

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  
AND ORS (ACCORDING TO THE SCHEDULE ATTACHED)

Defendants

CERTIFICATE IDENTIFYING EXHIBIT

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Date of document: 21 March 2014

Filed on behalf of: The plaintiff

Prepared by:

**Allens**

Lawyers

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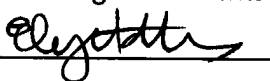
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This is the **Exhibit** marked '**CCH-11**' now produced and shown to **Clinton Charles Hinchen** at the time of swearing his affidavit on 21 March 2014.

Before me 

**ELYSE KATE ADAMS**  
of 101 Collins Street, Melbourne  
Victoria 3000  
An Australian Legal Practitioner  
within the meaning of the  
Legal Profession Act 2004

**'CCH-11': a true copy of the  
judgment of Justice Judd in  
proceeding No SCI 2011 888  
dated 15 March 2011**

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

Not Restricted

S CI 2011 0888

IN THE MATTER OF TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)

BETWEEN

TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION) (ACN 092 311 469)  
IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE 2004 TIMBERCORP  
CITRUS PROJECT (ARSN 108 887 538) AND THE 2005 TIMBERCORP CITRUS  
PROJECT (ARSN 114 091 299) AND ORS ACCORDING TO THE SCHEDULE

Plaintiffs

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<u>JUDGE:</u>	JUDD J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	3, 7 March 2011
<u>DATE OF JUDGMENT:</u>	15 March 2011
<u>CASE MAY BE CITED AS:</u>	Re Timbercorp Securities Limited (In liq)
<u>MEDIUM NEUTRAL CITATION:</u>	[2011] VSC 83

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Corporations – Liquidation – Application for directions under s 511 of the Corporations Act 2001 (Cth) – Managed investment scheme – Constitutional amendment – Termination of rights of scheme members – Informal winding up – Sale of property under control of receivers.

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APPEARANCES:

Counsel

Solicitors

For the Plaintiffs

Dr O Bigos

Arnold Bloch Leibler

For the Receivers of Align Funds  
Management Limited

Ms W Harris SC with  
Mr T Clarke

Allens Arthur Robinson

For TGG Citrus Committee Inc  
For Timbercorp Growers Group

Mr M Galvin  
Ms C Armstrong

Gadens  
Clarendon Lawyers

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HIS HONOUR:

- 1 This is an application made under s 511 of the *Corporations Act 2001* (Cth) by the liquidators of the first plaintiff Timbercorp Securities Limited (In liquidation). The liquidators, Mark Anthony Korda and Leanne Kylie Chesser, are the second and third plaintiffs. The liquidators seek a direction that they are justified and otherwise acting properly and reasonably in procuring Timbercorp Securities, in its capacity as the responsible entity of the 2004 Timbercorp Citrus Project and the 2005 Timbercorp Citrus Project to terminate or surrender licences granted to growers by Timbercorp Securities pursuant to Citrus Licence Agreements. Each grower was granted a licence over a 'citruslot' on land in South Australia known as Kangara Estate, although some citruslots for the 2005 Project were on adjoining land at Solara South. This application only concerns grower licences over citruslots on land at Kangara Estate.
- 2 The evident purpose of the application is to have the court approve the termination or surrender of the Licence Agreements to facilitate the completion of contracts for the sale of Kangara Estate and associated water rights. The sale process was not undertaken by the liquidators. Paul William Kirk and Michael Fung are receivers of the land and related water rights, having been appointed by the trustee of secured debenture holders in the Timbercorp Orchard Trust (TOT). They commenced the sale process in November 2009, and entered into a Land Sale Contract on 3 December 2010 and a Water Sale Contract on 4 January 2011.
- 3 There are no named respondents to the application, although members of the schemes were represented at the hearing. On the first day of the hearing Keree Anne Bezencon, chairperson of the Timbercorp Growers Group Citrus Committee Inc, was granted leave to appear on behalf of the growers represented by the Citrus Committee. Ms Bezencon is a director of Siger Super Services Pty Ltd, trustee of the Kereg Trust. The Kereg Trust is a member of the 2005 Timbercorp Citrus Project.

Also represented at the hearing was the Timbercorp Growers Group, which is a collection of other growers represented by Clarendon Lawyers.

4 The liquidators had served a copy of the originating process dated 28 February 2011 and all supporting affidavits on the Australian Securities and Investment Commission; Messrs Kirk and Fung; the Timbercorp Growers Group, represented by Clarendon Lawyers; and the Citrus Committee by its representative, Ms Bezencon.

5 At the close of submissions made on behalf of the liquidators and the receivers in support of the application, Ms Bezencon sought an adjournment for the purpose of obtaining legal advice and assistance to enable the Citrus Committee to better explain the merits of a proposal advanced to the receivers on 28 February 2011. That proposal had been rejected by the receivers and liquidators as so indefinite as to be incapable of serious consideration. The proposal followed upon earlier proposals advanced by or in association with Ms Bezencon. The further hearing of the application was adjourned to 7 March 2011. On that day the Citrus Committee was represented by counsel who sought a further adjournment for one week so that the proposal could be refined and perhaps made more attractive to the receivers and liquidators. The Citrus Committee did not attempt to explain and support the proposal dated 28 February 2011, which was the purpose for which the adjournment had been granted.

6 It was not submitted by anyone that the growers, whose interests stood to be affected by the proposed action of the liquidators, were not adequately notified of the application and I am satisfied that they were.

7 It was not disputed that the Timbercorp group of companies, including Timbercorp Securities, are hopelessly insolvent. Timbercorp Ltd is the holding company of Timbercorp Securities and other corporate members of the group. The liquidators were appointed liquidators of Timbercorp Securities on 29 June 2009.

- 8 Timbercorp Securities is the responsible entity of a large number of registered managed investment schemes, including schemes for the cultivation of eucalypt plantations, schemes for the growing of almonds, schemes for the growing of olives, schemes for the growing of citrus fruit and schemes for the growing of table grapes.
- 9 The 2004 and 2005 Citrus Projects are regulated under Chapter 5C of the Act. The relevant governing documents were Constitutions, Management Agreements and Grower Licence Agreements. The Constitution governing the 2004 Citrus Project is dated 27 April 2004 and the Constitution governing the 2005 Citrus Project is dated 2 May 2005. The Constitutions are relevantly identical.
- 10 Kangara Estate is described in several certificates of title. The registered proprietor of the land is Align Funds Management Limited (receivers and manager appointed) in its capacity as the responsible entity of the TOT. Align Funds Management was previously known as Orchard Investments Management Ltd. Kangara Estate is approximately 1,425 hectares, of which approximately 1,179 are planted. There are 739 hectares of citrus orchards (approximately 490,500 citrus trees) and 440 hectares of vineyards (approximately 739,700 vines).
- 11 Align Funds Management purchased the land from AgriExchange Murtho Pty Ltd, which retained a first right of refusal if the property was sold. That obligation bound Align Funds Management to offer the property to AgriExchange on the same terms and conditions as a proposed sale to a third party. Such a right and corresponding obligation presented the receivers with a significant strategic disadvantage when negotiating a sale of the land with a third party.
- 12 Align Funds Management had leased the land to Timbercorp under a head lease dated 26 May 2004. In turn, Timbercorp had granted two sub-leases to Timbercorp Securities, one in relation to that part of the land used in the 2004 Project and the other in relation to that part of the land used in the 2005 Project. The sub-leases are dated 28 April 2004 and 5 May 2005 respectively.

- 13 Kangara Estate is employed for scheme projects other than the Citrus Projects. Wine grape vineyards are located on some parts of it, and there is a vineyard that is not part of a managed investment scheme.
- 14 In addition to the land comprising Kangara Estate, Align Funds Management owned associated water rights, with access to 10,238.51 mega litres per annum. In October 2010, a 1,337.01 mega litre entitlement was transferred to Timbercorp so that Align Funds Management now holds the remaining 8,861.5 mega litre per annum entitlement.
- 15 Timbercorp Securities, as sub-lessee from Timbercorp of Kangara Estate, entered into Citrus Licence Agreements with participating growers in each of the 2004 and 2005 Citrus Projects. I was told that there are around 320 growers participating in the Projects with nearly 3000 citruslots on Kangara Estate land.
- 16 The TOT has 55 unit holders with a total of 24,976,537 units. The trust issued secured debentures listed on the Australian Stock Exchange, and unsecured and unlisted annuity bonds. Trading in the secured debentures was suspended on 23 April 2009. There are currently 614,530 debentures on issue with a face value of \$100. The Trust Company (Nominees) Ltd, previously known as Permanent Nominees (Aust) Ltd, is the trustee for the holders of the debentures pursuant to the Timbercorp Orchard Trust Debenture Trust Deed, dated 17 October 2003. The Trust Company holds, as security on behalf of the debenture holders, a fixed and floating charge over the assets of the TOT. The Trust Company also holds a mortgage over Kangara Estate. It is the only secured creditor of the TOT. The receivers were appointed by The Trust Company.
- 17 The purchasers under the Land Sale Contract are Agriproperty Pty Ltd and Kingston Vineyards Pty Ltd. The contract contains the following conditions precedent.

#### 5.1 Conditions Precedent

Settlement will not proceed unless and until the following conditions (the *Conditions Precedent*) are fulfilled or waived in accordance with this Contract:

- (a) (Growers' Claims): Each of the following having occurred in respect of the Citrus Projects:
  - (A) the Court directing that the Liquidators of TSL are justified in procuring TSL, in its capacity as responsible entity of the Citrus Projects, to extinguish all of the rights of Growers (including under the Grower Licences) in respect of the Property, in accordance with the Surrender Deed;
  - (B) the Court making orders determining the rights of all and any persons (including Growers and Permanent) to all or any part of the net proceeds of the sale under this Contract, or ordering that those net proceeds be held on trust until the rights of those persons are determined by a further order of the Court; and
  - (C) the Liquidators of TSL executing and delivering to the Vendor the Surrender Deed,

Such that the Property may be transferred to the Purchaser at Settlement free of any encumbrances relating to the rights of Growers and Permanent and any Growers' Claims.

- (b) (Non-exercise of First Right of Refusal): The non-exercise or waiver of the First Right of Refusal by AgriExchange.
- (c) (Timbercorp Leases): Each of the parties to the deeds of surrender in respect of the Timbercorp Leases agree in writing to the execution of the deeds of surrender that are to be delivered by the Vendor at Settlement in accordance with Special Condition 16.3(a)(vi).

The date by which the conditions are to be satisfied is 16 March 2011.

- 18 The Water Sale Contract is between the receivers and the Commonwealth of Australia, for the sale of the water entitlement of 8,861.50 mega litres That contract contains the following conditions precedent.

## 2. CONDITIONS PRECEDENT

Completion will not occur unless and until the following conditions are fulfilled or waived under this Contract:

- 2.1. Each of the following having occurred for each of the Citrus Projects:

- (i) the Court directing that the Liquidators of TSL are justified in procuring TSL, in its capacity as the responsible entity of the Citrus Projects, to extinguish all of the rights of Growers (including under the Growers Licences) in respect of the Property and the Water Entitlement, in accordance with the Surrender Deed;

- (ii) the Court making orders determining the rights of all and any persons (including Growers and Permanent) to all or any part of the net proceeds of the sale under this Contract or ordering that those net proceeds be held on trust until the rights of those persons are determined by a further order of the Court; and
- (iii) the Liquidators of TSL executing and delivering to the Seller the Surrender Deed,

Such that the Water Entitlement may be transferred to the Buyer at Completion free of any encumbrances relating to the rights of Growers and any Growers' Claims; and

- 19 The apparent purpose of the evidence filed by and on behalf of the receivers, and of their submissions, was to satisfy the court of a 'robust sale process' concluding in the contracts, and to explain the history of the sale process and the various bids and proposals, including proposals advanced by or in association with Ms Bezencon. The sale process conducted by the receivers was described in great detail. One might have thought that this was an application made on behalf of the receivers seeking authorisation to enter into those contracts. It was not. It was an application by the liquidators for approval to terminate grower rights to facilitate the completion of contracts by the receivers. In that respect, the application resembled one made to Davies J in *Re Timbercorp Securities (In Liquidation)* on 9 December 2009.<sup>1</sup> That application concerned the sale of properties employed in almond schemes by Timbercorp Securities. The sale contracts were negotiated by receivers appointed by the Australia and New Zealand Banking Group Ltd. Mr Kirk was one of the receivers. The liquidators took no part in the sale process. That was also the situation with the sale process conducted by the receivers in this case.
- 20 The liquidators rely upon assurances given by the receivers to the effect that they have complied with their obligations under s 420A of the Act. The liquidators' application, if successful, will facilitate the sale by satisfying a condition precedent. The receivers also depend upon the cooperation of the liquidators to exercise the power to terminate or surrender the Licence Agreements to ensure that the receivers are in a position to transfer unencumbered land to the purchaser.

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<sup>1</sup> [2009] VSC 590.  
SC:HB



- 21 The sale process undertaken by the receivers was complicated. I have already mentioned the existence of a first right of refusal in favour of AgriExchange. During the sale process it was necessary for the receivers to ensure continued maintenance of the orchards in order to preserve their value. For that purpose they entered into agreements with CostaExchange Ltd to cultivate and market the citrus crops. The costs of CostaExchange were secured against the proceeds from crop sales, but any shortfall was to be paid out of the proceeds of settlement on the sale of Kangara Estate. The quality of the 2010 citrus crop was compromised. There was a likelihood of a shortfall of around \$600,000. Furthermore, it became apparent that citrus trees would need to be removed and replaced, resulting in falls in future forecast revenue.
- 22 An additional complication to the sale process was a resolution by growers, at a meeting held on 9 November 2010, to remove Timbercorp Securities as responsible entity of the Citrus Projects and appoint Food and Beveridge Australia Ltd in its place. Other complications included the reformulation of bids by potential buyers and the entry of new potential buyers into the process after deadlines had been reached.
- 23 In order to better inform themselves as to the value of Kangara Estate, the receivers engaged Mr Peter Hay, of Hay Consultants, to provide a valuation of Kangara Estate and the water rights. The initial valuation, dated 29 July 2010 was revised after the provision of some additional information. The most recent valuation was dated 21 October 2010. The valuation was sought on the basis of land only (without water entitlements); the land inclusive of water entitlements; and of water entitlements alone. The combined price obtained by the receivers for the land and water rights compares favourably with the range of values attributed to the land and water entitlements by Mr Hay.
- 24 While this court is not asked to declare that the receivers have discharged their obligations under s 420A, it is necessary to consider whether the evidence points to circumstances which might cause a reasonable liquidator, in the position of these liquidators, to doubt the veracity of assurances given by the receivers about the sale

process, or which might cause them to be dissatisfied by the evidence filed by the receivers in connection with the sale process, or to otherwise conclude that the transactions were not in the best interests of the scheme members.

- 25 When considering compliance with the obligations imposed by s 420A, the primary consideration will be the adequacy and robustness of the sale process. In *Florgale Uniforms Pty Ltd (Receivers and Managers Appointed) (in liquidation) and Ors v Orders and Anor*<sup>2</sup> Dodds-Streeton J observed,

The expert evidence establishes that the exercise of all reasonable care by a receiver would entail a process of selecting the method of realising the highest net return, by considering the different available means of sale and weighing the prices likely to be achieved against the likely costs and expenses entailed and the relative risks of the various methods in all the circumstances. The process is informed by the objective of securing the best possible return for the secured creditor, subject to the obligations imposed by general law doctrines and s.420A. It necessarily involves the exercise of judgment, taking into account all the relevant variables and circumstances of the particular case. It does not depend on matters of price or revenue alone, or any single factor in isolation.

In my opinion, the process of evaluating and balancing the competing costs and benefits and the associated risks of various methods of sale will not, in every case, require a formal comparative analysis or documented calculations. All will depend on the circumstances of the individual case, including the scale of the receivership, the value and nature of the property involved, the receiver's expertise in relation to the type of property, relevant expert advice, the advice or input of proprietors and staff, the trading history and marketing of the company, including during the receivership, and other relevant variables in a realistic commercial context.

- 26 The growers did not contend that the receivers had failed to comply with their obligations under s 420A of the Act.
- 27 The connection between one of the purchasers of the land, Agriproperty, and CostaExchange, exposed a matter of potential concern to the receivers and thus the liquidators. It is a former subsidiary of CostaExchange, involved in management of the trees and crop sales. AgriExchange was and is a subsidiary, and the holder of the right of first refusal. It should be noted that Agriproperty was the successful tenderer in the sale process in relation to the Solara South property when a

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<sup>2</sup> (2004) 11 VR 54, paras 442 and 443.

subsidiary of CostaExchange. That sale process was the subject of orders made by Davies J on 26 February 2010<sup>3</sup> in which her Honour considered and rejected an allegation that the liquidators at Timbercorp Securities were acting in breach of fiduciary duty in enabling a sale to a wholly owned subsidiary of CostaExchange.

- 28 Agriproperty is no longer a wholly owned subsidiary of CostaExchange. Timbercorp holds 35% of the issued shares in CostaExchange Holdings Pty Ltd. CostaExchange Holdings owns 90% of the issued shares in CostaExchange. CostaExchange no longer holds any shares in Agriproperty. ASIC records disclose that the shareholders comprise eight corporations, some of which are apparently connected with the Costa family. Robert Costa is a director.
- 29 The circumstances in which the change of ownership has taken place has not been explained, but the continued association or connection between the Costa family and Agriproperty no doubt contributed to the receiver's ability to procure AgriExchange to waive its right of first refusal, and an agreement to reduce the exposure of the proceeds from the sale to a reduction under the management agreements with CostaExchange. The waiver was necessary to clear the way for an uncomplicated completion of the Land Sale Contract. Thus, while the right of first refusal was an impediment, the connection between Agriproperty and CostaExchange gave the liquidators an opportunity to negotiate its removal as part of the overall transaction.
- 30 The evidence before the court does not, in my opinion, disclose any circumstance which would cast doubt upon the veracity of the assurances, given by the receivers to the liquidators of their compliance with s 420A of the Act. The evidence supports a considered and rigorous commercial sale process that has resulted in the execution of contracts, albeit conditional, at a price justified by an independent valuer.

#### **Directions under s 511 of the Act**

- 31 Section 511 of the Act provides:

#### **Application to Court to have questions determined or powers exercised**

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<sup>3</sup> [2010] VSC 50.

- (1) The liquidator, or any contributory or creditor, may apply to the Court:
  - (a) to determine any question arising in the winding up of a company; or
  - (b) to exercise all or any of the powers that the Court might exercise if the company were being wound up by the Court.
- (1A) APRA may apply to the Court under subsection (1) in relation to a company that is a friendly society within the meaning of the *Live Insurance Act 1995* and which may be wound up voluntarily under subsection 180(2) of that Act.
- (2) The Court, if satisfied that the determination of the question or the exercise of power will be just and beneficial, may accede wholly or partially to any such application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just.

32 The court has a discretion as to whether to give directions to a liquidator and will generally give directions to resolve a difficulty that has arisen in the liquidation.<sup>4</sup> By giving a direction, the court does not finally determine the rights and liabilities of parties arising out of the subject-matter of the application for directions.<sup>5</sup> It is not the function of the court to make commercial judgements on behalf of liquidators or substitute its judgement for their judgement. In *Re Ansett Australia Ltd*<sup>6</sup> Goldberg J said,

In a number of authorities, the courts have made it clear that courts should pay regard to the commercial judgment of liquidators when considering compromises of claims or causes of action made by liquidators in respect of which compromises the approval of the court is sought. The Act and its predecessors, entrust to liquidators and administrators the conduct of liquidations and administrations, albeit subject to the ultimate supervision of the court. The court will generally defer to the commercial judgment of liquidators and administrators. In *Re Spedley Securities Ltd (in liq)* (1992) 9 ACSR 83, Giles J said at 85–6:

In any application pursuant to s 377(1) [equivalent to Corporations Act s 477(2A)] the court pays regard to the commercial judgment of the liquidator: *Re Chase Corp (Australia) Equities Ltd* (1990) 8 ACLC 1118. That is not to say that it rubber stamps whatever is put forward by the liquidator but, as is made clear in *Re Mineral Securities Australia Ltd* [1973]

<sup>4</sup> *Dean Wilox v Soluble Solution Hydroponics Pty Ltd* (1997) 42 NSWLR 209, 212.

<sup>5</sup> *Re GB Nathan & Co Pty Ltd (in liquidation)* (1991) 24 NSWLR 674, 677, 679–80.

<sup>6</sup> (2001) 39 ACSR 355, [65]–[68].

2 NSWLR 207 at 231-2, the court is necessarily confined in attempting to second guess the liquidator in the exercise of his powers, and generally will not interfere unless there can be seen to be some lack of good faith, some error in law or principle, or real and substantial grounds for doubting the prudence of the liquidator's conduct. The same restraint must apply when the question is whether the liquidator should be authorised to enter into a particular transaction the benefits and burdens of which require assessment on a commercial basis.

Put shortly, it is not the role of the court to make a commercial judgment for the liquidators or administrators or to substitute its judgment for their judgment. The court is not qualified to do so and it is not part of the judicial function to do so. Street CJ made this point in *Re Mineral Securities Australia Ltd (in liq)* [1973] 2 NSWLR 207 at 232:

When the court is required to pronounce upon the commercial prudence of a transaction, it enters upon a slippery and uncertain field. Apart from the lawyer's disclaimer of expert qualifications in matters of business prudence, the very process of litigation and the necessary limitations upon the scope of admissible evidence restrict the available material to far less than is necessary for the making of a commercial decision.

As I have pointed out earlier, although courts will not pronounce upon the commercial prudence of a particular transaction, they will act in an appropriate case to protect liquidators and administrators from claims that they have acted unreasonably in entering into particular transactions. That protection will remain so long as the liquidators or administrators have made a full and fair disclosure to the court of all facts material to the subject-matter under consideration: *Re G B Nathan & Co Pty Ltd (in liq)*, above, at 679; *Mentha v G E Capital Ltd* (1997) 154 ALR 565 ; 27 ACSR 696 at 702.

In this consideration of relevant principles, I have considered the relevant principles as applying equally to court appointed liquidators and administrators appointed pursuant to Pt 5.3A of the Act.

There is a difference between court appointed liquidators and administrators appointed pursuant to the provisions of Pt 5.3A of the Act. Administrators are not officers of the court in the same way as court appointed liquidators are officers of the court. Part 5.3A of the Act enables an administrator of a company to be appointed by the company (s 436A), by a liquidator of a company (s 436B), by a person entitled to enforce a charge on the whole of the company's property (s 436C) and by the court where a company is under administration but no administrator is acting (s 449C(6)). There is a suggestion in some authorities that a voluntary liquidator not appointed by the court is not an officer of the court: *Re London County Commercial Reinsurance Office* [1922] 2 Ch 67 at 84; *Re David A Hamilton & Co Ltd (in liq)* [1928] NZLR 419 at 422, but see *Re T H Knitwear (Wholesale) Ltd* [1987] 1 WLR 371 at 377.

33 It has now become customary for liquidators to seek court approval before terminating grower rights when winding up schemes and their responsible entities. The sale process was outside their control. They were involved in an informal winding up of the schemes. In such circumstances I regard their application as prudent.

### **Constitutional amendment**

34 It has now become customary for liquidators to seek court approval before terminating grower rights when winding up schemes and their responsible entities. The sale process was outside their control. They were involved in an informal winding up of the schemes. In such circumstances I regard their application as prudent.

35 The Constitutions for each scheme were, in material respects, the same. Each Constitution contemplated the preparation of Licence Agreements and Citruslot Management Agreements. Pro forma agreements were attached to each Constitution as a schedule. Each Constitution provided that the Licence Agreement must be read subject to the terms of the Constitution. Under each Constitution the Project may be wound up, prior to its completion, if the responsible entity considers that the purpose of the Project could not be accomplished (s 601NC) or was directed by a court to wind up the Project (s 601ND). The Projects have not yet been wound up.

36 Under the Citruslot Management Agreements, each participating grower engaged Timbercorp Securities to manage and administer the Project including the operation of each citruslot. Each Licence Agreement authorised the grower to use the relevant citruslot for the sole purpose of growing and cultivating citrus trees. The licence included a water licence for each citruslot. The Licence Agreement was to continue until the earlier of the date which is one day before the expiry or termination of the lease between Timbercorp Securities and Align Funds Management; termination of the participating growers' interest in the Project; 29 June 2026; and termination of the Project.

- 37 Following their appointment as liquidators of the companies in the Timbercorp group, the applicants commenced to manage and undertake a realisation of scheme assets. Various applications were made to the court with a view to extinguishing grower rights to facilitate the sale of unencumbered land. On 18 August 2009, Finkelstein J, in the Federal Court of Australia, made an order that the liquidators were justified in procuring Timbercorp Securities to unilaterally amend the Constitutions of the Forestry Schemes pursuant to s 601GC(1)(b) of the Act, granting the responsible entity an express power to terminate growers' rights. An order to that effect was made.<sup>7</sup> The consequential amendment became the foundation for subsequent orders made in this court on 30 September 2009<sup>8</sup> and 17 December 2009.<sup>9</sup>
- 38 On 21 August 2009 Robson J, in this court, authorised the liquidators to cause Timbercorp Securities to amend Constitutions by incorporating a power to terminate or surrender grower rights.
- 39 Having obtained orders from the Federal Court of Australia and from this court approving amendments to the Constitutions in relation to the forestry and almond schemes, the liquidators decided that they would proceed to make such amendments in relation to the olive schemes, and subsequently the citrus schemes with which this application is concerned, without first having obtained judicial approval. The amendments were made in the context of a sale process having been commenced by the receivers and following notice to ASIC and to solicitors known to the liquidators as representing grower groups.
- 40 Thus, the Constitutions for the 2004 and 2005 Citrus Projects were amended by deeds dated 29 December 2009 and by further deeds dated 28 January 2010. The effect of the amending deeds was to incorporate a power vested in the responsible entity 'to assign, terminate, surrender or otherwise deal with any Licence Agreement'.

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<sup>7</sup> Finkelstein J, 18 August 2009, Federal Court of Australia.

<sup>8</sup> *In the Matter of Timbercorp Securities Ltd (in liquidation)* [2009] VSC 597, Pagone J.

<sup>9</sup> *In the Matter of Timbercorp Securities Ltd (in liquidation)* [2009] VSC 608, Davies J.

41 The liquidators do not seek court approval of the amendment to the Constitution, but only to exercise of the power conferred upon the responsible entity by the amendment. The liquidators have given an undertaking that they will not cause Timbercorp Securities to exercise the power to surrender the Licence Agreements unless and until the Land Sale Contract and the Water Sale Contract are both completed. The liquidators also state that if they cause Timbercorp Securities to surrender the Grower Licences they will also use their power as liquidators to disclaim the head lease and sub leases on the grounds that those leases are onerous.

42 It was not submitted on behalf of the growers that the amendment was invalid or was otherwise effective. Nonetheless, it is appropriate to review the basis for the amendment, if only to be satisfied that there was a proper basis for the opinion of the liquidators that the amendment 'would not adversely affect members' rights'. Section 601GC(1) of the Act provides:

- (1) The Constitution of a registered scheme may be modified, or repealed and replaced with a new Constitution:
  - (a) by special resolution of the members of the scheme; or
  - (b) by the responsible entity if the responsible entity reasonably considers the change will not adversely affect members' rights.

43 In *ING Funds Management Ltd v ANZ Nominees Ltd*.<sup>10</sup> Barrett J observed that there were three requirements that must be satisfied for a Constitutional amendment effected under the provision. His Honour said,

The conclusion just expressed as to deficiency in the form of the November 2008 documents makes it unnecessary to consider whether, in terms of s 601GC(1)(b), the situation at that time was one in which INGFM "reasonably considers the change will not adversely affect members' rights". I nevertheless proceed to consider that matter.

Before the factual context is examined, the content of the condition must be addressed. The necessary inquiry concerns the state of mind of INGFM and what, as a matter of fact, it "considered" (in the sense of "concluded"). There must be factual findings about the assessment INGFM actually made concerning the impact of the modification. For the condition to be satisfied, several components must be established. In the present proceedings, it is for INGFM as plaintiff to establish them.

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<sup>10</sup> (2009) NSWSC 243; (2009) 228 FLR 444, paras 84-88.  
SC:HB



The first component involves an assessment of how INGFM viewed "members' rights" before the modification and the impact that the modification would have on those rights. The process of determining the state of mind of a company arises for consideration here, as does the meaning of "members' rights".

Second, it must be seen that INGFM considered that, according to a comparison of "members' rights" before the modification with the changed rights that would exist after the event, there would be no "adverse" affectation of the "rights" whatsoever, this being the import of the words "the change will not adversely affect members' rights". It is necessary here to consider the meaning of "adversely affect".

Third, it is necessary that the opinion formed by INGFM as to the absence of adverse affectation be seen to be something that the responsible entity "reasonably considers".

44 In *Re Timbercorp Securities Ltd*,<sup>11</sup> Davies J had occasion to consider an application by the liquidators seeking justification to procure Timbercorp Securities to exercise its power to terminate or surrender licences in relation to the 2005 Citrus Scheme. Her Honour took the view that in the course of considering the liquidators' application for endorsement of a proposed decision to exercise the power it was appropriate to consider the validity of the amendment. In that case it had been argued on behalf of growers that the amendment was invalid or of no affect. No such submission was made in this case.

45 Mr Korda deposed that the amendments were made in a context where Timbercorp Securities was insolvent, with no funds to continue to operate and manage the Citrus Projects. The amendments were made for the purpose of enabling an 'informal winding up' of the Citrus Projects, after the liquidators became aware that Kangara Estate and the water rights had been put up for sale by the receivers. The liquidators anticipated that any such sale would be conditional upon the extinguishment of any grower rights in order to maximise the purchase price by offering for sale unencumbered assets.

46 The liquidators said that they had formed the opinion that the process of informal winding up would be most beneficial for scheme members. They said that the

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<sup>11</sup> [2010] VSC 50, Davies J, 26 February 2010.  
SC:HB

amendment to the Constitution was designed to enable them to facilitate that process. The liquidators said that they had formed the opinion that the Constitutional amendment would not adversely affect growers' rights. They were not in a position to interfere with the sale process undertaken by the receivers.

47 The liquidators relied upon the fact of court approval of similar amendments in the past. Finally, they argued that in the absence of a power to support an informal winding up, involving a sale of Kangara Estate and the water rights by the receivers, they would have been confined to pursue a formal winding up. In that event the Licence Agreements could have been terminated upon a winding up of the schemes or termination of the head leases.

48 I am satisfied that the evidence discloses a basis upon which the liquidators could properly have concluded that the amendment would not adversely affect members rights.

#### **Proposed exercise of the power to terminate**

49 The liquidators are of the opinion that they should exercise the power to terminate or surrender the Grower Licences over Kangara Estate in order to support the informal winding up of the schemes. They are of the opinion that the Land Sale Contract and the Water Sale Contract provide the best outcome for the scheme members. They have been assured by the receivers that they have complied with their obligations under s 420A of the Act. I am not so much persuaded by the assurances of the receivers, as by the detailed material filed by them, explaining in great detail the steps taken in the sale process. The course taken by the liquidators is by no means novel. It is a course that has been adopted by them in respect of other schemes operated by the Timbercorp group. They have previously sought and obtained court approval for that course in similar circumstances.

50 In my opinion, there is no apparent basis upon which the court should not accept the commerciality and bona fides of the liquidators' judgement. The evidence strongly supports the appropriateness of their decision.

51 Perhaps the most powerful argument in favour of the proposed exercise of the power is that had the liquidators sought to wind up the Projects by order of the court or terminated the Head Leases, the Licence Agreements would have terminated by operation of cl 4.2(b)(iv). What they have sought to do is to participate in an informal winding up in circumstances where the principal assets are controlled by the receivers. The informal process undertaken by the liquidators is very likely to yield a better outcome for the growers than formal winding up proceedings.

#### **Australian Financial Services Licence**

52 Timbercorp Securities had been issued an Australian Financial Services licence which enabled it to operate managed investment schemes. That licence has now been cancelled by ASIC. Nevertheless, ASIC has allowed the licence to continue in effect, under s 915H of the Act, as though the cancellation had not happened. The extension is to enable Timbercorp Securities to provide, until 30 June 2011, financial services that are reasonably necessary for or incidental to the transfer to a new responsible entity or the winding up of the schemes of which Timbercorp Securities is currently the responsible entity.

53 In the absence of a further extension by ASIC of the licence, Timbercorp Securities will no longer be in a position to provide financial services to assist in the informal winding up of the schemes from 30 June 2011. Thus, quite apart from the obligations under the existing contracts, and the risks to those contracts if completion is frustrated or delayed, there is an added imperative that finality be achieved in the winding up prior to 30 June 2011.

#### **The Citrus Committee proposal – Ms Bezencon**

54 By presenting the proposal, dated 28 February 2011, to the receivers and liquidators, Ms Bezencon would interrupt the completion of the contracts. She contended that there was a new and meritorious option that must be considered before approval could be given to the liquidators to terminate grower rights. If the Citrus Committee is to be given a further opportunity to develop their proposal, as they have sought, it

would be very unlikely that the condition precedent could be satisfied by 16 March 2011. The question is whether the proceeding should be further adjourned and interrupt the approval process and completion.

- 55 Ms Bezencon has participated in the sale process in various capacities. The most recent, and only relevant capacity, is as chairperson of the Citrus Committee, to advocate a proposal to recapitalise the TOT and replace Align Fund Management as the responsible entity. The object of the proposal was to give growers an opportunity to rescue something from the wreckage by surrendering their existing rights in favour of an interest, yet to be defined, in the TOT.
- 56 Ms Bezencon was involved with a bid made to the receivers as early as 22 January 2010. In August 2010 she was involved in calling the meeting of growers to replace Timbercorp Securities as responsible entities. The proposed new responsible entity was to be Food and Beverage Australia Ltd. The meeting was adjourned on a number of occasions, but the resolution was apparently passed on 9 November 2010. Food and Beverage Australia has been reluctant to complete the formalities required for its appointment, and there is evidence that its chief executive officer, Mr Chris Day, has expressed his company's reluctance to take any step as responsible entity of the Citrus Projects, at least at this time.
- 57 In about October 2010 the receivers were informed that Ms Bezencon was attempting to prepare a proposal for the recapitalisation of the TOT. Also in that month, Ms Bezencon advanced a proposal for the purchase of the land and water rights. In mid-December 2010, Ms Bezencon advanced a further proposal to recapitalise the Projects. When engaged with the liquidators in discussions about her proposals she was told on 11 February 2011 that this application would be made to the court on 3 March 2011.
- 58 The proposal for the replacement of Timbercorp Securities as responsible entity seems to have fallen away in favour of the proposal advanced by Ms Bezencon on 28 February 2011. That proposal is comprised of a bundle of documents constituting

a confidential exhibit to an affidavit of Anthony Scott Munroe, sworn 2 March 2011. Mr Munroe is a chartered accountant and director of Kordamentha Pty Ltd. The proposal includes a timeline for its implementation, with the last event scheduled for 19 May 2011.

59 While I am reluctant to disclose much of the detail of the proposal that has been treated as confidential, some disclosure is necessary in order to explain my decision. The scheme of the proposal is set out in a document entitled Heads of Agreement, dated 28 February 2011. The Heads of Agreement are between Fresh Produce Group Pty Ltd and the Citrus Committee. Key terms of the proposal include restructuring the ownership of the TOT, by converting existing ownership interests into ordinary units. It is proposed to introduce new equity into the TOT from Fresh Produce Group and other investors to be introduced by the Citrus Committee or Fresh Produce Group. It is proposed to provide existing growers with an opportunity to subscribe for equity and to enter into management, operations and sales and marketing contracts with Fresh Produce Group.

60 Significantly, the proposal depends upon Kangara Estate remaining in the ownership of the TOT, although it is proposed to sell so much of the land and water rights as are not required for the new project. The scheme advanced by the Citrus Committee involves the conversion of existing interests in the TOT into new units 'based on agreed valuations' and the removal of the receivers, which implies a discharge of the TOT liabilities. It is proposed to replace Align Funds Management as responsible entity of the TOT.

61 The liquidators and the receivers submitted that the new proposal advanced by the Citrus Committee, encapsulated in the Heads of Agreement, was not a proposal that could be seriously considered by them as a basis to delay the completion of the Land Sale Contract and the Water Sale Contract.

62 Counsel on behalf of the Citrus Committee argued that the court should not proceed to deal with the application until the receiver had had an opportunity to consider all

relevant proposals. He submitted that the existence of an alternative proposal which might be viewed as more beneficial to the growers may be a basis upon which to refuse the application. That submission overlooked the importance of finality and timeliness in the determination of this application, but more particularly the work of the liquidators. There is no guarantee that the proposal, if reformulated or better particularised, will be any more attractive to the receivers and liquidators than the present proposal. The 28 February 2011 proposal was obviously incomplete and lacked detail and the information necessary to satisfy the receivers and liquidators of the capacity of the parties to perform.

63 The proponents of the recapitalisation scheme are, in effect, requesting the court to second guess the receivers and liquidator's judgement about what they should do in the discharge of their respective duties. That is not the function of the court. Moreover, they would have the court interrupt the completion of contracts, which the receivers and liquidators consider are the best that can be achieved, and to require them to consider a prospective and indefinite proposal from the Citrus Committee. For the court to so interfere would be to undermine the legislative scheme investing receivers and liquidators with powers and regulating the exercise of those powers.

64 Counsel for the Citrus Committee also submitted that the evidence did not address the viability of the orchards, as distinct from the responsible entity. That is true. The general thrust of the liquidators' concern in relation to solvency and viability related to the position of the Timbercorp group and its ability to continue to manage and maintain the orchards. The evidence did not descend to an analysis of the viability of individual orchards or of the orchards comprising the Project. Such an analysis may be a useful tool on an application to wind up a scheme, or when considering the viability of a restructuring proposal. The Citrus Committee did not adduce any evidence that the citrus orchards were viable, although its proposal seems to proceed on the assumption that they were.

- 65 In my opinion, the absence of evidence as to viability does not warrant refusing the liquidators' application. If and insofar as the orchards are commercially viable, their value will be reflected in the price paid by the purchaser under the Land Sale Contract.
- 66 The paramount interest of the growers is the reason why the liquidators seek the court's approval. The liquidators are of the opinion that the Land Sale Contract and the Water Sale Contract are the best that can be achieved for the growers. The growers' interests are protected by certainty and by achieving the best possible price for the land and water rights and to hold the proceeds in trust awaiting apportionment by the court.
- 67 Ms Bezencon and the Citrus Committee have had more than enough time and opportunity to formulate proposals to advance to the receivers and liquidators prior to the execution of the contracts. Ultimately, the application by the liquidators must be decided on the material before the court. There is no justification in further delay in the hope that the Citrus Committee can formulate a more definite and attractive proposal.
- 68 I am satisfied that the liquidators would be justified in exercising their power to surrender the Licence Agreements over the land at Kangara Estate granted under the 2004 and 2005 Citrus Schemes upon completion of the Land Sale Contract and Water Sale Contract. The process of informal winding up, involving the sales by the receivers and the supervision by the court of the apportionment of the funds is, in my opinion, likely to lead to a more beneficial outcome for growers than a winding up under the Constitution or the *Corporations Act*. I will make the orders sought by the liquidators.
- 69 Confidentiality orders have been made in respect of many of the documents generated in the course of the sale process, including the executed contracts. In my view those orders should not extend beyond 28 days after the completion of the

contracts. There is no justification for permanent orders maintaining confidentiality of that material.


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**CERTIFICATE**

I certify that this and the 21 preceding pages are a true copy of the reasons for judgment of Judd J of the Supreme Court of Victoria delivered on 15 March 2011.

DATED this 15th day of March 2011.



  
Associate to Justice Judd