifications required by a restructure may have put the tax effectiveness of the Almond Projects into jeopardy, rendering further involvement in the projects unattractive to investors¹³⁸ – in circumstances where the changes required to effect the restructure would require member approval.¹³⁹
70. By reason of the foregoing matters, Davies J 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.”
71. Accordingly, in relation to the fourth question which arose in the proceeding (referred to above), the value ascribed to the proprietary rights of the Growers was nil.

¹³³ (2011) 84 ACSR 341 at 371-2 [118]

¹³⁴ (2011) 84 ACSR 341 at 371-2 [118].

¹³⁵ (2011) 84 ACSR 341 at 372 [119].

¹³⁶ (2011) 84 ACSR 341 at 374 [124].

¹³⁷ (2011) 84 ACSR 341 at 378 [134].

¹³⁸ (2011) 84 ACSR 341 at 378 [135(a)].

¹³⁹ (2011) 84 ACSR 341 at 373-4 [124].

72. Although the Growers appealed the decision of Davies J, the Almond Land Rights Proceeding was settled before the appeal was heard.¹⁴⁰ It is respectfully submitted that her Honour’s reasoning on each of the four key issues, as outlined above, was impeccable.

G.1.1 Application to the Bella Vista Rights Proceeding

73. Before turning to the applicability of the decision of Davies J to the Bella Vista Rights Proceeding, it is first necessary to refer in brief terms to the relevant project documents.
74. The project documents for the 2004 Table Grape Project included a series of lease and licence agreements:¹⁴¹
- (a) by lease dated 15 April 2004, Align (formerly Orchard Investments Management Limited) leased the Bella Vista Land, including the capital works and required water licences, to Timbercorp;¹⁴²
 - (b) by sub-lease dated 15 April 2004 Timbercorp sub-leased the Bella Vista Land to TSL, which sub-lease also included the water licences and capital works and an acknowledgement by TSL that the capital works and vines on, and the required water licences attaching to, the Grapelots, at all times remained the property of Align;¹⁴³ and
 - (c) TSL entered into *licence agreements* with each of the Growers in respect of the Bella Vista Land, granting the Growers a licence to use the land to plant and grow table grape vines and to process and sell the fruit,¹⁴⁴ whilst also providing, among other things, that:
 - (i) the licence was granted to the Grower to use the relevant Grapelots for the sole purpose of conducting the Grapelot Operations,¹⁴⁵ where “Grapelot” 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

¹⁴⁰ [2012] VSC 590 at [28]-[29].

¹⁴¹ BV1:99 at [20].

¹⁴² BV2:524 at cl 3.1.

¹⁴³ BV2:690-1 at cll 3.1, 4.3.

¹⁴⁴ BV2:834 at cl 3.1.

¹⁴⁵ BV2:834, 836 at cll 3.1, 8.1.

Grapelot and New Grapelot on which a Participant Grower will conduct the Grapelot Operations and its interest in, and rights in relation to the Table Grape Vines, the Capital Works and the Required Water Licences attributed to the Project;¹⁴⁶

- (ii) the Growers acknowledged that the Capital Works and Table Grape Vines on, and the Required Water Licences attaching to, the Participant Growers' Grapelots were, and would at all times remain, the property of Align;¹⁴⁷
- (iii) the Growers paid TSL a tax-deductable fee in return for the right to use and occupy the Grapelots under licence from Align for a limited duration;¹⁴⁸
- (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;¹⁴⁹
- (v) the licence did not confer rights of exclusive occupation on the Growers;¹⁵⁰
- (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 2019, or termination of the Project.¹⁵¹

75. The lease, sub-lease and licence agreement with respect to the 2005 Table Grape Project were in relevantly identical terms (even to the extent of the clause numbers in the licence agreement between TSL and the Growers being the same).¹⁵² Accordingly, the matters referred to in the preceding paragraph apply equally to the 2005 Table Grape Project, and need not be set out again.

76. The foregoing reveals that the 2004 and 2005 Table Grape Projects were licence-based schemes, and that the Growers' rights in relation to those schemes were of a contractual nature only, rather than of proprietary character. Thus, if the reasoning of

¹⁴⁶ BV2:831 at cl 1.1.

¹⁴⁷ BV2:834 at cl 2.3.

¹⁴⁸ BV2: 834-6 at cll 4.1, 7.

¹⁴⁹ BV2:834 at cl 3.2(b).

¹⁵⁰ BV2:835-7 at cll 5.2, 8.2(g)-(i), (k), 9.1 and 9.2.

¹⁵¹ BV2:834 at cl 4.1(b).

¹⁵² BV2:606, 766, 846.

Davies J in the Almond Land Rights Proceeding (in relation to the 2002 Private Offer Scheme and 2002 Almond Scheme) were applied to the Bella Vista Rights Proceeding, the Growers in the Table Grape Projects would have no entitlement to share in the net proceeds obtained from the sale of the Bella Vista Land and related assets and the Bella Vista Water Rights.

77. 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 Table Grape Projects establishing that the schemes were viable under the existing structure or if restructured. Thus, any such rights as they may have had were worthless:
- (a) TSL, the responsible entity of the Table Grapes Projects, could not perform its obligations because it was hopelessly insolvent, unable to continue managing the 2004 and 2005 Projects, and unable to continue its task as responsible entity because of its insolvency;¹⁵³
 - (b) the available evidence does not reveal any alternative for continuation of the 2004 and 2005 Table Grape Projects:¹⁵⁴
 - (i) the liquidators were unable to fund the ongoing maintenance of the vineyards;
 - (ii) upon appointment, the Receivers did not have funds to continue maintenance of the crop, which risked wasting if it was not attended to urgently with irrigation, fertiliser and pest and disease sprays;
 - (iii) the Receivers were prepared to consider all offers for the Bella Vista Property and Water Rights either as encumbered by the Table Grape Projects or on an unencumbered basis;
 - (iv) the Receivers undertook “a robust and thorough sale process calculated to maximise the value of the land and water rights”,¹⁵⁵ and the terms of the Bella Vista Sale Contracts negotiated with the preferred bidders required the Bella Vista Land and Water Rights to be transferred free

¹⁵³ *BOSI Security Services Limited* (2011) 84 ACSR 341 at 364 [84]; BV3:1455 at [6]; BV3:1362 at [5].

¹⁵⁴ BV1:122-3 referring to the relevant paragraphs of the Kirk affidavit at BV2:885.

¹⁵⁵ BV3:1362 at [6].

of any encumbrances relating to the rights of Growers in the Table Grape Projects;

- (c) there is no material upon which the Court could conclude that the Table Grape Projects could have been restructured and continued as a viable project;¹⁵⁶ and
- (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 Table Grape Projects given that the interests of Growers in the scheme were liable to imminent and inevitable extinction.

78. Accordingly, if the key findings in Davies J's judgment in the Almond Land Rights Proceeding were applied consistently in the Bella Vista Rights Proceeding, the Growers are highly likely to be found to have no entitlement to the net proceeds from the sale of the Bella Vista Property and Water Rights.

G.1.2 Application to the Kangara Rights Proceeding

79. The same analysis (as just undertaken in relation to the Bella Vista Rights Proceeding) applies equally to the Kangara Rights Proceeding.
80. Taking the 2004 Citrus Project first, it was also characterised by a series of lease and licence agreements, which can be summarised as follows:¹⁵⁷
- (a) by lease dated 26 May 2004, Align leased the Kangara Land, including the capital works, and a licence of the required water licences, to Timbercorp;¹⁵⁸
 - (b) by sub-lease dated 28 May 2004, Timbercorp sub-leased the Kangara Land to TSL, which also included the capital works and a licence to exploit the required water licences, and an acknowledgement by TSL that the capital works and citrus trees on, and the required water licences attaching to, the Citruslots, at all times remained the property of Align;¹⁵⁹ and
 - (c) TSL entered into *licence agreements* with each of the Growers in respect of the Kangara Land, granting the Growers a licence to use the new Citruslots for

¹⁵⁶ Based on paragraph 95 of Davies J's judgment in the Almond Land Rights Proceeding, the Representative Growers would be required to establish on the balance of probabilities that the extinguishment of their rights lost them the opportunity to have the project restructured and continued to full term: (2011) 84 ACSR 341 at 367 [95].

¹⁵⁷ K1:98-9 at [22].

¹⁵⁸ K2:440 at cl 3.1.

¹⁵⁹ K2:514 at cll 3.1, 4.3.

the sole purpose of growing and cultivating citrus on, and management of, the new Citruslots for the production of saleable citrus for commercial gain,¹⁶⁰ whilst also providing, 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,¹⁶¹ 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 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;¹⁶²

- (ii) the Growers acknowledged that the Capital Works and Citrus Trees on, and the Required Water Licences attaching to, the Participant Growers’ New Citruslots were, and would at all times remain, the property of Align;¹⁶³
- (iii) the Growers paid TSL a tax-deductable fee in return for the right to use and occupy the Citruslots under licence from Align for a limited duration;¹⁶⁴
- (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;¹⁶⁵
- (v) the licence did not confer rights of exclusive occupation on the Growers;¹⁶⁶ and
- (vi) the licence was limited in duration, being expressed to continue until the earlier of the expiry or termination of the sub-lease between

¹⁶⁰ K2:581 at cl 3.1.

¹⁶¹ K2:581, 583 at cll 3.1, 8.1.

¹⁶² K2:577 at cl 1.1.

¹⁶³ K2:580 at cl 2.1(b).

¹⁶⁴ K2:581-3 at cll 4.1, 7.

¹⁶⁵ K2:581 at cl 3.2(b).

¹⁶⁶ K2:582-3 at cll 5.2, 8.2(g)-(i), (k), 9.1, 9.2.

Timbercorp and TSL, termination of the Grower's participating interest in the project, 29 June 2026, or termination of the Project.¹⁶⁷

81. The lease, sub-lease and licence agreement with respect to the 2005 Citrus Project concerning the Kangara Land were in relevantly identical terms.¹⁶⁸ Thus, the matters referred to in the preceding paragraph apply equally to the 2005 Citrus Project, and are therefore not set out again here.
82. As with the Table Grape Projects, the foregoing reveals that the Growers' rights in relation to the 2004 and 2005 Citrus Projects, as licence-based schemes, were of a contractual nature only. Thus, applying the reasoning of Davies J in the Almond Land Rights Proceeding, the Growers in the 2004 and 2005 Citrus Projects would have no entitlement to share in the net proceeds obtained from the sale of the Kangara Land and related assets and the Kangara Water Rights.
83. Further and in any event, even if it were found that the Growers had some right of a character entitling them to a prima facie interest in the Kangara net sale proceeds, on the available evidence there is no realistic prospect of the Growers in the Citrus Projects establishing that the schemes were viable under the existing structure or if restructured. Thus, as with the Table Grape Projects, such rights as the Growers may have had were worthless:
 - (a) TSL, the responsible entity of the Table Grapes Projects, could not perform its obligations because it was hopelessly insolvent, and unable to continue managing the 2004 and 2005 Citrus Projects;¹⁶⁹
 - (b) the Receivers were not able to fund the continued management of the Kangara Property, and the citrus and wine grapes risked wasting if not attended to urgently with irrigation, fertilisers and pest and disease sprays;¹⁷⁰
 - (c) the available evidence does not reveal any alternative for continuation of the Citrus Projects. Specifically, there is no material upon which the Court could conclude that the Citrus Projects could have been restructured and continued

¹⁶⁷ K2:581 at cl 4.1(b).

¹⁶⁸ K2:440, 545, 589. NB Clause 2.1(b) in the 2004 licence agreement (K2:580) is reflected in cl 2.1(c) in the 2005 licence agreement (K2:599); and the 2004 licence agreement expired in 2026 (K2:581), whereas the term of the 2005 licence agreement expired in 2027 (K2:601).

¹⁶⁹ *BOSI Security Services Limited* (2011) 84 ACSR 341 at 364 [84]; K3:1075 at [7]; K3:1225 at [6]; BV3:1362 at [5].

¹⁷⁰ K2:628 at [27].

as a viable project. While Food and Beverages Australia Limited and interests associated with Ms Keree Bezencon made proposals for appointment as replacement responsible entity, none of these proposals reached fruition,¹⁷¹ and

- (d) while the Receivers offered the Kangara Property and associated assets and the Kangara Water Rights for sale either encumbered by the Citrus Projects or unencumbered, the terms on which the preferred bidders were prepared to proceed provided for the purchase of the Kangara Property and associated assets, or the Kangara Water Rights, free from any encumbrances relating to the rights of Growers.¹⁷²

84. As earlier referred to in these submissions, in the Resolved Timbercorp Apportionment Proceedings, Judd J in his reasons for judgment considered the viability of the 2005 Citrus Project.¹⁷³ That project was conducted on both the Kangara Property and the Solora Property. Relevantly, at paragraphs 52 and 96 of the judgment, his Honour found that:

“[52] The financial predicament of the Citrus Project, following the collapse of the Timbercorp group, was not unlike the other schemes. The responsible entity was unable to perform its obligations. It was hopelessly insolvent. There were proposals for the restructure and continuation of the project. Food and Beverage Australia Ltd, an entity associated with Ms Bezencon, advanced proposals for the appointment of a replacement responsible entity. Those proposals were not sustainable and would not have resulted in a viable restructure. When the receivers offered the Solora Land and associated assets for sale, either encumbered by the scheme or unencumbered, they received only three bids. All bids were conditional on assets free of encumbrance by grower rights. ...”

And

“[96] The available evidence in relation to the viability of the citrus project disclosed a scheme that required substantial funding to continue. Funding was not available. There was no replacement responsible entity willing to accept its statutory obligations. There was no viable restructuring proposal and accordingly, whatever may have been the nature of the rights enjoyed by the participating growers, termination was inevitable. On the approach adopted by Davies J, the growers’ rights were valueless immediately prior to their extinguishment.”

¹⁷¹ K1:120-1 at [81].

¹⁷² K1:121-2 at [82].

¹⁷³ [2012] VSC 590.

85. In light of the foregoing matters, The Trust Company submits that there was no alternative to extinguishment of the Growers' rights in the Citrus Projects given that the interests of Growers in the schemes were liable to imminent and inevitable extinction, with the value of any investment made by the Growers being substantially or entirely lost. Accordingly, it is further submitted that if the principal findings in Davies J's judgment in the Almond Land Rights Proceeding were applied in the Kangara Rights Proceeding, the Growers are highly likely to be found to have no entitlement to the net proceeds from the sale of the Kangara Property and Water Rights.
86. For all these reasons, and based on the evidence currently available, The Trust Company respectfully submits that the likelihood of the Growers obtaining judgment significantly in excess of the amounts offered under the Deeds of Compromise is remote, if not non-existent. This provides a powerful reason in support of the conclusion that the Deeds of Compromise are in the best interests of Growers.

G.2 Counsels' advice and decision of Representative Growers

87. As referred to earlier in these submissions, between October 2013 and January 2014, negotiations about the terms of the Deeds of Compromise took place between the parties and their legal advisers.¹⁷⁴ Macpherson + Kelley acted on behalf of the Representative Growers during that process.¹⁷⁵
88. Prior to entering into the Deeds of Compromise, the Representative Growers in each of the Bella Vista and Kangara Rights Proceedings received formal written advice from counsel.¹⁷⁶ In November 2013, conferences were arranged between the Representative Growers, their instructing solicitors and counsel, during which counsel provided oral advice and answered any questions of the Representative Growers.¹⁷⁷ In each case the Representative Growers each formed the view that the terms of the relevant Deed of Compromise were in the best interests of all Growers they represent.¹⁷⁸

¹⁷⁴ BV1:127-8 at [85]-[86]; K1:126-7 at [92]-[93].

¹⁷⁵ BV4:1585; K4:1363.

¹⁷⁶ BV4:1586 at [8]; K4:1364 at [8].

¹⁷⁷ BV4:1586 at [6]-[7]; K4:1364 at [6]-[7].

¹⁷⁸ BV1:41, 65; K1:41, 65.

89. Copies of counsels' written advices have been made available to any Grower in the relevant proceeding,¹⁷⁹ and filed as confidential exhibits to the affidavits of Yu-chiao Hsueh.¹⁸⁰ The other parties to the proceeding have not been provided with copies of the advices.
90. Subsequently, in the Kangara Rights Proceeding, counsel provided the Representative Growers with supplementary written advice in response to issues raised by Kerree Bezencon.¹⁸¹ Counsel also conferred with the Representative Growers on 15 and 17 April 2014.¹⁸² The Representative Growers in the Kangara Rights Proceeding each confirmed that they did not wish to alter their decision about entering into the Deed of Compromise.¹⁸³ A copy of the supplementary advice was also provided to Ms Bezencon.¹⁸⁴

G.3 Notice and assistance given to Growers

91. On 4 March 2014, and in accordance with clause 6 of the Deeds of Compromise, a letter and email was sent to all Growers (to their last known addresses) informing them that a compromise in each of the Proceedings had been reached, and an information notice (known as the First Notice to Growers) had been uploaded onto the websites of Macpherson + Kelley, KordaMentha, and Arnold Bloch Leibler at certain specified URL addresses.¹⁸⁵ 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.¹⁸⁶
92. In relation to the Bella Vista Rights Proceeding, 655 hard copy letters were sent to Growers (of which 15 to 20 were returned¹⁸⁷) and 484 emails were sent (of which 10

¹⁷⁹ BV4:1586 at [11]; K4:1364 at [11].

¹⁸⁰ BV4:1586 at [8]; K4:1364 at [8].

¹⁸¹ K4:1392-3 at [20].

¹⁸² K4:1392-3 at [21]-[22].

¹⁸³ K4:1393 at [21]-[22].

¹⁸⁴ K4:1441-2 at [9]-[12].

¹⁸⁵ BV4:1599-1600 at [22]-[23]; K4:1377-8 at [22]-[23].

¹⁸⁶ BV1:65; K1:65.

¹⁸⁷ The Second Affidavit of Leanne Chesser states that 16 letters were returned, and the Third Affidavit of Yu-chiao Hsueh states that a further four were returned after 23 March 2014, for a total of 20: BV4:1600 at 24(c), BV4:1611 at [5]. The Fourth Affidavit of Yu-chiao Hsueh states that the correct total of Return to Sender notifications is 15: BV4:1614 at [7]-[10]. In any event, all of the Growers were ultimately contacted either by email or post.

“bounced back”).¹⁸⁸ In relation to the Kangara Rights Proceeding, 270 hard copy letters were sent to Growers (of which 4 or 5 were returned¹⁸⁹) and 233 emails were sent (of which 10 “bounced back”).¹⁹⁰ In relation to the Kangara Rights Proceeding, there was no Growers who had both a letter returned and an email bounce-back.¹⁹¹ Of the people who had letters returned, all were subsequently contacted and provided with copies of the short letter and First Notice to Growers.¹⁹² In relation to the Bella Vista Rights Proceeding, there were 10 Growers who had letters returned who were not also initially sent emails.¹⁹³ All of those Growers were subsequently contacted, had their details updated and were provided with a copy of the First Notice to Growers.¹⁹⁴

93. On 4 March 2014, an advertisement was placed in *The Australian* newspaper, to the same effect as the short letter to Growers sent on the same day.¹⁹⁵ Also uploaded onto the websites of KordaMentha and Arnold Bloch Leibler were copies of the Deeds of Compromise, and a list of frequently asked questions for each proceeding, and the answers to them.¹⁹⁶ 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 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.
94. Copies of the short letter to Growers, the newspaper advertisement, the First Notice to Growers, and frequently asked questions (with answers), are exhibited to the second

¹⁸⁸ BV4:1600 at [24].

¹⁸⁹ The Affidavit of Leanne Chesser states that four letters were returned: K4:1378 at [25(b)]. The First Affidavit of Yu-chiao Hsueh states that one letter was returned, and the Second Affidavit of Yu-chiao Hsueh states that a further four were returned, for a total of five: see K4:1441 at [7].

¹⁹⁰ K4:1378 at [24]; K4:1390 at [5].

¹⁹¹ K4:1378 at [25].

¹⁹² K4:1441 at [8].

¹⁹³ BV4:1600 at [25].

¹⁹⁴ BV4:1617 at [12(c)].

¹⁹⁵ BV1:24 at [12(c)]; K1:24 at [12(c)].

¹⁹⁶ BV4:1598-9 at [20]-[21]; K4:1376-7 at [20]-[21]

affidavit of Clinton Hinchin in the Bella Vista Rights Proceeding, and the third affidavit of Clinton Hinchin in the Kangara Rights Proceeding.¹⁹⁷

95. Since notice of the Deeds of Compromise was provided to Growers in each of the proceedings, TSL has arranged for a telephone hotline facility and email facility to be maintained to enable Growers to, among other things, ask questions, make comments, and update personal information.¹⁹⁸
96. A protocol was developed for those communicating with Growers through the telephone hotline and email facilities. The terms of the protocol were agreed between TSL and Macpherson + Kelley, acting on behalf of the Representative Growers.¹⁹⁹ A copy of the protocol is exhibited to the affidavit of Leanne Chessier, filed by the liquidators of TSL, in each proceeding.²⁰⁰
97. Following the letters and emails sent to Growers, as well as the advertisements in The Australian and material posted on the internet, information about the number and details of calls and emails from Growers was collated and provided to Macpherson + Kelley.²⁰¹ As at 5 May 2014:
 - (a) in respect of the Bella Vista Rights Proceeding:²⁰²
 - (i) there were no objections lodged by any Grower;
 - (ii) there were 12 Growers who said they had difficulty in accessing documents on the internet and asked for them to be emailed or posted to them;
 - (iii) 5 Growers asked for information about the particulars of their investments;
 - (iv) 4 Growers asked for information about how much they were entitled to under the Deed of Compromise;
 - (v) 20 Growers returned bank account nomination forms and/or direction to pay forms to TSL;

¹⁹⁷ BV1:64-92, K1:64-91.

¹⁹⁸ BV4:1601-2 at [27]-[32]; K4:1379-80 at [27]-[32].

¹⁹⁹ BV4:1602 at [30]; K4:1379-80 at [30].

²⁰⁰ BV4:1609-10; K4:1387-8.

²⁰¹ BV4:1588 at [22], 1603 at [33], 1612, 1613-14 at [5]; K4:1366 at [22], 1381 at [33]; 1440-1 [5].

²⁰² BV4:1588-9 at [25], 1611-12 at [7].

- (vi) 5 Growers requested more information about the Deed of Compromise;
 - (vii) 5 Growers notified of change of address or contact details.
- (b) in respect of the Kangara Rights Proceeding:²⁰³
- (i) the only objection lodged was by Ms Kerree Bezencon;²⁰⁴
 - (ii) there were 7 Growers who said they had difficulty in accessing documents on the internet and asked for them to be emailed or posted to them;
 - (iii) 2 Growers asked for information about the particulars of his or her investments;
 - (iv) 1 Grower asked for information about how much he or she was entitled to under the Deed of Compromise;
 - (v) 3 Growers returned bank account nomination forms and/or direction to pay forms to TSL;
 - (vi) 1 Grower requested more information about the Deed of Compromise;
 - (vii) 1 Grower notified of change of address or contact details.
98. The “bank account nomination form” referred to above was sought from Growers for payments from the Funds, through TSL, to be made to Growers.²⁰⁵ 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.²⁰⁶

H. Ms Kerree Bezencon and the TGG Citrus Committee Inc

99. On 9 August 2013, Ms Kerree Bezencon was given leave to appear on behalf of the TGG Citrus Committee Inc in the Kangara Rights Proceeding. On that same day, Ms Bezecon’s application to become the representative grower in the 2005 Citrus Projected was rejected by the Court, but orders were made requiring any document served in the proceeding to also be served on the TGG Citrus Committee.

²⁰³ K4:1366-7 at [25], 1389-93, 1441-2 at [7]-[8].

²⁰⁴ The nature of Ms Bezencon’s objection is unclear: see further below at [100].

²⁰⁵ BV4:1598 at [18]; K4:1376 at [18].

²⁰⁶ BV4:1598 at [18]; K4:1376 at [18].

100. To date, Ms Bezencon has not served any affidavit or sought to file any submissions in relation to the Kangara Rights Proceeding approval process. Although apparently disputed by her, Ms Bezencon has been served with materials and information in relation to the approval process.²⁰⁷ On 15 April 2014, Ms Bezencon wrote to the parties seeking consent to the payment of her costs of engaging a firm of solicitors to represent the TGG Citrus Committee in relation to the approval process in order to assist her in a role as “contradictor”.²⁰⁸ The Trust Company responded the following day, acknowledging the important role of a contradictor in proceedings such as the present one, but noting that any payment out of the Fund for additional legal costs would need to be approved by the Court.²⁰⁹ The Trust Company indicated that it would oppose such an application, having regard to numerous considerations including the fact that Representative Growers had already been appointed by the Court to act on behalf of all Growers (and whose legal costs were already being met out of the Fund); Ms Bezecon was entitled and able to engage in the court approval process (just as she had done previously), and had been provided with material enabling her to do so, but chosen not to so engage by filing evidence in accordance with the orders made by the Court; and further depletion of the Fund could not be justified in circumstances where there was already a significant shortfall in the sums available to repay the secured creditor. A copy of this and other correspondence is exhibited to the second affidavit of Yu-chiao Hseuh and the fourth affidavit of Clinton Hinchin in the Kangara Rights Proceeding.²¹⁰ The nature of Ms Bezencon’s position – in particular, the grounds of any objection she might raise to the compromise in the Kangara Proceeding – has not been articulated by her to The Trust Company and remains unclear.²¹¹
101. If Ms Bezencon files any affidavit or submission subsequent to the filing of these submissions, The Trust Company will seek to respond to that material as appropriate.

²⁰⁷ K4:1438 at (d).

²⁰⁸ K4:1432.

²⁰⁹ K4:1432, 1437-9.

²¹⁰ K4:1389, 1436.

²¹¹ There is reference to Ms Bezencon’s objection in Mr Hsueh’s second affidavit in the Kangara Proceeding: K4:1390 at [7]-[19]. However, the Trust Company has not seen the relevant exhibits to the affidavit as they are marked ‘confidential’ and privilege has been claimed over them.

I. Duration and costs of proceedings

102. As earlier stated in these submissions, 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. That case is relevant not only for providing guidance on how a court might approach the present proceedings, and what the likely outcome of those proceedings might be, but also because it provides some insight into the time and cost involved in such proceedings.
103. The Almond Land Rights Proceeding was heard over 12 days in February and March 2011.²¹² 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.²¹³ Expert evidence covered fields of expertise in relation to the appropriate revenue and cost inputs necessary to model the value of the relevant growers' rights, together with an appropriate discount rate to be adopted; water allocation, availability and cost; estimated future operating costs and almond yields; and the valuation of the rights of the relevant growers and secured lenders in connection with the relevant managed investment scheme.²¹⁴ Subsequently, the Growers appealed the decision of Davies J, and filed a notice of appeal.²¹⁵ In summary, they challenged her Honour's findings in relation to the nature of the contractual rights that growers held in two of the projects; the requirement that the growers had to establish a proprietary interest in order to have any entitlement to the proceeds of sale; and that the growers' interests were at risk of immediate and inevitable termination immediately prior to their actual termination.²¹⁶ The appeal was ultimately settled, however, as part of the Resolved Timbercorp Apportionment Proceedings.
104. These matters reveal that, if the Bella Vista and Kangara Rights Proceedings proceeded to trial, it is likely that significant time and cost will be involved in the preparation of evidence and submissions, and in the hearing itself. It can also be expected, based on the Growers' notice of appeal in the Almond Land Rights

²¹² BV1:114 at [62].

²¹³ BV1:114 at [60]-[61].

²¹⁴ BV1:114 at [61].

²¹⁵ BV3:1515 at [28].

²¹⁶ BV3:1515 at [28].

Proceeding, that all issues decided by Davies J would again be contested (and possibly appealed), so minimal time and expense may be saved from having had that case heard and determined.

105. In the meantime, default interest continues to accrue in respect of the secured debt in relation to the net sale proceeds the subject of both proceedings²¹⁷ and The Trust Company as secured creditor, who will already (under the Deeds of Compromise) receive substantially less than the sum owed to it, will be kept out of funds for a further period of time while the trial and any appeal is heard and determined. By contrast, if each of the Deeds of Compromise is approved, disbursement of the funds to the Growers and The Trust Company can be effected immediately on the terms set out in the deeds.

J. Conclusion

106. The proposed resolution comprised in the Deeds of Compromise provides an efficacious, fair, and final resolution of the Bella Vista and Kangara Rights Proceedings.
107. 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) Davies J’s judgment in the Almond Land Rights Proceeding and the fact that, having regard to the issues that fall to be considered in each of the current proceedings in light of her Honour’s findings:
 - (i) it is highly probable that the Growers will receive nothing if the proceedings go to trial;
 - (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;

²¹⁷


BV1:102 at [30]; K1:100-1 at [32].

- (b) 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;
- (c) 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;
- (d) 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;
- (e) the absence of objections received to the proposed compromises (save for Ms Bezencon), having regard to the number of Growers involved;
- (f) 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 Projects; and
- (g) the fact that significant amounts of money will be incurred in litigating each proceeding, thereby reducing the balance of the Funds available for distribution.

108. Accordingly, The Trust Company respectfully submits that orders in the form provided for in the Deeds of Compromise, and attached to these submissions in draft, should be made in each of the Bella Vista and Kangara Rights Proceedings.

W A Harris

M D Rush



Allens
 Solicitors for the Plaintiff

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

LIST B
S CI 2013 01477

BETWEEN:

**THE TRUST COMPANY (NOMINEES) LIMITED
(ACN 000 154 441)**

Plaintiff

- and -

**MICHAEL FUNG IN HIS CAPACITY AS RECEIVER AND
MANAGER OF ALIGN FUNDS MANAGEMENT LIMITED
(RECEIVER AND MANAGER APPOINTED) (ACN 105 684
231) IN ITS CAPACITY AS THE RESPONSIBLE ENTITY
OF THE TIMBERCORP ORCHARD TRUST & OTHERS
(ACCORDING TO THE SCHEDULE)**

Defendants

**GENERAL FORM OF ORDER
(BELLA VISTA RIGHTS PROCEEDING)**

JUDGE: The Honourable Justice Judd

DATE MADE:

ORIGINATING PROCESS: Originating Motion dated 25 March 2013

HOW OBTAINED: Return of the plaintiff's summons dated 12 March 2014

ATTENDANCE:

OTHER MATTERS:

THE COURT ORDERS THAT:

1. Pursuant to r 16.01(4) of the *Supreme Court (General Civil Procedure) Rules 2005*, the compromise set out in clause 2 of the Deed of Compromise dated 14 January 2014 between the plaintiff and the first to third defendants is approved and shall be binding on the absent persons who are represented by the second and third defendants.

THE COURT ORDERS FURTHER BY CONSENT THAT:

2. The proceeding is dismissed.
3. The plaintiff's and second and third defendants' costs of this proceeding, including their costs of and incidental to negotiating and giving effect to the Deed of Compromise, be paid in accordance with paragraph 6 of the orders of the Honourable Justice Judd made on 19 July 2013.
4. There be otherwise no order as to costs.

DATE:

.....

The Hon. Justice Judd

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

LIST B
S CI 2013 01478

BETWEEN:

**THE TRUST COMPANY (NOMINEES) LIMITED
(ACN 000 154 441)**

Plaintiff

- and -

**MICHAEL FUNG IN HIS CAPACITY AS RECEIVER AND
MANAGER OF ALIGN FUNDS MANAGEMENT LIMITED
(RECEIVER AND MANAGER APPOINTED) (ACN 105 684
231) IN ITS CAPACITY AS THE RESPONSIBLE ENTITY
OF THE TIMBERCORP ORCHARD TRUST & OTHERS
(ACCORDING TO THE SCHEDULE)**

Defendants

**GENERAL FORM OF ORDER
(KANGARA RIGHTS PROCEEDING)**

JUDGE: The Honourable Justice Judd

DATE MADE:

ORIGINATING PROCESS: Originating Motion dated 25 March 2013

HOW OBTAINED: Return of the plaintiff's summons dated 12 March 2014

ATTENDANCE:

OTHER MATTERS:

THE COURT ORDERS THAT:

1. Pursuant to r 16.01(4) of the *Supreme Court (General Civil Procedure) Rules 2005*, the compromise set out in clause 2 of the Deed of Compromise dated 14 January 2014 between the plaintiff and the first to third defendants is approved and shall be binding on the absent persons who are represented by the second and third defendants.

THE COURT ORDERS FURTHER BY CONSENT THAT:

2. The proceeding is dismissed.
3. The plaintiff's and second and third defendants' costs of this proceeding, including their costs of and incidental to negotiating and giving effect to the Deed of Compromise, be paid in accordance with paragraph 6 of the orders of the Honourable Justice Judd made on 19 July 2013.
4. There be otherwise no order as to costs.

DATE:

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The Hon. Justice Judd