

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

Date of document: 21 March 2014

Filed on behalf of: The plaintiff

Prepared by:

Allens

Lawyers

101 Collins Street

Melbourne VIC 3000

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Ref CCHM:120338387

(Clint.Hinchen@allens.com.au)

This is the **Exhibit** marked '**CCH-17**' 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-17': a true copy of the
letter from Allens to Align dated
3 April 2013**

Date 3 April 2013

ABN 47 702 595 758

From Clint Hinchin / Alicia Salvo

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To **Andrew Ashbolt**, Company Secretary, Align Funds
Management Limited, Melbourne

Email aashbolt@alignmanagement.com.au

Correspondence
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Melbourne VIC 3001 Australia
DX 30999 Melbourne

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Confidential Email

Dear Mr Ashbolt

Kangara Rights Proceeding-

Supreme Court of Victoria Proceeding No SCI 1478 of 2013

Please see attached.

Attach

Our Ref 120338387;120338387

ansm A0124648675v4 120338387 3.4.2013

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3 April 2013

Andrew Ashbolt
Company Secretary
Align Funds Management Limited
Level 33, 360 Collins Street
Melbourne VIC 3000

By Email

Dear Mr Ashbolt

**Kangara Rights Proceeding-
Supreme Court of Victoria Proceeding No SCI 1478 of 2013**

1. Background

We act for The Trust Company (Nominees) Limited.

As you are aware, on 15 March 2011, the Honourable Justice Judd made various orders in Supreme Court Proceeding No SCI 888 of 2011 (**Orders**) regarding the sale of the Kangara property and associated water rights. A copy of the Orders is attached. Terms defined in the Orders apply to this letter.

Completion of the Land Sale Contract occurred on 28 April 2011 and completion of the Water Sale Contract occurred on 2 June 2011. In accordance with paragraph 3 of the Orders, Michael Fung in his capacity as receiver and manager of the assets charged by Align Funds Management Limited in its capacity as the responsible entity of the Timbercorp Orchard Trust (**Align**) currently holds the Net Sale Proceeds on trust in an interest bearing account pending the hearing and determination by the Court of a proceeding to determine which person or persons have any rights to all or any part of the Net Sale Proceeds. That proceeding (defined as the Kangara Rights Proceeding in section 2 below) has now been commenced by our client as secured creditor.

2. The Kangara Rights Proceeding

We attach for your reference the originating motion for Supreme Court of Victoria Proceeding No SCI 2013 1478 (**Kangara Rights Proceeding**) which was filed on behalf of our client on 25 March 2013.

As you will note, Mr Fung has been joined as a defendant to the proceeding in his capacity as "stakeholder" of the Net Sale Proceeds which he currently holds on trust.

Our Ref 120338387:120338387

ansm A0124648675v4 120338387 3.4.2013

Our client proposes to issue shortly an application by summons (supported by affidavit) seeking, among other things, directions and orders for:

- (a) the appointment of growers as representatives for each of the Timbercorp Citrus Projects pursuant to order 16 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) (**Rules**); and
- (b) the joinder of those appointed representatives as defendants to the proceeding pursuant to rule 9.02 and/or rule 9.06(b) of the Rules.

Our client does not propose to seek orders for the joinder of any other parties.

3. Align's role

Align is the responsible entity of the Timbercorp Orchard Trust (ARSN 106 557 297). In accordance with clause 10 of the Timbercorp Orchard Trust Debenture Trust Deed dated 17 October 2003 (**Trust Deed**), our client is required to pay to Align any balance remaining from the funds it recovers by order of the Court in the Kangara Rights Proceeding *after* it has first applied those funds to:

- (a) repaying its own costs and expenses; and
- (b) repaying all amounts outstanding to the debenture holders in accordance with the terms of the Trust Deed.

The amount of our client's secured debt exceeds the current balance of the Net Sale Proceeds. As such, regardless of the amount (if any) of the Net Sale Proceeds the Court orders is payable to the growers in the Kangara Rights Proceeding, there will be no surplus for payment to Align by our client in accordance with the terms of the Trust Deed.

In the circumstances, our client considers that Align does not have any interest in the outcome of the Kangara Rights Proceeding and is therefore not a necessary party in accordance with order 9.03 of the Rules.

If Align has an alternative view and considers that it is a proper party to the Kangara Rights Proceeding, it can apply to the Court for leave to be joined as a defendant.

Please confirm by return correspondence by no later than **12 April 2013** what role (if any) Align proposes to take in the Kangara Rights Proceeding.

Yours sincerely



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CC: Michael Fung
Receiver and Manager of Align Funds Management Limited in its capacity as the responsible entity of the Timbercorp Orchard Trust
PricewaterhouseCoopers