

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  
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**

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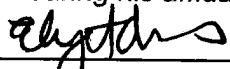
Ref CCHM:120339854

(Clint.Hinchen@allens.com.au)

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This is the **Exhibit** marked '**CCH-13**' 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-13': a true copy of the  
judgment of Justice Davies in  
proceeding No SCI 2010 7029  
dated 7 February 2011**

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

Not Restricted

LIST E  
No. 7029 of 2010

IN THE MATTER of TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)  
(ACN 092 311 469)

TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)  
(ACN 092 311 469) IN ITS CAPACITY AS THE  
RESPONSIBLE ENTITY OF THE 2004 TIMBERCORP  
TABLE GRAPE PROJECT (ARSN 108 648 086)  
AND THE 2005 TIMBERCORP TABLE GRAPE PROJECT  
(ARSN 113 512 236) & ORS

Plaintiffs

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<u>JUDGE:</u>	Davies J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	2 February 2011
<u>DATE OF JUDGMENT:</u>	7 February 2011
<u>CASE MAY BE CITED AS:</u>	Re Timbercorp Securities Limited (In liq)
<u>MEDIUM NEUTRAL CITATION:</u>	[2011] VSC 24

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CORPORATIONS – Application by liquidators for judicial advice and directions – Managed investment schemes – Responsible entity in liquidation – Sale by receiver of assets used by table grape schemes – Sale to be completed unencumbered by Growers' rights in relation to those assets – Whether liquidators justified in procuring the extinguishment of Growers' rights to enable completion of the land and water sales – Net proceeds to be held on trust pending determination of persons entitled to receive the proceeds – S 511 of the *Corporations Act 2001* (Cth).

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiffs	Mr. O Bigos	Arnold Bloch Leibler

Messrs Kirk and Fung,  
Receivers and Managers of  
Align Funds Management  
limited

Ms. W A Harris SC with  
Mr. T Clarke

Allens Arthur Robinson

Timbercorp Growers Group

Ms. C Armstrong

Clarendon Lawyers

HER HONOUR:

- 1 Timbercorp Securities Limited (in liquidation) ("TSL") is the responsible entity ("RE") of the 2004 Timbercorp Table Grape Project and the 2005 Timbercorp Table Grape Project ("the Table Grape Projects"), which the liquidators of TSL are in the course of winding up because TSL is hopelessly insolvent. The liquidators seek directions from the Court pursuant to s 511 of the *Corporations Act 2001* (Cth) ("the Act") in connection with the proposed sale of assets used by investors ("the growers") in the Table Grape Projects.
- 2 The growers hold licenses and associated rights to cultivate grapes on land owned by another company, Align Funds Management Limited (previously Orchard Investments Management Limited) in its capacity as the RE of the Timbercorp Orchard Trust ("TOT RE"). TOT RE is in receivership. The receivers and managers have contracted to sell the land and water rights owned by TOT RE that the growers presently utilize, unencumbered by the growers' rights in relation to those assets. Thus the growers' rights in relation to those assets must be extinguished if the sales are to be completed. The liquidators seek directions pursuant to s 511 of the Act that they would be justified in terminating or surrendering the growers' licences and in extinguishing all of the rights of the growers in respect of the assets which the receivers and manager have contracted to sell.
- 3 The role of the Court on this application is not to venture into the commercial arena and to substitute its own commercial judgment for that of the liquidators. Indeed the Court should generally defer to a liquidator's commercial judgment.<sup>1</sup> The Court's function is supervisory, that is to say to consider whether there may be some legal impediment to what is proposed or whether there may be some impropriety or other good reason which may indicate that the liquidators may be acting inappropriately or unreasonably in effecting the extinguishment of the rights of the growers in relation to the assets that are to be sold on an unencumbered basis.<sup>2</sup> The

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<sup>1</sup> *Re Ansett Australia Limited v Mentha* (2001) 39 ACSR 355, 371 (Goldberg J).

<sup>2</sup> *Re Ansett Australia Limited v Korda* (2002) 40 ACSR 433; *Re Spedley Securities Ltd (In Liq)* (1992) 9 ACSR 83, 85-6 (Giles J); *Corporate Affairs Commission v ASC Timber Pty Ltd* (1998) 29 ACSR 109, 118 (Austin J).

Court has already given similar directions to the liquidators in earlier applications by the liquidators in the course of winding up other managed investment schemes of which TSL is the RE.<sup>3</sup> The earlier decisions provide considerable guidance for the disposition of this application and I am satisfied that the directions sought in this application should also be made.

4 First, the orders and directions are sought on the basis that the proceeds of sale will be held by the liquidators in trust pending the Court's determination of which person or persons have the right to all or any part of the net sale proceeds<sup>4</sup> and that the rights of the secured creditor and the growers to make a claim on the proceeds will not be prejudiced.

5 Next, I am satisfied that the Constitutions of the Table Grape Projects confer valid and effective powers on the liquidators to terminate or surrender the growers' licences. This power was inserted into both Constitutions by the liquidators exercising the amendment power under s 601GC(1)(b) of the Act, which provides that:

The constitution of a registered scheme may be modified, or repealed and replaced with a new constitution:

- (b) by the responsible entity if the responsible entity reasonably considers the change will not adversely affect members' rights.

In *Re Timbercorp Securities Limited*<sup>5</sup> I addressed the requirements for the valid exercise of power under s 601GC(1)(b). The section requires the responsible entity to consider and form the opinion that there would be no "adverse" affect on the "rights" that members held before the amendment with the "rights" that they would hold after the amendment. This requires a comparison of members' rights before and after the proposed amendment. The section also requires that the opinion

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<sup>3</sup> *Re Timbercorp Securities Limited (In Liquidation) (No. 3)* (2009) VSC 510; 74 ACSR 626 (Robson J); *In the Matter of Timbercorp Securities Limited (In Liquidation) & Ors* (2009) VSC 597 (Pagone J); *Re Timbercorp Securities Limited (No. 4)* (2009) VSC 530 (Croft J); *Re Timbercorp Securities Limited (In Liquidation)* (2009) VSC 590 (Davies J); *Re Timbercorp Securities Limited (In Liquidation)* (2010) VSC 50; 77 ACSR 291 (Davies J).

<sup>4</sup> *Re Timbercorp Securities Limited* (2009) VSC 510; 74 ACSR 626.

<sup>5</sup> 77 ACSR 291.

formed by the responsible entity be an opinion that the responsible entity “reasonably” holds.<sup>6</sup> I am satisfied that each of those requirements has been met. The evidence before the Court was that the liquidators gave due consideration to the affect on “members’ rights” of the proposed constitutional amendment before they made it. In this instance, the amendments were made after the liquidators became aware that the land and water rights had been put up for sale, in the circumstance where TSL has no funds to continue to manage the Table Grape Projects and is hopelessly insolvent and unable to continue its task as RE because of its insolvency. The evidence also was that the liquidators followed the same process that they applied in determining to amend the constitutions of the forestry schemes, the almond schemes and the olive schemes where TSL was the RE, as part of the informal winding up of those schemes. Had the liquidators instead sought to have the projects wound up by direction of the Court<sup>7</sup> or sought to take steps to wind up the scheme in accordance with s 601NC of the Act, the licence agreements would have been terminated by operation of clause 4.1(b)(iv) of the growers’ licences.

6 Next, the receivers and managers have confirmed with the liquidators that they have complied with their obligations under s 420A of the Act and the evidence from the receivers and managers bears out that they have undertaken a robust and thorough sale process calculated to maximise the value of the land and water rights. The receivers and managers have explained that process and the basis for their view that the proposed sales will realise the maximum value for the land and the water rights.

7 Next, the receivers and managers support the proposed orders and directions that are sought and there has been no opposition by or on behalf of any of the growers. The Australian Securities and Investment Commission was also given notification of the application and advised that it neither consented to nor opposed the orders and directions sought.

8 Consequently I will make the orders and directions sought.

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<sup>6</sup> 77 ACSR 291, 294 [7].

<sup>7</sup> *Corporations Act 2001* (Cth) s 601ND.

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**CERTIFICATE**

I certify that the 3 preceding pages are a true copy of the reasons for Judgment of Davies J of the Supreme Court of Victoria delivered on 7 February 2011.

DATED this seventh day of February 2011.

