

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

LIST E

SCI 2009 10699

BETWEEN:

BOSI SECURITY SERVICES LIMITED (ACN 009 413 852) as trustee for  
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED  
(ACN 005 357 522) and BOS INTERNATIONAL (AUSTRALIA) LIMITED  
(ACN 066 601 250) and WESTPAC BANKING CORPORATION  
(ACN 007 457 141)

Plaintiff

and

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED  
(ACN 005 357 522) & ORS (according to the attached Schedule)

Defendants

CERTIFICATE IDENTIFYING EXHIBIT

Date of document: 3 March 2010  
Filed on behalf of: the Second, Third and Fourth Defendants

Prepared by:  
**ARNOLD BLOCH LEIBLER**  
Lawyers and Advisers  
Level 21  
333 Collins Street  
MELBOURNE 3000

Solicitor's Code: 54  
DX 38455 Melbourne  
Tel: 9229 9999  
Fax: 9229 9900  
Ref: [ ]  
(Leon Zwier [lwier@abl.com.au](mailto:lwier@abl.com.au) /  
Lucy Kirwan [lkirwan@abl.com.au](mailto:lkirwan@abl.com.au))

This is the exhibit marked '**MAK-70**' now produced and shown to MARK ANTHONY  
KORDA at the time of swearing this affidavit on 3 March 2010.

Before me: **LUCY HANNAH KIRWAN**  
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-70'**

**Copy of Interlocutory Application and  
Andrew Malarkey's Affidavit**

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

**LIST E**

No 7114 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 EACH OF THE MANAGED INVESTMENTS SCHEMES  
LISTED IN SCHEDULE 1 OF THE ORIGINATING PROCESS  
First Plaintiff**

**MARK ANTHONY KORDA and LEANNE KYLIE CHESSER  
Second and Third Plaintiffs**

**INTERLOCUTORY PROCESS FOR DIRECTIONS  
PURSUANT TO SECTION 511 OF THE CORPORATIONS ACT 2001**

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Date of document: 11 September 2009

Filed on behalf of: the Plaintiffs

Prepared by:

Arnold Bloch Leibler

Lawyers and Advisers

Level 21

333 Collins Street

MELBOURNE 3000

Solicitor's Code: 54

DX 38455 Melbourne

Tel: 9229 9999

Fax: 9229 9900

Ref: 011499489

(Leon Zwier [lwier@abl.com.au](mailto:lwier@abl.com.au))

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**A. DETAILS OF INTERLOCUTORY APPLICATION**

This interlocutory application is made under section 511 of the *Corporations Act 2001* (Cth) (the Act).

On the facts stated in the supporting affidavit of Andrew Malarkey sworn on 9 September 2009 (Affidavit):

- 1 The Second and Third Plaintiffs (in their capacity as administrators of the First Plaintiff acting in its personal capacity) seek directions pursuant to section 511 of the Act that the First Plaintiff is justified in entering into the agreement a copy of which is annexed hereto.

2 Such further or other orders as the Court deems fit.

DATE: 11 September 2009

  
**ARNOLD BLOCH LEIBLER**  
Solicitors for the Plaintiffs

This application will be heard by the Justice Robson in Court No.2, Supreme Court, 450 Little Bourke Street, Melbourne at 10.30 am on 14 September 2009.

**B. NOTICE TO DEFENDANT**


Not applicable.

**C. APPLICATION FOR WINDING UP ON GROUND OF INSOLVENCY**

Not applicable.

**D. FILING**

Date of filing: 11/09/ 2009

  
**PROTHONOTARY**

This originating process is filed by Arnold Bloch Leibler of Level 21, 333 Collins Street, Melbourne, VIC, 3000, solicitors for the Plaintiffs.

**E. SERVICE**

The plaintiff's address for service is C/- Arnold Bloch Leibler, Level 21, 333 Collins Street, Melbourne, VIC, 3000.

It is not intended to serve a copy of this interlocutory process on any person.

3 September 2009

Mr Ian Carson  
PPB  
Level 10, 90 Collins Street  
Melbourne VIC 3000

Dear Sir

**Mark Korda ("the Liquidator") as liquidator of Timbercorp Securities Limited (In Liquidation) ("the Company")**

The Liquidator and the Company have engaged you to perform a review of the reasonableness of an anticipated offer from Almond Land Pty Ltd (In Liquidation) to the Company in relation to the Almond Schemes ("the Engagement").

This letter sets out the terms of your Engagement. If you accept these terms they will govern our arrangements, including the way your costs are calculated and paid, and will constitute an agreement between us in relation to the Engagement that can be enforced in the same way as any other contract.

#### **Scope of Engagement**

The scope of the review we require you to undertake is as follows:

*In the event that Almond Land Pty Ltd (In Liquidation) makes an offer to the Company:*

- *provide an opinion as to whether this is an offer you would/would not accept as a reasonable compromise if you were the liquidator of the Company.*
- *provide a report supporting your opinion that details your reasons for recommending a particular range of apportionments of any sale proceeds which constitute scheme property to growers in return for the surrender of their subleases (and all other rights which the Company can exercise on behalf of the Growers) under the Schemes.*
- *In providing this opinion and report, you will:*
  - *meet with representatives of the Growers and secured creditors;*
  - *review submissions and material provided by representatives of the Growers and secured creditors;*
  - *meet with the Liquidator and review legal advice provided by Arnold Bloch Leibler to the Company and the Liquidator, and other material prepared by the Liquidator,*

*but you will not engage in any other activity, make any independent investigation or enquiry, or obtain separate legal advice, in relation to the matters the subject of your opinion and report.*

*For the purposes of your opinion and report you will assume that all legal advice and other documentation and materials provided to you by the Liquidator, the Company or Arnold Bloch Leibler is correct, and that the Scheme documents and other agreements provided to you by the*

*Liquidator, the Company or Arnold Bloch Leibler are accurate and enforceable in accordance with their terms. You may seek independent legal advice to assist you in determining the effect of those legal advices and other materials.*

- *while you are engaged by the Liquidator, you will act as if you have the same powers and duties as you would have if the court had appointed you as a special purpose liquidator in accordance with the terms of this retainer.*

*Depending upon the outcome, your report may be provided to the Court.*

As referred to above, we will also provide you with access to Arnold Bloch Leibler's legal advice (on your express agreement to keep the material confidential such that the Liquidator's and the Company's legal professional privilege in that advice is maintained on the basis that the Liquidator, the Company and you have a common interest in it).

We will also arrange for you to meet with key stakeholders as referred to above.

This limited scope is based on our preliminary discussions with you and may be varied by agreement between us as the Engagement evolves. Any agreed variation will require a revision to the fee estimate set out below.

### **Reporting**

On completion of our engagement, you will provide us with a high level written report outlining your findings and recommendations. You will also be available to discuss the report with the Liquidator and the Company in detail.

### **Professional Fees**

Your costs for performing these services are in accordance with your usual arrangements set out in the enclosed General Terms and Conditions.

A time costing basis will be used to calculate your professional fees and will be based on your standard rates. Your current rates (exclusive of GST) are \$595 per hour for Partners, \$495 per hour for Directors and \$495 per hour for Consultants.

In addition to professional fees, we will be required to pay costs incurred by you on our behalf, for items such as printing, deliveries and any travel expenses you incur in performing the Engagement, and the legal fees of Mallesons Stephen Jaques in advising you in relation to your role.

### **Capped Liability**

We agree that your liability arising out of the engagements, whether based on negligence or any other cause of action, will be capped to an amount equal to the fee that you are paid. No claim or claims may be made against you which, in aggregate, exceed that amount.

### **The PPB Team**

The engagement team will be:

Partner: Ian Carson

Director: Alan Friday

Consultant: Paul Beanland

Consultant: Les Cullen

Other professionals may become involved in the Engagement from time to time. Administrative work will be delegated to appropriate administrative staff.

**Timeframe**

Your opinion and report are to be provided by 16 September 2009. This deadline is subject to the Liquidator and the Company providing you with the required legal advices and materials in a timely fashion.

**Other Issues**

Any advice arising from this Engagement will be provided to the Liquidator and the Company in your capacity as independent consultants to the Liquidator and the Company. The decision to implement any or all of your recommendations will be entirely at the discretion of the Liquidator. At no stage will you assume any role in advising the management of the Company or in managing the affairs of the Company or in acting as a liquidator or manager.

As discussed, Rod Slattery (one of the partners of PPB) has private investments in some of the Almond investment products offered by Timbercorp. Rod Slattery will not be involved in the Engagement.

**Engagement Acknowledgement**

If you agree with the contents of this letter and the enclosed General Terms and Conditions (including the method and basis for the calculation of costs), please sign the copy of this letter included and return it to us.

**Condition Subsequent**

If the court does not give a direction by 16 September 2009 that we are justified in entering into this agreement, you or we may terminate this retainer.

**Queries**

Should you have any queries in relation to this Engagement Letter, please do not hesitate to contact either myself on 8623 3347 or Antony Munro on 8623 3404.

Yours faithfully

**ANDREW MALARKEY**

Partner

**FOR AND ON BEHALF OF  
MARK KORDA**

Liquidator

**PPB agrees with the terms of this Engagement Letter and the General Terms and Conditions that accompanied it.**

Name: \_\_\_\_\_

Signed: \_\_\_\_\_

On behalf of: \_\_\_\_\_

Position: \_\_\_\_\_

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

LIST E

No 7114 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 EACH OF THE  
MANAGED INVESTMENTS SCHEMES LISTED  
IN SCHEDULE 1 OF THE ORIGINATING PROCESS  
First Plaintiff

MARK ANTHONY KORDA and LEANNE CHESSER  
Second and Third Plaintiffs

AFFIDAVIT OF ANDREW MALARKEY  
IN SUPPORT OF APPLICATION FOR DIRECTION REGARDING APPOINTMENT OF PPB

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Date of document: 14 September 2009  
Filed on behalf of: the Plaintiffs  
Prepared by:  
Arnold Bloch Leibler  
Lawyers and Advisers  
Level 21  
333 Collins Street  
MELBOURNE 3000

Solicitor's Code: 54  
DX 38455 Melbourne  
Tel: 9229 9999  
Fax: 9229 9900  
Ref: 011499489  
(Leon Zwier)

---

I, **ANDREW MALARKEY** of Level 24, 333 Collins Street, Melbourne, Chartered Account, **SAY ON OATH** that:

- 1 I am a chartered accountant and a partner of the firm KordaMetha Pty Ltd (ACN 100 169 391) (**KordaMentha**). My partners Mark Korda and Leanne Chesser are the Second and Third Plaintiffs and are liquidators of the First Plaintiff (**Liquidators**), Timbercorp Securities Limited (In Liquidation) (ACN 092 311 469) (**TSL**). The Liquidators are also the liquidators of Almond Land Pty Ltd (ACN 091 460 392) (In Liquidation) (**Almond Land**).

BT AM

2 Except where I otherwise indicate, the matters deposed to in this affidavit are deposed to from my own personal knowledge of the facts. Where I depose to matters from information and belief, I believe such matters to be true.

3 I am the partner responsible for the operation of the Timbercorp horticulture assets and management of the sale or recapitalisation process.

### **TSL and Almond Land**

4 TSL is the responsible entity of the **Almond Schemes** (those number 1-7 in Schedule 1 of the Originating Process). In the 2002, 2005, 2006 and 2007 Almond Schemes, Almond Land owns land on which the Almond Schemes are operated (**Land**). Almond Land leases the Land to TSL.

5 In the 2005-2007 Almond Schemes, TSL subleases the Land to the Growers. In the 2002 Almond Scheme TSL leases the Land back to Almond Land and Almond Land then associates itself with the Growers in a licence and joint venture agreement (**LJVA**). The LJVA grants the Growers a licence to occupy the Land.

6 The details of the lease arrangements differ for each Almond Scheme and are described in paragraph 5.2 of each of the Almond Scheme affidavits of Mark Antony Korda sworn 3 July 2009 and in MAK-14 in each of the Almond Scheme affidavits of Mark Antony Korda sworn 9 July 2009.


### **Sale or Recapitalisation Process**

7 On 4 August 2009, the Liquidators initiated a sale or recapitalisation process for the Almond Schemes. The sale or recapitalisation process is explained in the affidavit of Mark Antony Korda sworn 17 August 2009 (paragraphs 43-49) and filed in this proceeding.

8 Final bids for the almond assets closed on 28 August 2009. The Liquidators are now negotiating with the bidders.

### **Almond Land's and TSL's Interests in the Sale or Recapitalisation**

9 If a sale proceeds, a purchaser may require Almond Land to sell the land free from all encumbrances. In order for Almond Land to sell the land unencumbered, Almond Land's lease to TSL and TSL's sublease to the Growers (or Almond Land's LJVA in respect of the 2002 Almond Scheme) may need to be surrendered. Pursuant to the direction of Justice Robson of the Victorian Supreme Court dated 21 August 2009, TSL has amended the Almond Scheme constitutions granting TSL the power to surrender the sub-leases and LJVAs on behalf of each Grower.

 AM

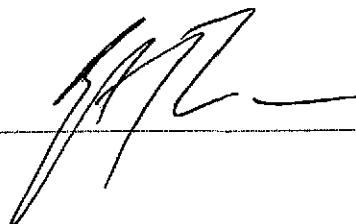


- 10 In order for TSL to exercise the power to surrender the sub-leases or LJVA, TSL and Almond Land may need to reach agreement about the value of the sub-lease or LJVA. That is, they may need to agree a dollar amount to be assigned as consideration for the surrender of the sub-lease or LJVA. The agreement between Almond Land and TSL would be exchanged contemporaneously, or as a condition precedent, with the agreement between Almond Land and the purchaser.
- 11 As has previously been explained to the Court in this proceeding, there are potential issues of conflict in the liquidators fulfilling the role of liquidator for multiple Timbercorp Group Companies. In this case, the liquidators of Almond Land and TSL are the same people. A potential for conflict arises if the Liquidators had to negotiate with themselves to determine the price for the surrender of the sub-leases or LJVA.
- 12 To assist the Liquidators, they have decided it would be useful to appoint an independent liquidator who will fulfil the role of a special purpose conflict liquidator (Special Purpose Liquidator). The Special Purpose Liquidator that the Liquidators have decided to retain is Ian Carson of PPB. Mr Carson has been a Chartered Accountant for over 20 years and is a managing partner of PPB.
- 13 Mr Carson's precise role will be determined by how the sale process evolves and may for example be facilitative or to provide an opinion. His general role is outlined in the retainer letter of 9 September 2009. Now produced and shown to me marked AM-1 is a copy of the signed retainer.
- 14 As the decision to retain PPB to assist them is an unusual step, the Liquidators seek a direction that they are justified in so doing.

SWORN by the abovenamed deponent at )  
Melbourne in the State of Victoria )  
this 14<sup>th</sup> day of September 2009 )



Before me:



BRIDGETTE AILSA TOY-CRONIN  
Arnold Bloch Leibler  
Level 21, 333 Collins Street  
Melbourne 3000  
An Australian Legal Practitioner within the  
meaning of the Legal Profession Act 2004

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

**LIST E**

No 7114 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 THE  
MANAGED INVESTMENT SCHEMES LISTED IN SCHEDULE 1  
First Plaintiffs**

**MARK ANTHONY KORDA and LEANNE KYLIE CHESSE**  
Second and Third Plaintiffs

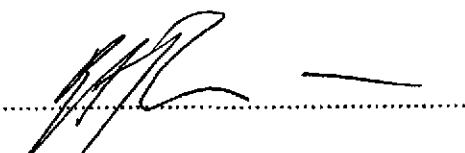
**CERTIFICATE IDENTIFYING EXHIBIT**

Date of document: 14 September 2009  
Filed on behalf of: the Plaintiffs  
Arnold Bloch Leibler  
Lawyers and Advisers  
Level 21  
333 Collins Street  
MELBOURNE 3000

Solicitor's Code: 54  
DX 38455 Melbourne  
Tel: 9229 9999  
Fax: 9229 9900  
Ref: 011499489  
(Leon Zwier)

This is the exhibit marked **AM-1** now produced and shown to **ANDREW MALARKEY** at the time of swearing his affidavit on 14 September 2009.

Before me: \_\_\_\_\_

  
**BRIDGETTE AILSA TOY-CRONIN**  
Arnold Bloch Leibler  
Level 21, 333 Collins Street  
Melbourne 3000  
An Australian Legal Practitioner within the  
meaning of the Legal Profession Act 2004

**Exhibit AM-1**  
**Copy of the signed retainer**

3 September 2009

KordaMentha

Mr Ian Carson  
PPB  
Level 10, 90 Collins Street  
Melbourne VIC 3000

Dear Sir

**Mark Korda ("the Liquidator") as liquidator of Timbercorp Securities Limited (In Liquidation) ("the Company")**

The Liquidator and the Company have engaged you to perform a review of the reasonableness of an anticipated offer from Almond Land Pty Ltd (In Liquidation) to the Company in relation to the Almond Schemes ("the Engagement").

This letter sets out the terms of your Engagement. If you accept these terms they will govern our arrangements, including the way your costs are calculated and paid, and will constitute an agreement between us in relation to the Engagement that can be enforced in the same way as any other contract.

#### Scope of Engagement

The scope of the review we require you to undertake is as follows:

*In the event that Almond Land Pty Ltd (In Liquidation) makes an offer to the Company,*

- *provide an opinion as to whether this is an offer you would/would not accept as a reasonable compromise if you were the liquidator of the Company.*
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- *In providing this opinion and report, you will:*
  - *meet with representatives of the Growers and secured creditors;*
  - *review submissions and material provided by representatives of the Growers and secured creditors;*
  - *meet with the Liquidator and review legal advice provided by Arnold Bloch Leibler to the Company and the Liquidator, and other material prepared by the Liquidator,*

*but you will not engage in any other activity, make any independent investigation or enquiry, or obtain separate legal advice, in relation to the matters the subject of your opinion and report.*

info@kordamentha.com  
www.kordamentha.com

Liability limited by a scheme of  
arrangement under Professional  
Standards Legislation

#### Melbourne

KordaMentha Pty Ltd  
ACN 100 169 391  
Level 24, 333 Collins Street  
Melbourne VIC 3000  
GPO Box 2985  
Melbourne VIC 3001  
Office: 03 8623 3333  
Fax: 03 8623 3399

#### KordaMentha Offices

Adelaide Perth  
Brisbane Singapore  
Gold Coast Sydney  
Melbourne Townsville  
New Zealand

#### Cooperation with AllxPartners

Chicago Munich  
Dallas New York  
Detroit Paris  
Düsseldorf San Francisco  
London Shanghai  
Los Angeles Tokyo  
Milan

*For the purposes of your opinion and report you will assume that all legal advice and other documentation and materials provided to you by the Liquidator, the Company or Arnold Bloch Leibler is correct, and that the Scheme documents and other agreements provided to you by the Liquidator, the Company or Arnold Bloch Leibler are accurate and enforceable in accordance with their terms. You may seek independent legal advice to assist you in determining the effect of those legal advices and other materials.*

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As referred to above, we will also provide you with access to Arnold Bloch Leibler's legal advice (on your express agreement to keep the material confidential such that the Liquidator's and the Company's legal professional privilege in that advice is maintained on the basis that the Liquidator, the Company and you have a common interest in it).

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The engagement team will be:

- Partner – Ian Carson
- Director – Alan Friday
- Consultant – Paul Beanland
- Consultant – Les Cullen.

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#### **Timeframe**

Your opinion and report are to be provided by 16 September 2009. This deadline is subject to the Liquidator and the Company providing you with the required legal advices and materials in a timely fashion.

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Any advice arising from this Engagement will be provided to the Liquidator and the Company in your capacity as independent consultants to the Liquidator and the Company. The decision to implement any or all of your recommendations will be entirely at the discretion of the Liquidator. At no stage will you assume any role in advising the management of the Company or in managing the affairs of the Company or in acting as a liquidator or manager.

As discussed, Rod Slattery (one of the partners of PPB) has private investments in some of the Almond investment products offered by Timbercorp. Rod Slattery will not be involved in the Engagement.

#### **Engagement Acknowledgement**

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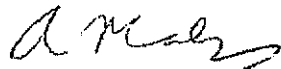
#### **Condition Subsequent**

If the court does not give a direction by 16 September 2009 that we are justified in entering into this agreement, you or we may terminate this retainer.

#### **Queries**

Should you have any queries in relation to this Engagement Letter, please do not hesitate to contact either myself on (03) 8623 3347 or Antony Munro on (03) 8623 3404.

Yours faithfully



ANDREW MALARKEY

Partner

For and on behalf of

MARK KORDA

Liquidator

**PPB agrees with the terms of this Engagement Letter and the General Terms and Conditions that accompanied it.**

Name:

Ian M. (A. J. C.)

Signed:

[Signature]

On behalf of:

PPB

Position:

Partner