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

LIST E

SCI 2009 10382

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 RESPONSIBLE ENTITY OF THE MANAGED INVESTMENTS SCHEMES LISTED IN SCHEDULE 1 AND ORS ACCORDING TO THE SCHEDULE OF THE ORIGINATING PROCESS
Plaintiffs

CERTIFICATE IDENTIFYING EXHIBIT

Date of document: 30 November 2009
Filed on behalf of: the Plaintiffs

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This is the exhibit marked "MAK-5" now produced and shown to **MARK ANTHONY KORDA** at the time of swearing his affidavit on 30 November 2009.

Before me: _____

BRIDGET ELLEN SLOCUM
Arnold Bloch Leibler
Level 21, 333 Collins Street
Melbourne 3000
An Australian Legal Practitioner within the meaning of the Legal Profession Act 2004

Exhibit "MAK-5"

Judgement of Justice Robson dated 8 October 2009 in Supreme Court Proceeding SCI 2009 9408

"MAK-5"

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

Not Restricted

COMMERCIAL COURT
CORPORATIONS LIST

No 9408 of 2009

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 responsible entity
of certain managed investment of certain managed investment schemes;
ALMOND MANAGEMENT PTY LTD (IN LIQUIDATION) (ACN 094 468 845)
in its capacity as manager of an unregistered managed investment scheme;
MARK ANTHONY KORDA;
LEANNE KYLIE CHESSER;
TIMBERCORP LIMITED (IN LIQUIDATION) (ACN 055 185 067) and
ALMOND LAND PTY LTD (IN LIQUIDATION)(ACN 091 460 9920) Plaintiffs

JUDGE:	ROBSON J
WHERE HELD:	Melbourne
DATE OF HEARING:	6 October 2009
DATE OF JUDGMENT:	8 October 2009
CASE MAY BE CITED AS:	Re Timbercorp Securities Ltd (in liquidation) No 3
MEDIUM NEUTRAL CITATION:	[2009] VSC 510

CORPORATIONS - application by liquidators for directions – managed investment schemes – responsible entity in liquidation - sale by responsible entity of schemes' interest in almond orchards - grower members of the schemes and land owners of orchards each holding proprietary interests in the almond orchards to be sold - dispute between growers and land owners' bank mortgagees on the value of the growers' interests – liquidators wish to accept a sum offered by the bank mortgagees in satisfaction of the growers' proprietary interests – liquidators justified in agreeing to sell orchards - liquidators not justified in accepting the bank mortgagees' offer – liquidators justified in settling on basis that sale

moneys are held on trust pending determination of growers' proprietary interests and their proper share of the sale proceeds – appropriate basis for apportioning sale proceeds between growers and mortgagees - s 477(2)(b), s 511 and s 568(1)(a) of the *Corporations Act 2001*

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr L Zwier with Ms B Toy-Cronin	Arnold Bloch Leibler
For the Timbercorp Growers Group	Mr G T Bigmore QC with Mr S G Hopper	Clarendon Lawyers
For Keree Anne Bezencon	Mr M W Shand QC	Maurice Blackburn
For the Bank of Scotland, Westpac Banking Group and ANZ Banking Group	Mr P G Cawthorn SC with Mr R G Craig	Blake Dawson Waldron
For ASIC	Mr I Waller SC with Mr S J Hibble	ASIC

Cases cited
Barnes v Addy (1874) LR 9 Ch App 244
Hazelton Air Charter Pty Ltd (2002) 41 ACSR 472
Inwards v Baker [1965] 2 QB 29
Muschinski v Dodds (1985) 160 CLR 583
National Australia Bank v State of New South Wales [2009] FCA 1066
Wilcox v Richardson (1997) 43 NSWLR 4

HIS HONOUR:

THE PROCEEDINGS

1 I have only had a very short period of time to consider the many issues this matter raises. My reasons, therefore, may appear a little inelegant, but my conclusions are clear.

2 By an originating process dated 5 October 2009, the plaintiffs, Timbercorp Securities Ltd ("TSL") in its capacity as responsible entity of certain managed investment schemes, Almond Management Pty Ltd ("Almond Management") in its capacity as manager of an unregistered managed investment scheme, Mr Korda, Ms Chesser, Timbercorp Ltd ("TL") and Almond Land Pty Ltd ("Almond Land"), seek orders and directions under s 477(2)(b), s 511 and s 568(1)(a) of the *Corporations Act 2001*.

3 In particular, they seek orders and directions that Mr Korda and Ms Chesser, in their capacity as liquidators of TSL, are justified in procuring TSL, as the responsible entity of the managed investment schemes listed in schedule 1 of the proposed order, to enter into and perform the sale and purchase deed between each of the plaintiffs and Olam Orchards Australia Pty Ltd and Olam International Ltd. which forms the confidential exhibit MAK4 to Mr Calder's affidavit of 5 October, or a document substantially in that form, which they call the sale and purchase deed, to extinguish the grower's rights.

4 They also seek a direction that Mr Korda and Ms Chesser, in their capacity as liquidators of TSL, are justified in entering an agreement with Almond Land to accept $6 million to extinguish the growers' rights in accordance with the terms of the bank offer as defined in their affidavit. They also seek similar orders in relation to the unregistered almond scheme.

THE MATERIAL FACTS

5 The four plaintiff companies are members of the Timbercorp Group of Companies. Mr Korda and Ms Chesser are the liquidators of the four plaintiff companies.

6 The Timbercorp Group of Companies carried on business promoting managed investment schemes, whereby investors (known as growers) invested in and participated in the growing of trees, almonds, olives and other horticultural products.

7 On 23 April 2009, the Timbercorp Group of Companies appointed administrators after they could not renegotiate large amounts of bank debt. The creditors then resolved to put each group company into voluntary liquidation. On 29 June 2009, Mr Korda and Ms Chesser were appointed the liquidators of TSL, Almond Management, TL and Almond Land.

8 TSL is currently the responsible entity of seven almond schemes which are registered managed investment schemes under the *Corporations Act 2001*. Almond Management also manages an unregistered almond scheme known as the '2002 private offer scheme'.

9 Mr Korda says that both TSL and Almond Management are hopelessly insolvent and are unable to manage the almond schemes. Although the *Corporations Act 2001* provides that the responsible entity of registered managed investment schemes can be removed and replaced, the members of the schemes (in this case "the growers") have not done so.

10 Mr Chris Garnaut, a grower, has been instrumental in establishing a group of growers known as the Timbercorp Growers Group ("TGG") and has been seeking to have another responsible entity appointed for the registered almond schemes but without success.

11 The major problem faced by the liquidators is that the relevant assets that constitute the relevant orchards are owned by different parties. Generally speaking, the land is owned by one Timbercorp company, whilst the growing rights are owned by the growers. The liquidators describe the bundle of assets that make up the relevant assets of the almond orchards as the 'almond assets'. The liquidators are of the view that the best way to realise the most money for the almond assets is to offer them for

sale as a whole and on an unencumbered basis. The liquidators were of the view that if the court ordered that the relevant registered almond schemes be wound up, then the liquidators would be able to enter into an arrangement with the holder of the other relevant almond assets to offer the almond assets for sale or recapitalisation on an unencumbered basis.

12 Earlier proceedings concerning Timbercorp have been pursued in the Federal Court of Australia as well as in this court. In substance, the Federal Court has been dealing with the tree schemes and this court has been dealing with the almond and olive schemes. Previously, Mr Korda and Ms Chesser sought a direction that they were justified in applying to the court to wind up the registered olive and almond schemes. The court gave directions that Mr Korda and Ms Chesser were justified in so applying. The application to wind up the registered almond and olive schemes (including registered almond schemes the subject of this application) came on for hearing before me from 15 July 2009 to 20 July 2009. The TGG opposed the winding up applications and cross claimed for the appointment of a temporary responsible entity.

13 The TGG is concerned that the winding up of the registered schemes may extinguish some of the growers' property rights. In particular, the TGG is concerned that the winding up of a scheme may have the effect of terminating the tenancy, cropping or akin rights that the relevant growers had over their relevant portion of the almond or olive groves.

14 On 20 July 2009, the winding up applications were adjourned by consent with orders that the liquidators cause TSL to call separate meetings of the almond and olive registered schemes to allow the growers to consider certain resolutions.

15 Certain resolutions were passed at the meetings along with purported amendments of the constitutions of the various managed investment schemes. By 17 August 2009, no one had made an unconditional and binding offer to take the role of replacement responsible entity of any of the registered almond schemes. Accordingly, on

18 August 2009, the liquidators reinstated their application to wind up the almond schemes. Mr Korda asserts that, as well as TSL being insolvent, the almond schemes themselves each have a cash flow deficiency. Mr Korda says that the liquidators are also concerned about the risk of severe wastage of the almond orchards if the almond assets are not sold or the schemes recapitalised in the near term.

16 As mentioned previously, a winding up of the schemes may allow the liquidators to offer the almond assets for sale or recapitalisation on an unencumbered basis. On the return of the application to wind up the schemes, the liquidators accepted that if they had the power to release or surrender the growers' rights under the registered schemes, they would be able to affect a sale or recapitalisation of the almond assets on an unencumbered basis without the schemes being wound up.

17 The difficulty that was identified at the hearing, and it was also canvassed at length in the July hearing, was how the purchase price for the almond assets would be allocated between that respective owners of the various assets that make up the almond assets. In practice, this means the allocation of the purchase price as between the growers of the one part and the banks who held securities over the land and other assets of the Timbercorp Group that were part of the almond assets of the other part.

18 The liquidators were acutely aware of this difficulty and encouraged the banks and the growers to agree on the division of the sale proceeds so that the sale of the almond assets could proceed.

19 As indicated above, the liquidators did not press their application to wind up the registered almond schemes but instead sought a direction that they would be justified in causing TSL to amend the constitutions of the 2001-2007 almond schemes to give TSL the explicit power to "assign, terminate, surrender or otherwise deal with any sub-leases, licence or joint venture agreement." I made the orders sought. Mr Korda made plain, however, that he would not exercise the power to extinguish the growers' rights in a sale or recapitalisation process without first seeking

directions from the court.

20 Subsequently, the liquidators caused the amendments to the almond scheme constitutions to be made.

21 On 4 August 2009, the liquidators advertised seeking expressions of interest for the possible purchase of the almond assets or the re-capitalisation of the almond schemes. A closing date for bids was fixed for 28 August 2009. The liquidators made available to interested parties access to an on-line data room which contained confidential information about the almond schemes.

22 The bidders were asked to apportion the purchase price between the land, water rights and cropping rights. The liquidators received seven bids for the almond assets. The bids have been disclosed on a confidential basis to the court and counsel for the parties appearing.

23 On 11 September 2009, the liquidators selected Olam Orchards as the preferred purchaser. The liquidators say that the terms and conditions of the Olam Orchards offer are "clearly the most favourable". The liquidators have provided information about the financial strength of Olam and no issue arises about that. A sale and purchase deed (SPD) has been entered into between TL, TSL (in its capacity as responsible entity of the almond schemes and in its personal capacity), Almond Land, Almond Management, the liquidators, Olam Orchards and its parent company Olam International Limited.

24 Olam Orchard's bid offers a total purchase price of approximately $128 million consisting of $81.6 million for permanent water rights and $46 million for the other Almond Assets. Completion (as defined) will occur when the conditions precedents have been fulfilled in about 75 days.

25 It is a condition precedent of the SPD that by 9 October 2009, the court gives a direction that the liquidators are justified in entering into the SPD and extinguishing the growers' rights. The liquidators say that if the court directs that they are justified

in doing so, they will not extinguish the growers' rights until shortly before completion.

26 Another condition on the almond sale is that the relevant lenders and Almond Land provide, at completion, releases of their charges over any of the almond assets and discharges of the mortgages over the relevant properties, and the permanent water rights included in the sale.

27 The securities relate to the following principal facilities:

(a) ANZ Almond Facility for $45 million to Almond Land dated 26 September 2006 ("ANZ Almond Facility").

(b) Syndicated Loan Agreement to TL dated 15 December 2006 (as amended) for $200 million ("Syndicate Facility"). BOSI Security Services Limited (formerly names BWA Custodians Limited) is the Security Trustee for the Syndicate Banks. The Obligors to the Syndicate Facility include Almond Land and Almond Management.

28 The liquidators believe that currently the ANZ Almond Facility is at least $47 million and the Syndicate Facility is at least $202 million.

29 The liquidators say that some of the securities were created within six months from the commencement of the Timbercorp Group's winding up. They say that they have not investigated the circumstances surrounding their creation or the financial position of each of the Timbercorp vendor companies at that time. They say that if the court grants the relief sought, settlement with the secured creditors is proposed to take place on a reservation of rights basis regarding the validity of the securities. They say that this is the only practical way in which they can complete the SPD and procure the releases of the securities from the secured creditors.

30 As a result of the disagreements between the growers and the secured creditors concerning the apportionment of the Olam sale proceeds during the sale or recapitalisation process, the liquidators sought to appoint a special purpose

liquidator to help facilitate the settlement of the disputes between the growers and the secured creditors and if necessary, provide a report to the court on the reasonableness of any offer that the liquidators may receive for the almond assets.

31 On 11 September 2009, the liquidators sought a direction from this court that TSL was justified in entering an agreement to appoint Ian Carson of PPB to fulfil the role of a special purpose liquidator in relation to the almond schemes. The liquidators say that they considered that they would be aided by appointing Ian Carson to assist with the conflicts between their roles as liquidators of TSL and Almond Land. In particular, the liquidators were faced with the possible conflict arising from them acting as liquidators of TSL, the responsible entity for the registered almond schemes, and as liquidators of Almond Land, which owned the land and other almond assets which were charged in favour of the banks. They were concerned that they would be negotiating with themselves over the allocation of the purchase price between the almond schemes and the Almond Assets owned by Almond Land.

32 On 14 September 2009, the hearing of that application took place. In the course of that hearing the liquidators' lawyer explained to the court how they envisaged the sale process taking place, including the making of this application. Mr Zwier explained Ian Carson's facilitative role in this process and the importance of the growers making a reasonable offer to the secured creditors.

33 I made the orders sought. Ian Carson accepted the appointment and retained Mallesons Stephen Jaques to advise him in relation to his appointment and discharging his function.

34 The liquidators have also made agreements with Select and Almond Land in relation to the care and maintenance of the orchards. Select has agreed to fund the maintenance of the orchards until 9 October, the date on which the immediate conditions precedent under the SPD have to be fulfilled.

35 The liquidators state that there are two critical issues relevant to determining the apportionment of the Olam sale proceeds between the secured creditors and the

almond growers. First, what are the proprietary interests of the growers in the almond assets and can those rights be determined by the winding up of the almond schemes or by disclaimer by virtue of the Timbercorp Group liquidations? The liquidators acknowledge that this issue raises complex legal issues. Secondly, what is the value of those proprietary interests and how should they be calculated? They say that these questions raise complex commercial considerations. As discussed below, in my opinion, they also raise legal issues that can be determined by well established legal principles of law and equity.

36 The liquidators say that to assist both Ian Carson and themselves in reaching their decision regarding the apportionment of the Olam sale proceeds, they asked TGG's solicitors to set out what they considered was the basis of the growers' claims and the portion of sale proceeds to which they considered the growers were entitled. They say that there was correspondence between the liquidators' solicitors and TGG's solicitors on this matter.

37 The liquidators say that they also asked the secured creditors to provide an analysis of the legal and commercial issues supporting their claim that they are entitled to receive all of the Olam sale proceeds. They say that Ian Carson also called on TGG to provide him with more detailed submissions on both the legal issues and the commercial issues, and TGG did so.

38 The liquidators say that for some considerable time, TGG and the secured creditors have been indirectly negotiating with one another, mainly through either Ian Carson or the liquidators and their respective lawyers.

39 The liquidators say that they have been told that at the most recent committee of inspection meeting, the growers offered to take $50 million from the Olam sale proceeds as fair consideration for the consensual extinguishment of their rights. The liquidators say that the secured creditors rejected this offer.

40 The liquidators say that to achieve "an expeditious termination or surrender" of the sub-leases and relevant joint venture agreements, the secured creditors have made a

conditional written offer to Almond Land that the secured creditors will pay $6 million to Almond Land, to be paid to TSL as responsible entity (for the benefit of the growers, including the relevant growers in the 2002 Private Offer Scheme). They say that the costs will be paid out before the $6 million is paid to growers. This offer is contained in a letter of 30 September 2009 ("the bank offer"). The bank offer also contains a detailed position paper explaining why the growers have severe legal impediments to their claims to the Olam sale proceeds. The letter also includes a commercial analysis of the growers' proprietary interest, prepared by Ferrier Hodgson, which values those interests lower than the offer of the secured creditors.

41 The growers have not accepted the bank offer and no agreement has been reached regarding apportionment. The liquidators say that the bank offer will lapse if not accepted by 9 October 2009.

42 On Friday 2 October 2009, the liquidators requested that Ian Carson complete his report based on the Olam SPD and the current state of the negotiations. On 4 October 2009 (early Sunday morning), Ian Carson issued his report.

43 The liquidators say that Ian Carson was asked to assume the correctness of the legal advice of Arnold Block Leibler regarding the legal issues referred to above. The legal advice of Arnold Block Leibler included an opinion from Charles Scerri QC and Phillip Crutchfield of counsel.

44 The liquidators have resolved that they should accept the bank offer. In doing so they say that they have had regard to the Ian Carson report, the confidential legal advice of Arnold Block Leibler and the opinion of Charles Scerri QC and Philip Crutchfield.

45 The liquidators say that they have also had regard to:

(a) the fact that Ian Carson's report has been prepared by an experienced independent insolvency practitioner whose sole focus has been TSL and who, unlike the liquidators, does not owe conflicting duties to other

members of the Timbercorp Group; and

(b) the robust sale or recapitalisation process that they have conducted and that no other person has sought to recapitalise the almond schemes notwithstanding that the Timbercorp Group insolvency administrations have been running for a period in excess of 160 days.

46 They said that they have also considered that Olam Orchards, who is a well resourced, financially strong and natural buyer of the almond assets, may not be prepared to resubmit a bid for the almond assets if the SPD conditions precedent are not fulfilled. They say that they also regard Olam Orchard's conditions precedent as commercially sensible from a buyer's perspective.

47 I should interpolate here that the issue in this case is not the appropriateness of the conditions imposed by Olam Orchards but the dilemma faced by the liquidators in view of the banks' stance that they will not permit the sale to settle unless they are paid all but $6 million of the proceeds without any meaningful determination of the property rights of the growers being made.

48 They say that:

(a) the price that Olam Orchards will pay for the almond assets and the terms and conditions on which it will acquire the almond assets represent the best offer to be made following a competitive bidding process;

(b) the real issue between the TGG and the secured creditors is confined to the apportionment of the Olam sale proceeds and not the sale price payable by, or the terms and conditions agreed with, Olam Orchards;

(c) acceptance of the bank offer will be "without prejudice" to the validity of the securities held by the secured creditors over the almond assets;

(d) the fact that, in order for TSL, on behalf of growers, to assert the

continued existence of growers' proprietary interests, TSL would be compelled to spend considerable time and money on expensive litigation in circumstances where it frankly does not have those funds and TSL's legal rights are, at best, uncertain;

(e) the extinguishment of growers' rights is a serious step for the liquidators to take, particularly when not all the growers can be heard on these complex issues and the TGG oppose the liquidators? doing so;

(f) the wasting nature of the almond assets and the damage that will be inflicted on the almond assets if the Olam SPD is not completed. That damage may exceed the amount of the bank offer. This threat to the almond assets, which are secured in favour of the secured creditors, may be regarded by growers as having commercial value greater than the bank offer;

(g) in real terms, the almond schemes have ceased to operate in accordance with their constitutions and are now operating on a "hand to mouth" basis, with part of next year's crop already having been sold to fund necessary expenditure;

(h) the fact that, even if almond growers have indicated that they wish to maintain their almond schemes, the almond growers have not funded an alternate responsible entity to do so;

(i) the fact that, even if growers were asked to contribute to the ongoing costs of the almond schemes, unless all growers contributed the required amount, those growers that did contribute would be required to increase their contributions to cover any shortfall. They say that this is particularly relevant given that:

    (i) Timbercorp Group entities are growers but will not be able to contribute;

(ii) many growers funded their contributions through loans from Timbercorp Finance but will now need to source alternate funding; and

(iii) the growers are entitled to terminate their participation in the almond schemes given the insolvency of the relevant Timbercorp Group entities;

(j) it is doubtful whether it would be in the growers' best interests to be asked to contribute further funding to the almond schemes, or to risk the proceeds from the 2009 crop (to which they would otherwise be entitled) to fund the almond schemes, in circumstances where there is no guarantee that the almonds schemes can or will continue;

(k) the liquidators do not have the money to continue maintenance of the almond orchards and they cannot borrow it. Select will not maintain the almond orchards indefinitely through the crop sale mechanism currently in place. Wastage, and ultimately, tree death, will arise if the almond orchards are not maintained;

(l) the recent failures of many high profile managed investment schemes and the global financial crisis and credit squeeze has made more high risk investments, such as these agribusinesses, less attractive in the market place generally;

(m) the lengthy drought and its effect on returns to agribusinesses has highlighted the inherent risks and made investments in agribusinesses less attractive in the market place generally; and

(n) unless the relevant parties consent to an extension, on 9 October 2009:

(i) the bank offer will expire;

(ii) the Olam SPD will terminate unless the immediate conditions

precedent are satisfied; and

(iii) the maintenance arrangement with Select under the crop sale agreements expires.

49 I have recited these factors at length to recognise the careful consideration that the liquidators have given to this issue and the relevant matters.

50 I do not propose to comment on these matters save to say that if there were to be litigation over the allocation of the proceeds between TSL as the responsible entity and the other interested parties, the costs of the liquidators may be able to be met out of the fund. I discuss this further below.

ALMOND LAND

51 The liquidators depose that Almond Land owes $249 million to the secured creditors. The liquidators say that the economic interest in Almond Land is best advocated by the secured creditors. The liquidators state that they regard it to be in their economic interest to offer $6 million to effect an orderly sale of the almond assets they claim are secured in their favour.

52 The liquidators state that by accepting the bank offer and completing the SPV, Almond Land:

(a) maximises value to all its creditors;

(b) avoids the requirement for them to disclaim the sub-leases and certain joint venture agreements and litigation that may ensue if some growers seek to challenge those disclaimers or seek relief from forfeiture;

(c) avoids the spectre of prolonged expensive litigation with TSL, secured creditors and growers;

(d) avoids damage to its property arising from cessation of maintenance of the almond orchards;

(e) achieves certainty of outcome; and

(f) reserves its rights to challenge the securities.

TSL

53 As liquidators of TSL, the liquidators have decided to support the sale to Olam, and in the absence of any higher offer they have also decided to accept the bank offer as it is currently the best option available to TSL for the following reasons, namely:

(a) the bank offer exceeds the value of the growers' interests in the almond schemes according to Ian Carson's report;

(b) based on their legal advice and their own assessment of the commercial value of the growers' interests in the almond schemes, they also believe that the bank offer exceeds the value of the growers' interests in the almond schemes;

(c) the growers will be relieved of any further financial obligations to contribute to the almond schemes and will share rateably in the 2009 crop proceeds of about $33 million, together with the growers in the other almond schemes;

(d) they place less weight on both the TGG valuation reports and the secured creditors' Ferrier Hodgson report as they were prepared as advocacy positions;

(e) leaving aside the commercial value of the growers' proprietary interests, the proprietary interests of the growers can be disclaimed or terminated by Almond Land or Almond Management or may be terminated on the winding up of the almond schemes;

(f) if TSL, on behalf of the growers, sought relief from the termination or sought to set aside the disclaimers, TSL would be required to commence and pursue expensive litigation and there is uncertainty as to whether

TSL would succeed. TSL does not itself have the funds necessary to do so and, based on the Arnold Block Leibler advice, it is highly unlikely that TSL could obtain litigation funding to do so;

(g) if growers wished to seek the relief themselves (assuming that they had the necessary funds to do so), their likelihood of success may be adversely affected if the percentage of growers seeking that relief was small. The percentage of growers who could or would seek that relief will be impacted by the fact that the Timbercorp Group entities own almond lots and that Timbercorp Finance financed growers to acquire their almond lots;

(h) they have conducted a robust recapitalisation and sale process and accepted the best offer available following a competitive bidding process and, given this, they believe that the sale to Olam Orchards should not be jeopardised;

(i) the satisfaction of the conditions precedent, the implementation of maintenance arrangements to replace the crop sale arrangements and the bank offer must all be resolved by 9 October 2009; and

(j) they have also provided the forum to give all stakeholders, including the growers, the opportunity to put forward their position and to negotiate for what they consider is the best outcome.

TGG CONTENTIONS

54 TGG put forward several submissions that amplifies the legal issues referred to by the liquidators. I do not seek to summarise all their submissions but I have summarised parts of them below.

55 The banks acknowledge in a deed of covenant that they take their rights subject to the growers' interests. The relevant schemes are divided into two categories:

(a) the 2002 scheme in which the growers entered into a licence and joint

venture agreement; and

(b) the 2005-2007 schemes in which the growers were granted a sub-lease of their almond lots.

56 TGG contends that the banks take their rights subject to the growers' interests in the 2002 schemes because the growers invested funds into the scheme which were used to improve the land in the expectation that they would be entitled to continue to use and enjoy the land with the benefit of the almond trees, the capital works and the water licences. TGG says that the banks were on notice of their client's equity and are bound by it under the principles in *Inwards v Baker*.[1]

57 TGG submits that the banks take their rights subject to the growers' rights under the 2005-2007 schemes because:

(a) the growers are tenants in possession under s 42(2)(e) of the *Transfer of Land Act 1958* (Vic);

(b) they have been granted a sub-lease of the almond lots as defined in the sub-leases. The almond lots include 'the Almond Trees, the Capital Works and the Water Licences attributable to the Project'. TGG submits that clause 2.2(a) of the sub-lease should be read down to only include a reservation to Almond Land of the reversion in those assets;

(c) if the sub-lease has been terminated, they have rights to seek an order for relief against forfeiture under s 146(4) of the *Property Law Act 1958* (Vic);

(d) the sub-leases will survive the surrender or merger of the head lease into the freehold under s 139 of the *Property Law Act 1958* (Vic);

(e) if the liquidators were to disclaim the head leases, then the head leases will merge into the freehold and their sub-leases survive the disclaimer

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1 [1965] 2 QB 29.

under s 139 of the *Property Law Act* 1958 (Vic);[2]

(f) alternatively, the growers can apply to have the disclaimer set aside under s 568B;

(g) the water rights, capital works and almond trees form appurtenances to the head leases and sub-leases necessary and convenient for the almond lot operations permitted by clause 8.1 and required by clause 8.2 and any interference with them by the mortgagee constitutes a derogation from the grant;[3] and

(h) the head leases contain clauses to the following effect (clause 9.3):

> Upon this Lease terminating for whatever reason, the Lessor irrevocably authorises and consents to the granting or continuation (or both) by the Growers of a right to occupy or use the Land granted under the Sub-leases (Wangera), on the same terms and conditions as the Growers are granted sub-leases, whether before or after the execution of this Lease, and with the Lessor accepting the obligations of the Lessee to the Growers under Sub-leases (Wangera).

(i) TSL is the responsible entity and holds the interest in the lease on trust for the growers (s 601FC(2) of the *Corporations Act*). TGG submits that it is obliged to act on its rights under clause 9.3 to ensure that a lease will be granted to the growers if the head lease is terminated. Consequently, the subleases bind Almond Land even if the lease to TSL is terminated.

58 TGG submits that further, the banks take their interests subject to the growers' rights under all schemes because:

(a) the water rights under the water licences are held on trust for them under clauses 3.2(a)(i) of the sub-leases and 3.3(a) of the licences;

(b) the investors' interests in the water licences, the capital works and the almond trees are scheme property held on trust for them under

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2 *National Australia Bank v State of New South Wales* [2009] FCA 1066,26 (Rares J).

3 See, eg, *Wilcox v Richardson* (1997) 43 NSWLR 4.

s 601FC(2) of the *Corporations Act 2001*;

(c) there is no power in the scheme constitution to encumber those assets to borrow or raise money for the scheme and any purported mortgage over those assets is in breach of s 601GA(3) of the *Corporations Act 2001* and of no effect under s 601GA(3) of the *Corporations Act 2001*;

(d) accordingly, any attempt to encumber their beneficial interest in those assets is a breach of either or both of those trusts and the *Corporations Act 2001*;

(e) the banks are presumed to know the provisions of the *Corporations Act 2001*;

(f) the banks acknowledged in their loan documents, and in particular their deeds of covenant, the interest of the investors;

(g) accordingly, each bank has actual or constructive knowledge that any attempt to grant a mortgage or other security over the water licences, capital works and the almond trees was in breach of the *Corporations Act* and in breach of trust. If the banks hold such a mortgage or other security, then it is subject to a constructive trust in favour of the TGG under the principles in *Barnes v Addy*;[4] and

(h) alternatively, the grant of the sub-leases and licences and the associated rights to use and enjoy the capital works, the almond trees and the water licences constituted a promise or representation to the growers that they would be entitled to the use and enjoyment of those assets for the balance of the term of their sub-leases or licences respectively. In reliance on those representations, the growers entered the scheme. The banks were on notice of, consented to and acquiesced in those promises or representations and are estopped from denying the growers' interests.

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4 (1874) LR 9 Ch App 244.

59 Further, TGG contends that the mortgages over land and the mortgages over water were executed on 30 December 2008 and registered in January 2009. The administration commenced on 23 April 2009 and that is the relation back date. TGG submits the mortgages may be voidable at the option of the liquidators.

METHODOLOGY OF MESSRS KORDA AND CARSON

60 TGG contends that the methodology proposed by Messrs Korda and Carson is flawed. They submit that:

(a) it accepts that the growers have property rights, yet attributes a value of only $6 million out of a proposed purchase price of $128 million to those rights, which should immediately arouse suspicion;

(b) a discounted cash flow method fails to consider the value of the growers' rights in an open market. It appears that the growers' rights have been attributed a value of more than $6 million. For example:

(i) there is a buyer in the market willing to pay $128 million for the almond assets;

(ii) that buyer is willing to ascribe $81.6 million to the water rights. That is not accepted as a proper method for valuing the water rights, as the buyer may have its own reasons for allocating the purchase price in that manner;

(c) in any event, the growers have a lease over the water rights or the right to use them for the balance of their lease or licence terms, which can be as long as 20 years; and

(d) no buyer would pay $81.6 million for a reversionary interest in those water rights, so a substantial part of that sum must have been paid for the growers' rights;

(e) further, the buyer has attributed $46 million to the other almond assets.[5] The value of the shares could be easily ascertained[6] leaving the balance of the $46 million being the purchase price for the properties. The growers have rights to exclusive possession of that land under the sub-leases or to exploit almost all of the commercial rights on that land for a period of around 20 years. Consequently, a significant portion of that sum must be being paid for the growers' rights;

(f) it fails to consider any comparable sales;

(g) it does not offer any independent apportionment of the purchase price. It uses a discounted cash flow method which is not appropriate in these circumstances. The report is not a determination of the market value of the growers rights, but a report to apportion part of the purchase price to the growers. A discounted cash flow cannot achieve this;

(h) it recognises the following concession by the liquidators' legal advisers:[7]

> ...the Arnold Block Leibler Advice recognises the existence of some difficult legal issues and concludes that the legal uncertainties provide some scope for argument on the part of the Growers;

(i) it recognises that ABL's advice relies heavily on the assumption that the growers' interests can be disclaimed and expresses reservations about the correctness of that view in light of advice from Carson's advisors;[8]

(j) the liquidators cannot disclaim the growers' rights because:

(i) if the liquidators were to disclaim the head lease, the head lease would merge into the freehold[9] and the sub-leases would survive under s 139 of the *Property Law Act 1958* (Vic);

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5 Korda at 59.
6 Korda at 49(c) and (d).
7 P 6 and 20.
8 Ibid.
9 *National Australia Bank v State of New South Wales* [2009] FCA 1066.

(ii) the licence and joint venture agreements have an unusual structure in which the landowner leases the land to TSL, who sub-leases it back to the landowner. The landowner then grants the licence to the grower.[10] Disclaimer of the lease or the sub-lease in the 2002 schemes would not affect the licence granted by the landowner to the growers; and

(iii) TSL is the responsible entity of the schemes and the powers in the constitution must be exercised for the benefit of the growers;

(k) it records that the Arnold Block Leibler advice notes that the growers' interests are presently liable to be terminated for default.[11] It does not identify the basis on which this is put and there is no evidence of rental arrears, outstanding invoices or other defaults by the growers;

(l) yet Carson is instructed to rely on ABL's legal advice and assume that it is correct;[12]

(m) a copy of that advice has not been annexed to Carson's report and has not been provided to the growers;

(n) the advice on which he purports to rely is identified on p 14. The first of those is dated 17 September 2009, yet the letter instructing him to rely on that advice is dated 3 September 2009 (see appendix 2). No earlier advice is referred to by Carson;

(o) it appears that Mr Carson was not given a copy of the banks' deeds of covenant;[13]

(p) as Mr Carson attributes no value to the growers' water rights, it appears that Arnold Block Leibler is of the view that the growers have no water

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10 Fernon at 12 to 15.
11 P 6 and 20.
12 P 8.
13 Appendix 3.

rights. This is not consistent with the grant in the sub-leases or the licence and joint venture agreements;

(q) it does not consider Mr Lennie's spreadsheet;[14]

(r) no reference is made to the growers' rights under *Inwards v Baker*,[15] their rights held on trust by the responsible entity and under *Barnes v Addy*,[16] their proprietary estoppel or their right to a new lease under clause 9.3 of the head lease;[17] and

(s) it declines to consider whether the banks' securities are void as against the Liquidator.[18]

61 TGG contend that Mr Carson's report acknowledged that he was bound to accept the Arnold Block Leibler advice. They say that he noted, however, that the Arnold Block Leibler advice relies heavily on an assumption that the growers' interests can, in effect, be disclaimed by the liquidators of almond land. They submit that he says that he has reservations about the correctness of that view, based upon his own legal advice. TGG submits, however, that on the basis of the correctness of the Arnold Block Leibler advice, Mr Carson believes that $6 million represents an offer that he would accept if the liquidator of TSL provided that he was satisfied that the offer is the product of a robust negotiation around the numerous, difficult issues.

62 I will not canvass all the arguments put forward by TGG. It is sufficient to say that they are detailed and amply demonstrate that there are real issues to be resolved as the liquidators concede. There are many complex legal issues that would need to be resolved to precisely identify the proprietary interest of the growers.

KERREE ANNE BEZENCON

63 Ms Bezencon appears on the applications represented by Mr Shand QC.

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14 Contained in exhibit OSL-1 to Mr Lennie's affidavit.
15 [1965] 2 QB 29.
16 (1874) LR 9 Ch App 244.
17 See pp 10-11.
18 P 20.

Ms Bezencon is a grower, accountant and the chair of the Timbercorp Growers' Almond Committee Inc. In substance, she opposes the liquidators' application. She complains about the bidding process and the provision of information to her by the liquidators. She seeks the appointment of Huntley Management Limited as an interim responsible entity of the schemes. She also deposes to a possible higher offer for the almond orchards.

64 The proposal of Huntley Management Limited to act as a temporary responsible entity was again subject to conditions and was not an unconditional offer. It was not one that the court was in a position to accept. I can understand the attempts by the growers to seek to extract as much as possible for their investment. The evidence establishes that the liquidators conducted a proper sale process that elicited seven bids. I have seen the bids. In my view the liquidators' are justified in accepting the Olam Orchards bid. The well known expression "a bird in the hand is worth two in the bush" may well be apposite.

65 To lose the Olam Orchards bid on the basis of a chance of a higher bid is not a responsible or reasonable step to take in view of the legitimate tender process undertaken by the liquidators.

66 In my view the court should and will do all that it reasonably can to assist the liquidators to complete the sale of the almond orchards to Olam Orchards subject to my decision on the $6 million offer.

MR CARSON'S REPORT

67 Mr Carson's report accepted that he was bound to accept the Arnold Bloch Leibler advice. He noted, however, that the Arnold Bloch Leibler advice relies heavily on an assumption that the growers' interests can in effect be disclaimed by the liquidators of Almond Land. He says that he has reservations about the correctness of that view, based upon his own legal advice.

68 However, on the basis of the correctness of the Arnold Bloch Leibler advice, he believes that $6 million represents an offer that he would accept if the liquidator of

TSL provided that he was satisfied that the offer is the product of a robust negotiation around the numerous difficult tasks.

69 In my opinion, his views are heavily qualified by the observations he makes about the soundness of Arnold Bloch Leibler's advice.

ASIC

70 ASIC appears on the application as *amicus curiae.* The court expresses its appreciation of ASIC's attendance. ASIC submits that it is unable to offer any material assistance to the court in this matter. ASIC is of the view that the issues before me are essentially commercial ones for the liquidators.

RE HAZELTON AIR CHARTER PTY LTD[19]

71 Mr Zwier drew to my attention *Re Hazelton Air Charter Pty Ltd,*[20] a decision of the Federal Court of Australia of Justice Goldberg. The case, in my opinion, clarifies the difficulties faced by the liquidators in this case and also provides the solution to the problem. The case involved the Ansett Group collapse where Mr Korda and his partner Mr Mentha were the administrators of the Ansett Group. I will briefly summarise the issues. The Hazelton Group had been taken over by the Ansett Group before the Ansett Group collapsed, leading also to the collapse of the Hazelton Group. The Ansett Group was owned by Air New Zealand. Prior to the collapse, Air New Zealand had given a letter of comfort to the Ansett and Hazelton Groups, stating it would provide moneys to enable the Ansett and Hazelton Groups to meet their debts, although their letter did not constitute a binding contract to do so.

72 Claims were made against the Air New Zealand directors and the upshot was that Air New Zealand paid $150 million to meet the claims of the Hazelton Group and the Ansett Group against the companies and the directors that may have arisen from, inter alia, issuing the letter of comfort.

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19 (2002) 41 ACSR 472.

20 Ibid.

73 The Hazelton Group and the Ansett Group (both under separate administrations) each accepted the $150 million and received court approval to do so, but at the time they made no agreement as to the allocation of the $150 million between themselves. That was left to be decided subsequently. The respective administrators could not agree on the allocation of the $150 million and they initiated proceedings in court where they put forward to the judge bases upon which the $150 million could be allocated. In particular, they submitted that as the promise was to meet the liabilities of the respective companies, the money should be divided in proportion to their total liabilities or alternatively, should be divided in proportion to the liabilities that they owed to their workers. There were all sorts of formulas put that, on their face, might seem fair and reasonable.

74 Goldberg J said that a fair and reasonable approach was not correct. He said that the allocation should be done based on well established principles of law and equity. I will quote what he said because it has great relevance to this case.

75 He said:

> 30 The various bases advanced by the Ansett administrators and the Hazelton administrator for apportionment (other than a comparison of the claims released under the Letter of Comfort) have an element of fairness and appropriateness about them, but they are not predicated upon any legal or equitable principle. Nor can they be established by reference to the intention of the parties. I am not satisfied that it was the common intention of the parties that the fund be apportioned on any of the bases propounded by the parties. The various bases propounded provide convenient methods for the distribution of the fund, but they are not based on any principle which identifies or measures the extent of the interest of each of the Ansett group and the Hazelton group in the fund at the time it was created and impressed with the relevant trust in favour of the Hazelton group. It is not for me to reach a fair, appropriate, equitable or just conclusion as to how the fund of $150m is to be apportioned. That may be a consequence or result of my resolution of the matter. Rather, my task is to determine, by reference to appropriate principles of law and equity, what was the extent and measure of the interest in the fund of the two groups at the time at which it was agreed to create the fund, namely the time of the execution of the Memorandum.
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> 31 Fairness or appropriateness is an insufficient basis on which to determine the interest of the Hazelton group in the fund of $150m. In *Muschinski v*

Dodds[21] Brennan J said at 608:

> *The flexible remedy of the constructive trust is not so formless as to place proprietary rights in the discretionary disposition of a court acting according to vague notions of what is fair.*

Deane J said at 615-616:

> *The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles: ...*
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> ...
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> *Under the law of this country - as, I venture to think, under the present law of England ... proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion ... subjective views about which party "ought to win" ... and "the formless void of individual moral opinion" ...*

32 I consider that the proper principle to be applied to determine the extent of the respective interests of the two groups in the fund and the manner of its apportionment between them is to determine what was bargained away or given up, by each group in exchange for the receipt of the $150m and then to place a value on what each group bargained away or gave up. In this way it is possible to identify the relative value of what was relinquished in exchange for an interest in the fund of $150m.

33 What occurred, by the execution of the Memorandum, was that the Air New Zealand group and the directors procured the payment of $150m to the Ansett administrators, albeit on behalf of themselves and the Hazelton administrator, in exchange for the Ansett administrators and the Ansett group and the Hazelton administrator and the Hazelton group each giving up something of value. Each of them gave up such claims as they had against the Air New Zealand group and the directors arising out of, or relating directly or indirectly, to the Letter of Comfort. The giving up of those rights was confirmed by the emphatic language of cl 12A (par 12 above).

34 Prior to the execution of the Memorandum each group had a claim or a potential claim against Air New Zealand Limited under the Letter of Comfort. The claim of each group, which had a value, was exchanged for an interest in the fund of $150m which is to be measured by the relativity of the claims of the two groups which were foregone.

35 In the absence of any agreement as to the apportionment of the $150m between the Ansett group and the Hazelton group, I consider that the measure of their respective proprietary interests in the fund of $150m is to be determined by reference to the relative proportions of the value of the rights or claims which each of them bargained away and gave up in exchange for the receipt of the $150m. Each of them had a share in the fund of $150m

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21 (1965) 160 CLR 583.

proportionate to the value of what they had bargained away.[22]

76 Then also at paragraph 47 he said again:

> Against this background, the maximum "equity is equality" is to be applied not by reference to the number of companies in each group, three in the case of the Hazelton group and 41 in the case of the Ansett group, but rather by reference to the proportionate share of the fund measured by the extent and value of the claims or rights given up in exchange for an interest in the fund.[23]

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.

78 Despite the matters raised by the liquidators that I have referred to at length, in my view, it is not appropriate for the liquidators to accept the bank offer merely because the banks assert that they will not allow their securities over the property to be sold as part of the almond assets.

79 The banks are entitled to the full extent and benefit of their charges and securities. The banks are under no obligation to give up or surrender any of their security rights if they so chose. On the other hand, subject to any agreement that is made between the parties, if the sale proceeds, the banks are only entitled to that portion of the sale proceeds that represents the property over which they hold securities.

80 In my opinion, the liquidators are not justified in entering into the agreement to accept $6 million (less some undefined costs) in full satisfaction for the property rights transferred or surrendered by the growers' to enable Olam Orchards to obtain clear and unencumbered title and rights to the almond assets. As indicated, there are well recognised legal principles for determining the rights of several property owners whose property is lost or converted into a common fund. The fund, if it is created, is not to be allocated between the property owners on the basis of

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22 (2002) 41 ACSR 472 at [30]-[35].

23 Ibid [47].

bargaining power. The fund is not to be allocated on arbitrary measures that may appear to be a fair and reasonable division of the fund. Rather, as the authorities establish, the fund is to be divided "by reference to the proportionate share of the fund measured by the extent and value of the claims or rights given up in exchange for an interest in the fund."[24]

81 Accordingly, the amount owed to the Banks appears to be of residual relevance. The banks can obtain payment for only so much of the property as they have a charge over. The key issue is what proportion of the fund represents the property over which they hold security.

82 Subject to any further submissions of counsel, I propose to make the following orders and directions.

83 The liquidators (in their capacity as liquidators of TSL) are justified in procuring TSL (as the responsible entity of the managed investment schemes listed in schedule 1 to this order) to enter into and perform the sale and purchase deed between each of TSL (as responsible entity of the managed investment schemes listed in schedule 1 to this order), Almond Management (in its capacity as manager of the unregistered managed investment scheme listed in schedule two to this order), the liquidators, TL and Almond Land and Olam Orchards Australia Pty Ltd and Olam International Limited. The sale and purchase deed is in the form of the confidential exhibit MAK-14 to the affidavit of Mark Anthony Korda sworn 5 October 2009 (the Affidavit) as filed herein, or documents substantially in that form (the Sale and Purchase Deed), and extinguishes and /or transfers the Growers' rights as provided therein.

84 The liquidators (in their capacity as liquidators of Almond Management) are justified in disclaiming the Project and Management Agreement (PMA) as defined in the Affidavit in respect of the unregistered managed investment scheme listed in schedule 2 of this order (the Unregistered Almond Scheme) and in entering into and performing the Sale and Purchase Deed and extinguishing and/ or transferring the

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24 *Re Hazelton Air Charter Pty Ltd* (2002) 41 ACSR 472 at [47] per Goldberg J.

Growers' rights as provided therein.

85 The liquidators (in their capacity as liquidators of TSL) are not justified in entering into an agreement with Almond Land to accept $6 million to extinguish the Growers' rights in accordance with the terms of the Bank Offer as defined in the Affidavit.

86 The liquidators (in their capacity as liquidators of TL) are not justified in entering into an agreement with Almond Land to accept $6 million to extinguish the Growers' rights in accordance with the terms of the Bank Offer as defined in the Affidavit.

87 The liquidators (in their capacity as liquidators of TSL, TL, Almond Management and Almond Land) are justified in instituting or participating in proceedings to determine the extent and measure of the interest in the fund constituted by the proceeds of sale of the Almond Assets of some $128 million of TSL (as the responsible entity of the managed investment schemes listed in schedule 1 to this order), Almond Management (as the manager of the unregistered managed investment scheme listed in schedule 2 to this order), TC, Almond Land and any other person whose property rights are to be extinguished, sold or transferred to Olam Orchards Australia Pty Ltd under the Sale and Purchase Deed and to hold the said fund in trust for those persons pending the hearing and determination of such proceeding or further order of this court.

88 These orders are long and complicated. I want to make clear what the position is in lay terms. The ball is in the banks' court. If they agree, the sale can go ahead, but if the sale goes ahead the proceeds must be held in trust until the growers' proprietary rights to those moneys are established or agreed on.

89 Subsequently, after further submissions on 9 October 2009, orders were made with the agreement of the banks and TGG. Ms Bezencon agreed to the orders other than costs. The orders were as follows:

THE COURT DIRECTS THAT:

1 The Third and Fourth Plaintiffs (in their capacity as liquidators of the First Plaintiff) are justified in procuring the First Plaintiff as responsible entity of the managed investment schemes listed in Schedule 1 of this order (Registered Schemes) to enter into and perform the SPD and extinguishing all of the rights of Growers (investors in the schemes set out in schedules 1 and 2 of this order) in respect of the assets the subject of the SPD (Grower Rights).

2 The Third and Fourth Plaintiffs (in their capacity as liquidators of the Second Plaintiff) are justified in procuring the Second Plaintiff as manager of the unregistered managed investment scheme listed in Schedule 2 of this order to enter into and perform the SPD and extinguishing all of the Grower Rights.

3 The Third and Fourth Plaintiffs (in their capacity as liquidators of the First Plaintiff) are justified in making, doing and executing such documents or things to give effect to the extinguishment of all of the Grower Rights in order to perform the SPD.

4 The Third and Fourth Plaintiffs (in their capacity as liquidators of the Second Plaintiff) are justified in making, doing and executing such documents or things to give effect to the extinguishment of all of the Grower Rights in order to perform the SPD.

5 The Third and Fourth Plaintiffs (in their capacity as liquidators of the Second Plaintiff) are justified in disclaiming the Project Management Agreements and the Licence and Joint Venture Agreements (as those respective terms are defined in the Affidavit) and to the extent necessary have leave to do so pursuant to section 568(1A) of the Corporations Act 2001 (Cth).

THE COURT ORDERS, DECLARES AND DIRECTS THAT:

6 The Third and Fourth Plaintiffs in their capacity as liquidators of the First, Second, Fifth and Sixth Plaintiffs may enter into and perform: the SPD; and any document referred to, in connection with, or necessary to give effect to the SPD.

7 Upon completion of any sale under the SPD the net proceeds of sale (after payment of selling costs and expenses, retentions (if any) and the costs and expenses of the liquidators of the First, Second, Fifth and Sixth Plaintiffs referable to the preservation and realisation of the assets the subject of the SPD, as approved by the committee of inspection of the Sixth Plaintiff and the Secured Creditors (as that term is defined in paragraph 13 of the Affidavit), or order of the Court) (Net Proceeds) be held by the Sixth Plaintiff in an interest bearing trust account with an Australian bank (as defined in section 9 of the Corporations Act) pending the hearing and determination by the Court of a proceeding (Rights Proceeding) to determine which person or persons have any rights to all or any part of the Net Proceeds (Claimants), and to be held on trust for the Claimants until further order of the Court.

8 Insofar as each of the Secured Creditors have any rights to the assets the subject of the SPD, whether under their securities over those assets or otherwise, nothing in the release of those securities upon completion of the SPD will prejudice those rights for the purposes of their claim to all or any part of the Net Proceeds.

9 Insofar as the Growers have any rights to the assets the subject of the SPD nothing in orders 1 to 5 above, or any action taken thereunder by the Third and Fourth Plaintiffs, will prejudice those rights for the purposes of their claim to all or any part of the Net Proceeds.]