

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

LIST E

No 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 INVESTMENTS SCHEMES LISTED IN SCHEDULE 1
AND ORS ACCORDING TO THE SCHEDULE**

Plaintiffs

CERTIFICATE OF EXHIBIT

Date of document: 10 November 2009
Filed on behalf of: the Plaintiffs

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This is the exhibit marked "**MAK-12**" now produced and shown to **MARK ANTHONY KORDA** at the time of swearing his affidavit on 10 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-12"
Transcript in Supreme Court Proceeding 9408 of 2009

SUPREME COURT OF VICTORIA

COMMERCIAL COURT

TIMBERCORP SECURITIES LTD

Plaintiff

v.

GARNAUT GROWERS & ORS

Defendants

JUDGE: Robson J

WHERE HELD: Melbourne

DATE OF JUDGMENT: 8 October 2009

APPEARANCES

MR L. ZWIER appeared on behalf of the Plaintiff.

MR G. BIGMORE QC appeared on behalf of The Growers Group.

MR M.W. SHAND QC appeared on behalf of The Growers Group.

MR I. WALLER SC appeared on behalf of ASIC.

MR P. CAWTHORN SC appeared on behalf of Secured Creditors.

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J U D G M E N T

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

By an originating process, dated 5 October 2009, the plaintiffs who are Timbercorp Securities Ltd, in its capacity as responsible entity, Almond Management Pty Ltd in its capacity as manager of the Unregistered Managers Investment Scheme, Mr Calder, Mr Chesser, Timbercorp Ltd and Almond Land Pty Ltd seek orders and directions under s.477(2)(b), s.511 and s.568(1)(a) of the Corporations Act 2001.

In particular, they seek orders directions that the 3rd and 4th plaintiffs in their capacity as liquidators of the 1st plaintiff, are justified in procuring the 1st plaintiff and 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 Ollum Orchards Australia Pty Ltd and Ollum International Ltd, which forms confidential exhibit MAK4 to Mr Calder's affidavit of 5 October, or a document substantiating that form which they call the sale and purchase deed and extinguishing the grower's rights.

They also seek a direction that the 3rd and 4th plaintiffs in their capacity as liquidators of the 1st plaintiff are justified in entering into an agreement with the 6th plaintiff to accept \$6m to extinguish the

1 grower's rights in accordance with the terms of the bank
2 offer as defined in the affidavit and without reading
3 them, they also seek similar orders in relation to the
4 unregistered Almond scheme.

5 The four plaintiff companies are members of the
6 Timbercorp Group of companies. Mr Calder and Mr Chesser
7 are the liquidators of the four plaintiff companies. The
8 Timbercorp Group of companies carried on business
9 promoting Managed Investment Schemes whereby investors,
10 known as growers, invested in and participated in the
11 growing of trees, almonds, olives and other horticultural
12 products.

13 On 23 April 2009, the Timbercorp Group of companies
14 appointed administrators after they could not renegotiate
15 large amounts of bank debt. The creditors then resolved
16 to put each of the group companies into voluntary
17 liquidation. On 29 June 2009, Mr Calder with Ms Chesser
18 were appointed the liquidators of the 1st plaintiff,
19 Timbercorp Securities Ltd, the 2nd plaintiff Almond
20 Management Pty Ltd, the 5th plaintiff, Timbercorp Ltd and
21 the 6th plaintiff Almond Land Pty Ltd.

22 Timbercorp Securities is currently the responsible
23 entity of seven Almond schemes which are registered
24 Managed Investment Schemes under the Corporations Act
25 2001. Almond Management also manages an unregistered
26 Almond scheme known as the 2002 private office scheme.
27 Mr Calder says that Timbercorp Securities and Almond
28 Management are each hopelessly insolvent and are unable
29 to manage the Almond schemes.

30 Although the Corporations Act 2001 makes revision
31 for the responsible entity of a registered Managed

1 Investment Scheme to be removed and replaced, the members
2 of the schemes, in this case known as the growers, have
3 not done so.

4 Mr Chris Garnaut, a grower, has established a group
5 of growers known as the Timbercorp Growers Group and for
6 which group has been seeking to have another responsible
7 entity appointed of the registered Almond Schemes but
8 without success. The major problem faced by the
9 liquidators in the liquidation of the tenth core group
10 was in this case that the relevant assets that
11 constituted the relevant orchards were owned by different
12 parties.

13 Generally speaking, the land was owned by one of the
14 Timbercorp companies whilst the growing rights were owned
15 by the growers as members of the Managed Investment
16 Schemes. The bundle of assets that made up the relevant
17 assets of the Almond Orchards, the liquidators describe
18 as the Almond Assets. The liquidators were of the view
19 that the best way to realise the most money for the
20 Almond Assets was to be able to offer them for sale or
21 recapitalisation as a whole on an unencumbered basis.

22 The liquidators were of the view that if the court
23 ordered that the relevant resident Almond schemes be
24 wound up, then the liquidators would be able to enter
25 into an arrangement with the holder of the other relevant
26 Almond Assets, mainly the land owner, to offer the assets
27 for sale or recapitalisation on an unencumbered basis.
28 Earlier proceedings concerning Timbercorp have been taken
29 to the Federal Court of Australia as well as in this
30 court. In substance, the Federal Court has been dealing
31 with the forestry schemes and this court with the Almond

1 and Olive schemes.

2 Previously, Mr Calder and Mr Chesser sought a
3 direction that they were justifying the claim to this
4 court to wind up the registered Olive and Almond schemes.
5 The court gave directions that Mr Calder and Mr Chesser
6 were justified in so applying. The application to wind
7 up the registered Almond and Olive schemes, including the
8 registered Almond schemes as subject to this application,
9 came for hearing before me from 15 July 2009 to 20 July
10 2009.

11 The Timbercorp Growers Group opposed the winding up
12 applications and cross claimed in effect for the
13 appointment of a temporary responsible entity. The
14 Timbercorp Growers Group was concerned that the winding
15 up of the registered schemes may extinguish some of the
16 property rights of the schemes or the growers.

17 In particular, the Timbercorp Growers Group was
18 concerned that the winding up of a scheme may have the
19 effect of terminating the tenancy or similar rights that
20 the relevant growers or the schemes had over their
21 relevant portion of the almond or olive orchards. On
22 20 July 2009, the winding up applications were adjourned
23 by consent with orders that the liquidators cause
24 Timbercorp Securities Ltd to call separate meetings of
25 the almond and olive registered scheme members to allow
26 the growers to consider certain resolutions. Resolutions
27 were passed to the meetings, along with purported
28 amendments of the constitutions.

29 By 17 August 2009, no party had made an
30 unconditional and binding offer to take the role of a
31 replacement responsible entity of any of the registered

1 Almond schemes. Accordingly, on 18 August 2009, the
2 liquidators reinstated their application to wind up the
3 Almond schemes. Mr Korda asserts that as well as
4 Timbercorp Securities Ltd being insolvent, the Almond
5 schemes themselves each had a cash flow deficiency.

6 Mr Korda said that the liquidator, also concerned
7 about the risk of severe wastage of the Almond orchards,
8 if the Almond assets were not sold, or the schemes
9 recapitalised in the near term. As mentioned above, a
10 winding up of the schemes would have allowed the
11 liquidators to offer the Almond assets for sale or
12 recapitalisation on an unencumbered basis. On the return
13 of the application to wind up the schemes, the
14 liquidators accepted if they had the power to release or
15 surrender the grower's rights under the registered
16 schemes, they would be able to affect the sale or
17 recapitalisation of the Almond assets on an unencumbered
18 basis.

19 During that hearing, and earlier, a difficulty was
20 identified in how the purchase price was to be allocated
21 as between - of the Almond assets as between the
22 respective owners. In practice, as I mentioned above,
23 this meant a division as between the growers on the one
24 part, or their schemes, and the banks who held securities
25 over the land and other assets of the Timbercorp Group
26 that were part of the Almond assets of the other part.
27 The liquidators were, and still are, acutely aware of
28 this difficulty, and encouraged the banks and the
29 growers to agree on the division of the sale proceeds.

30 As it was, the liquidators did not press their
31 application and wind up the registered Almond schemes,

1 but instead sought a direction that they would be
2 justified in causing Timbercorp Securities Ltd to amend
3 the constitutions of the 2001 to 2007 Almond schemes, to
4 give Timbercorp Securities Ltd the explicit power to
5 assign, terminate, surrender, or otherwise deal with a
6 sublease's licence or joint venture agreement. I made
7 the order sought.

8 Mr Korda made it plain, however, that he would not
9 exercise the power to extinguish the grower's rights in a
10 sale or recapitalisation without first seeking the
11 directions from the court, and he's done that.
12 Subsequently, the liquidator caused the amendments to the
13 Almond schemes constitution to be made. On 4 August
14 2009, the liquidators advertised, seeking expressions of
15 interest for the possible purchase of the Almond assets
16 or the recapitalisation of the Almond schemes, fixing a
17 closing date for bids of 28 August 2009.

18 The liquidators made available to interested parties
19 access to an online data room which contained
20 confidential information about the Almond schemes. The
21 bidders were asked to apportion the purchase price
22 between the land, water rights, and cropping rights. The
23 liquidators receive seven bids from the Almond assets.
24 The bids have been disclosed on a confidential basis to
25 the court and counsel for the parties appearing. On
26 11 September 2009, the liquidators selected Ollum
27 Orchards Australia Pty Ltd as the preferred purchaser.
28 The liquidators say that the terms and conditions of the
29 Ollum Orchards offer were clearly the most favourable.

30 The liquidators have provided to the court
31 information about the financial strength of Ollum, and no

1 issue arises about that. A sale and purchase deed, which
2 they call an SPD, has been entered into between
3 Timbercorp Securities Ltd, in its capacity as responsible
4 entity of the Almond schemes, and in its personal
5 capacity, Almond Land, Almond Management, the
6 liquidators, Ollum Orchards, and its parent, Ollum
7 International Ltd. Ollum Orchards' bid offers a total
8 purchase price of approximately \$128m, allocated as to
9 81.6 million for permanent water rights, and 46,000,000
10 for the other Almond assets.

11 Completion, as defined in the agreement, will occur
12 when the conditions precedent have been fulfilled in
13 about 75 days. It is a condition precedent of the deed
14 that by 9 October 2009, that's tomorrow, the court gives
15 a direction that the liquidators are justified in
16 entering into the deed and extinguishing the grower's
17 rights. The liquidators say if the court directs that
18 they are justified in doing so, they will not extinguish
19 the grower's rights until shortly before completion.

20 Another of the conditions precedent to the almond
21 sale is the relevant lenders, and Almond Land, provide at
22 completion releases of their charges releasing any of the
23 Almond assets encumbered by the lender's charges and
24 discharges of the mortgages over the relevant properties,
25 and the permanent water rights included in the sale. The
26 securities relate to the following principal facilities.

27 (a) The ANZ Almond facility for \$45m to Almond Land,
28 dated 26 September 2006, (b) the syndicate loan agreement
29 to Timbercorp Ltd dated 15 December 2006 for \$200m, BOSI
30 Securities Ltd is the security trustee for the syndicate
31 banks. The obligers to the syndicate facility include

1 Almond Land and Almond Management.

2 The liquidators understand that currently, the ANZ
3 Almond facility is at least \$47m, and the syndicate
4 facility is at least \$202m. The liquidators say that
5 some of the securities were created within six months
6 from the commencement of the Timbercorp Group's winding
7 up. They say they have not investigated the
8 circumstances surrounding their creation, or the
9 financial position of each of the Timbercorp vendor
10 companies at that time. They say that if the court
11 grants the relief sought, settlement with the secured
12 creditors is proposed to take place on a reservation of
13 rights basis regarding the validity of the securities.

14 They say this is the only practical way in which
15 they can complete the sale purchase deed and procure the
16 releases of the securities from the secured creditors.
17 As a result of the disagreements between the growers and
18 the secured creditors concerning the apportionment of the
19 (indistinct) sale proceeds, during the sale or
20 recapitalisation process, the liquidators sought to
21 appoint a special purpose liquidator to help facilitate
22 the settlement of the disputes between the growers and
23 the secured creditors, and, if necessary, to provide a
24 report to the court on the reasonableness of the any
25 offer that the liquidators may receive from the Almond
26 assets.

27 On 11 September 2009, the liquidators sought a
28 direction from this court that Timbercorp Securities Ltd
29 was justified in entering into an agreement to
30 appointment Ian Carson of PPB to fulfil the role of a
31 special purpose liquidator in relation to Almond assets.

1 The liquidators say that they considered they would
2 be aided by appointing Ian Carson to assist with the
3 conflicts between their roles as liquidators of
4 Timbercorp Securities Ltd and Almond Land. In particular
5 the liquidators were faced with the possible conflict
6 arising from them acting as liquidators of TSL as the
7 responsible entity for the registered Almond schemes, and
8 as liquidators of Almond Land which owned the land and
9 other Almond assets which were charged in favour of the
10 banks. They were concerned they would be negotiating
11 with themselves over the allocation of the purchase price
12 between the Almond schemes and the Almond assets owned by
13 Almond Land.

14 On 14 September 2009 the hearing of that application
15 took place. In the course of that hearing, the
16 liquidator's lawyer, Mr Zwier, explained to the court how
17 they envisaged the sale process taking place, including
18 the making of this application. Mr Zwier explained Ian
19 Carson's facilitative role in this process and the
20 importance of the growers making a reasonable offer to
21 the security creditors. I made the orders sought. Ian
22 Carson accepted the appointment and retained Mallesons'
23 Steven Jacques to advise him in relation to his
24 appointment and discharging his function.

25 The liquidators have also made arrangements with
26 Select and Almond Land in relation to the care and
27 maintenance of the orchards, Select has agreed to fund
28 maintenance on the orchards until 9 October, the date the
29 immediate conditions proceeding under the sale purchase
30 deed have to be fulfilled.

31 The liquidators state that there are two critical

1 issues relating to determining the apportionment of the
2 Ollum sale proceeds between the secured creditors and the
3 almond growers. They say that it is necessary to
4 determine that first, what are the proprietary interests
5 of the growers in the Almond assets, can they be
6 determined by the winding up of the almond screens or by
7 disclaimer by virtue of the Timbercorp Group
8 liquidations. They acknowledge that these questions
9 raise complex legal issues.

10 Secondly, they say that it needs to be determined
11 what are the value of those proprietary interests and how
12 should they be calculated. The liquidators say that
13 these raise complex commercial considerations. As
14 discussed below, they also raise legal issues that can be
15 determined by well established legal principles of law in
16 equity.

17 The liquidators say that to assist both Ian Carson
18 and them in reaching their decision regarding the
19 apportionment of Ollum sale proceeds, they asked the
20 Timbercorp Growers Group solicitors to set out what they
21 consider was the basis of the growers claims and the
22 portion of the sale proceeds to which they consider the
23 growers were entitled. They say that there was
24 correspondence between Arnold Bloch Leibler and
25 Clarendons on this matter.

26 The liquidators say they also asked the security
27 creditors to provide an analysis of the legal and
28 commercial issues justifying their claim that they are
29 entitled to receive all of the Ollum sale proceeds. They
30 say that Ian Carson also called on the Timbercorp Growers
31 Group to provide him more detailed submissions on both

1 the legal issues and the commercial issues and that the
2 Timbercorp Growers Group did so.

3 The liquidators say that for some considerable time
4 the Timbercorp Growers Group and Security creditors have
5 been indirectly negotiating with one another in the main
6 through either Ian Carson or the liquidators and their
7 respective lawyers. The liquidators say they have been
8 told at the most recent committee of inspection meeting,
9 that the growers offered to take 50 million from the
10 Ollum proceeds as representing fair consideration for
11 consensual extinguishment of their rights. The secured
12 creditors rejected this offer.

13 The liquidators say that to achieve, "an expeditious
14 termination or surrender" of the subleases and the joint
15 venture agreements, the secured creditors have made a
16 conditional written offer to Almond Land that the secured
17 creditors will pay \$6m to Almond Land to be paid to
18 Timbercorp Securities Ltd as the responsible entity for
19 the benefit of the growers including the relevant growers
20 in the 2002 private offer scheme.

21 They say that before the six million is paid to the
22 growers, the costs will be paid out. The offer is
23 contained in a letter of 30 September 2009 which they
24 describe as the bank offer. The bank offer also
25 contained a detailed position paper explaining why the
26 growers have severe legal impediments to their claims to
27 the Ollum sale proceeds. The letter also includes a
28 commercial analysis of the growers' proprietary interest
29 prepared by Ferrier Hodgson, a firm of chartered
30 accountants, which valued those interests lower than the
31 secured creditors' offer.

1 The growers have not accepted the bank offer and no
2 agreement has been reached regarding apportionment. The
3 liquidators say that the bank offer will lapse if not
4 accepted by 9 October 2009. On Friday 2 October 2009 the
5 liquidators requested that Ian Carson complete his report
6 based on the Ollum deed and the current state of
7 negotiations. On 4 October 2009, early Sunday morning
8 Mr Carson issued his report. The liquidators say that
9 Mr Carson was asked to assume the correctness of the
10 legal advice of Arnold Bloch Leibler, solicitors,
11 regarding the legal issues referred to above.

12 The legal advice of Arnold Bloch Leibler included an
13 opinion from Mr Charles Scerri, Queen's Counsel and
14 Mr Phillip Crutchfield of counsel. The liquidators have
15 resolved that they should accept the bank offer. In
16 doing so they say they have had regard to the Ian Carson
17 report, the confidential legal advice of Arnold Bloch
18 Leibler and the opinion of Mr Scerri and Mr Crutchfield.
19 They say the Arnold Bloch Leibler advice is directed to
20 the nature of the growers' proprietary interest in the
21 Almond scheme and whether those interests are likely to
22 be extinguished in the context of Timbercorp group
23 liquidation. They have had regard to the bank offer
24 including the Ferrier Hodgson analysis. They say the
25 Ferrier Hodgson analysis directed to the commercial issue
26 of the valuation of the growers' proprietary interest in
27 the Almond schemes.

28 The position paper they say is directed to nature of
29 the growers' proprietary interest in the Almond schemes.
30 They have had regard to the written submissions made by
31 Clarendon's on behalf of the growers from time to time

1 and these submissions also address the valuation issues
2 which I have described above as the legal issues. And
3 they have had regard to the affidavit of Michael Fernon.
4 In addition, Mr Korda has held meetings of the committee
5 of inspection, attended meetings of the Timbercorp
6 Growers Group executive and secured creditors and those
7 groups' advisors.

8 The liquidators have also said that they have had
9 regard to the fact that Ian Carson's report has been
10 prepared by an experienced independent insolvency
11 practitioner whose sole focus has been Timbercorp
12 Securities Limited and who unlike the liquidators does
13 not owe conflicting duties to other members of the
14 Timbercorp group. They have had regard to the robust
15 sale or recapitalisation process that they have conducted
16 and that no other person has sought to recapitalise the
17 Almond schemes notwithstanding that the Timbercorp Group
18 insolvency administrations have been running for a period
19 in excess of 160 days.

20 They say that they have also considered that Ollum
21 Orchards is a well resourced, financial strong and
22 natural buyer of the Almond assets who may not be
23 prepared to resubmit a bid for the Almond assets if the
24 share purchase conditions precedent are not fulfilled.
25 They also say they have had regard to Ollum Orchards'
26 condition precedent as commercially sensible from a
27 buyer's perspective. I should interpolate here that the
28 issue in this case is not the conditions imposed by Ollum
29 Orchards but the dilemma faced by the liquidators in view
30 of the stance of the banks that they will not permit the
31 sale to settle unless they are paid all but \$6m of the

1 proceeds without any meaningful determination of he
2 property rights of the growers being made.

3 They have had regard to the price that Ollum
4 Orchards will pay for the Almond assets and the terms and
5 conditions on which it will acquire the Almond assets and
6 they say they represent the best offer to be made
7 following the competitive bidding process. They say they
8 have had regard to the fact that the real issue between
9 the Timbercorp Growers Group and the secured creditors is
10 confined to the apportionment of the Ollum sale proceeds
11 and not the sale price payable by or the terms and
12 conditions agreed with Ollum Orchards.

13 They have had regard to the acceptance of the bank
14 offer will be without prejudice, the validity of the
15 securities held by the secured creditors over the Almond
16 assets. They have had regard to the fact that in order
17 for Timbercorp Securities Limited on behalf of the
18 growers group to assert the continued existence of the
19 growers' proprietary interests, Timbercorp Securities
20 Limited will compelled to spend considerable time and
21 money on expensive litigation in circumstances where it
22 frankly does not have those funds and Timbercorp
23 Securities Limited's legal rights are at best uncertain.

24 They have had regard to the fact that the
25 extinguishment of the growers' rights is a serious step
26 for the liquidators to take, particularly where not all
27 the growers can be heard on these complex issues and the
28 Timbercorp Growers Group oppose the liquidators doing so.
29 They have had regard to the wasting (indistinct) of the
30 Almond assets and the damage that would be inflicted on
31 the Almond assets if the Ollum SPD is not completed.

1 They say that damage may exceed the amount of the bank
2 offer. They say this threat to the Almond Assets which
3 is secured in favour of the secured creditors may be
4 regarded by growers as having commercial value greater
5 than the bank offer.

6 They say that in real terms the Almond schemes have
7 ceased to operate in accordance with their constitutions
8 and they are operating on a hand to mouth basis with part
9 of the next year's crop already having been sold to fund
10 necessary expenditure. They say they have had regard to
11 the fact that even if the almond growers have indicated
12 they wish to maintain their Almond schemes, the almond
13 growers have not funded an alternative responsible entity
14 to do so. They say that have had to regard the fact that
15 even if the growers were asked to contribute to the
16 ongoing costs of the Almond schemes, unless all growers
17 contributed the required amount, those growers that did
18 contribute would require to increase their contribution
19 to cover any shortfall. They say this is particularly
20 relevant given that the Timbercorp Group entities are
21 growers but will not be able to contribute.

22 Further, many growers funded their contributions
23 through loans from Timbercorp Finance but will now need
24 an alternative funding source and thirdly, that the
25 growers are entitled to terminate their participation in
26 the scheme given the insolvency of the relevant timber
27 pool grower group entities. They say they have had
28 regard to the fact that it is doubtful whether it would
29 be in the growers' best interest to be asked to
30 contribute further funds to the schemes, or to risk the
31 proceeds from the 2009 crop to which they would otherwise

1 be entitled to fund the Almond schemes, in circumstances
2 where there is no guarantee that the Almond schemes can
3 or will continue.

4 They say that they have had regard to the fact that
5 the liquidators do not have the money to continue
6 maintenance of the Almond orchards and that they cannot
7 borrow it. They say that Select will not maintain the
8 Almond orchards indefinitely through the crop sale
9 mechanism currently in place. They say wastage and
10 ultimately tree death will arise if the Almond orchards
11 are not maintained. They say they have had regard to the
12 recent failures of many high profile management
13 investment schemes and the global financial crisis and
14 credit squeeze has made more high risk investments such
15 as these agribusinesses less attractive in the market
16 place generally.

17 They say they have had regard to the lengthy drought
18 and its effect on the returns to agribusinesses which has
19 highlighted the inherent risk of investments made in the
20 business and made them less attractive in the market
21 place generally. They say they have had regard to the
22 fact that unless the relevant parties consent to an
23 extension on 9 October 2009, the bank offer will expire,
24 the Ollum deed will terminate unless the conditions are
25 satisfied and the maintenance agreement with Select on
26 the crop agreement sale agreed will expire.

27 I've recited these factors at considerable length,
28 perhaps trying length, to acknowledge the careful
29 consideration that the liquidators have given to this
30 issue. I do not propose to comment on these matters,
31 save to say that if there were to be litigation over the

1 allocation of the proceeds between Timbercorp Securities
2 Limited, as a responsible entity and the other interested
3 parties, the cost of liquidators might be able to be met
4 out of the fund, which I discuss below.

5 The liquidators state that Almond Land owes
6 \$249,000,000 to the secured creditors. The liquidators
7 say that the economic interest in Almond Land is best
8 advocated by the secured creditors. The liquidators
9 state that the banks regard it in their economic interest
10 to offer \$6,000,000 to effect an orderly sale of the
11 Almond assets they claim are secured in their favour.

12 They say that by the liquidators' accepting the bank
13 offer and completing the sale, Almond Land maximises
14 value to all creditors, avoids the requirement for them
15 to disclaim the sub-leases and the joint venture
16 agreements and the litigation that may ensue if some
17 growers seek to challenge those disclaimers, or seek
18 relief afforded, avoids the spectre of prolonged
19 expensive litigation with Timbercorp Securities Limited,
20 secured creditors and growers, avoids damage to its
21 property arising from a cessation of maintenance on the
22 Almond orchards, achieves certainty of outcome and
23 reserves its right to challenge the securities.

24 The liquidators say that as liquidators of TSL they
25 have decided to support the sale of Ollum and in the
26 absence of any higher offer, they have also decided to
27 accept the bank offer as it is currently the best option
28 available to Timbercorp Securities Limited for the
29 following reasons. That the bank offer exceeds the value
30 of the growers' interest in the Almond schemes according
31 to Mr Carson's report. They say, based on their legal

1 advice and their own assessment of the commercial value
2 of the growers' interest in the Almond schemes, they also
3 believe that the bank offer exceeds the value of the
4 growers' interest in the Almond schemes.

5 They say the growers will be relieved of any further
6 financial obligations to contribute to the Almond schemes
7 and will share greater in the 2009 crop proceeds of about
8 \$33,000,000 together with the growers in the TPIF Almond
9 schemes. They say they pay less weight on both the
10 Timbercorp Growers Group valuation reports and the
11 secured creditors Ferrier Hodgson report as they were
12 prepared as advocacy positions. They say leaving aside
13 the commercial fare of the growers' proprietary interest,
14 the proprietary interest of the growers can be disclaimed
15 or terminated by Almond Land or Almond Land management or
16 may be terminated on the winding up of the Almond
17 schemes.

18 They say that if TSL on behalf of the growers sought
19 relief from the termination or to set aside the
20 disclaimers Timbercorp Securities Limited would require
21 to commence and prosecute expensive litigation, and there
22 is uncertainty as to whether Timbercorp Securities
23 Limited would succeed. Timbercorp Securities Limited
24 does not, itself, they say, have funds necessary to do
25 so, and based on the advice Arnold Bloch Leibler it is
26 highly unlikely that Timbercorp Securities Limited could
27 obtain litigation funding to do so.

28 They say that if the growers wish to seek the relief
29 themselves, assuming they had the necessary funds to do
30 so, their likelihood of success may be adversely affected
31 if the percentage of growers seeking that relief was

1 small. They say they have conducted a robust
2 recapitalisation and sale process and accepted the best
3 offer available following competitive bidding process,
4 and given this, they believe that the sale to Ollum
5 Orchards should not be jeopardised.

6 They say that the satisfaction of the immediate
7 conditions precedent the implementation of the
8 maintenance arranged to replace the crop sale
9 (indistinct) and the bank offer must all be resolved by
10 9 October and they have provided and informed all
11 stakeholders including the growers giving the opportunity
12 to put forward their position and negotiate for what they
13 consider is the best outcome. Again I have given those
14 considerations at length to show that the liquidators
15 have given their all and best consideration to these
16 issues.

17 The Timbercorp Growers Group have submitted
18 submissions opposing the making of the orders and I will
19 refer to some of these but I will incorporate the whole
20 of the submissions in my final reasons and I refer to
21 some of these to show you the many legal issues that
22 arise in identifying precisely what the growers' rights
23 are.

24 They first of all say that the banks acknowledge in
25 a deed of covenant that they take their rights subject to
26 the grower's interests. They say that the banks take
27 their rights subject to the growers' interests in the
28 2002 schemes because the growers invested funds into the
29 scheme, which were used to improve the land in the
30 expectation that they would be entitled to continue use
31 and enjoyment of the land with the benefit of the almond

1 trees, the capital works and the wood licenses.

2 They say the banks were on notice of our client's
3 equity and are bound by them under the principles in
4 Immons v. Baker which I can interpolate there are well
5 known as principles of equitable proprietary estoppel
6 whereby the people who spend the money are given an
7 actual interest in the land.

8 They also say the banks take their rights subject to
9 the growers right under the 2005, 2007 schemes because
10 (a) the growers are tenants in possession under
11 s.42(2)(e) of the Transfer of Land Act. They say their
12 clients have been growing for the sub-lease of the almond
13 lots as defined in the subleases and they say the almond
14 lots include the almond trees, the capital works and the
15 watered licences included a triple in the project and
16 they can quote there from the sub-leases.

17 I will not read on because of the time it would take
18 to do this, but the submissions are detailed and
19 persuasive of the issues of the fact that there are many
20 real issues to be resolved. The submissions also include
21 criticism, constructive criticism of the methodology used
22 by the liquidators and Mr Carson in valuing the interest
23 of the growers. Again, I will not read those criticisms,
24 but I will incorporate those in my reasons.

25 Sufficient to say that it is apparent that as
26 Mr Zwier himself says that there are many, many complex
27 legal issues that would need to be resolved to precisely
28 identify the proprietary interest of the growers. Caree
29 v. Bezzacom has appeared on the applications represented
30 by Mr Shan, one of Her Majesty's Council. And
31 Ms Bezzacom is a grower, accountant and the chair of the

1 Timbercorp growers' Almond Committee Group, Almond
2 Committee. In substance, she opposes the liquidators
3 application. She complains about the bidding process and
4 the provision of information to her by the liquidators.
5 She seeks the appointment of Huntley Management even as a
6 temporary response management entity. She deposes to a
7 possible higher offer.

8 The proposal of Huntley Management Limited to act as
9 a temporary responsible entity was again subject to
10 conditions and again they - was not an unconditional
11 offer and was not one that the court was in a position to
12 accept. I can understand the attempts by the growers to
13 seek to extract as much as possible for their investment.
14 In my opinion however, the evidence establishes that the
15 liquidators conducted a proper sale process that elicited
16 seven bids. I have seen the bids. I accept that the
17 liquidator - I accept the liquidator's view that they
18 should accept the Almond Orchard bid. If I can say the
19 following, a bird in the hand is worth two in the bush.

20 To lose the Almond bid and the chance on the basis
21 of the chance of a possible higher bid is not a
22 responsible reasonable step to take in view of the
23 legitimate tender process as being undertaken by the
24 liquidators.

25 In my view the court should and will do all that it
26 can to assist the liquidators to complete the sale of the
27 Almond sale to Olive, subject to my decision on the \$6m
28 offer. Mr Carson's - I will turn to Mr Carson's report
29 briefly. Mr Carson's report accepted that he was bound
30 to accept the Arnold Bloch Leibler advice. He noted
31 however, that the Arnold Bloch Leibler advice relies

1 heavily on an assumption that growers' interest can in
2 effect be disclaimed by the liquidators of Almond Land.
3 He says that he has reservations about the correctness of
4 that view, based upon his own legal advice.

5 However, on the basis of the correctness of the
6 Arnold Bloch Leibler advice, he believes that \$6m
7 represents an offer that he would accept if the
8 liquidator Timbercorp Securities Ltd provided that he was
9 satisfied that the offer is the product of a robust
10 negotiation around the numerous difficult tasks. In my
11 opinion, his views are heavily qualified by the
12 observations he makes about the soundness of Arnold Bloch
13 Leibler's advice. And now I will just briefly mention
14 ASIC.

15 ASIC appeared and the court again should express its
16 - publicly its appreciation of ASIC's attendance. ASIC
17 was unable to, felt it was unable to offer any material
18 assistance to the court in this matter, they were of the
19 view that the issues were essentially commercial ones for
20 the liquidators.

21 Now, I wish to turn to a case that Mr Zwier drew to
22 my attention. The case in my opinion exposes the
23 difficulties faced by the liquidators in this case, but
24 exposes the solution to the problem and I refer to Re
25 Hazelton Air Charter, a decision of the Federal Court of
26 Australia of Justice Goldberg reported in 2002 Volume 41
27 Australian Companies Security Report 472. Involved the
28 Ansett Group collapse and Mr Calder as everybody knows
29 was the liquidator and administrator involved in that
30 collapse and Mr Zwier was also obviously personally
31 involved in those matters. That is by the bye.

1 But in that matter, if I could briefly summarise the
2 issue, the Hazleton Group had been taken over by the
3 Ansett Group before the Ansett Group collapsed and then
4 the Hazleton Group collapsed. As you all probably
5 remember Ansett was owned by Air New Zealand. Prior to
6 the collapse Air New Zealand had given a letter of
7 comfort whereby it said that it would provide moneys to
8 enable the Ansett and Hazelton Groups to meet their debts
9 although their letter did not constitute a binding
10 contract to do so.

11 Proceedings were taken against Air New Zealand's
12 directors. Proceedings may not have been taken but
13 claims were made against them and the upshot was that Air
14 New Zealand paid \$150m to meet the claims of the Hazelton
15 Group and the Ansett Group against the companies and the
16 directors that may have arisen from misleading and
17 deceptive conduct in issuing the letter of comfort.

18 The Hazelton Group and the Ansett Group accepted the
19 \$150m and got court approval to do so but at the time
20 they made no agreement as to the allocation of the \$150m
21 between themselves. That was left to be decided
22 subsequently. The parties could not agree on the
23 allocation of the \$150m and they went to court and put
24 forward to the judge bases upon which the \$150m could be
25 allocated. In particular they said well as the promise
26 was to meet the liabilities of the respective companies
27 perhaps the money should be divided in proportion to
28 their total liabilities or another alternative was in
29 proportion to the liabilities they owed to their workers.
30 There were all sorts of formulas put that were, on their
31 face, might seem fair and reasonable.

1 Justice Goldberg said that a fair and reasonable
2 approach was not correct. He said that the allocation
3 should be done on well established principles of law and
4 equity. If you would forgive me I will quote what he
5 said because it has great relevance to this case.

6 Beginning at Paragraph 30 he says:

7
8 "The various bases advanced by the Ansett
9 administrators and the Hazelton administrators for
10 apportionment, other than a comparison of the claims
11 released and the letter of comfort, have an element of
12 fairness and appropriateness about them, but they are not
13 predicated upon any legal or equitable principle nor can
14 they be established by reference to the intention of the
15 parties. I am not satisfied that it was the common
16 intention of the parties that the fund be apportioned on
17 any of the bases propounded by the parties.

18 The various bases propounded provide convenient
19 methods for the distribution of the fund but they are not
20 based on any principle which identifies or measures the
21 extent of the interest of each of the Ansett Group and
22 the Hazelton Group in the fund at the time it was created
23 and impressed with the relevant trust and favour of the
24 Hazelton Group. It's not for me to reach a fair,
25 appropriate, equitable or just conclusion as to how the
26 fund of 150 million is to be apportioned. That maybe a
27 consequence or result of my resolution of the matter.
28 Rather my task is to determine by reference to
29 appropriate principles of law and equity what was the
30 extent and measure of the interest in the fund of the two
31 groups at the time at which it was agreed to create the
32 fund. Namely the time of the execution of the
33 memorandum.

34 Fairness or appropriateness is an insufficient basis
35 on which to determine the interest of the Hazelton Group
36 in the fund of 150 million. In Muschinski v. Dodds
37 Justice Brennan of the High Court said, 'The flexible
38 remedy of the constructed trust is not (indistinct) as to
39 place proprietary rights in a discretionary disposition
40 of a court acting according to vague notions of what is
41 fair. Justice Dean said the fact that the constructive
42 trust remains predominantly remedial does not, however,
43 mean that it represents a medium of the indulgence of
44 idiosyncratic notions of fairness and justice as an equal
45 remedy is available only when warranted by established
46 equitable principles or by the legitimate process of
47 legal reasoning by analogy, induction and deduction from
48 the starting point of a proper understanding of the
49 conceptual foundation of such principles'.

50 He went on to say, 'I consider that the proper

1 principle to be applied to determine the extent of the
2 respective interests of two groups in the fund and the
3 manner of its apportionment between them is to determine
4 is to determine what was bargained away or given up by
5 each group in exchange for the receipt of the 150 million
6 and then to place a value on what each group bargained
7 away or gave up. In this way it is possible to identify
8 the relative value of what was relinquished in exchange
9 for an interest in the fund \$150m.

10 What occurred by the execution of the memorandum was
11 that the Air New Zealand Group and the directors procured
12 the payment of \$150m to the Ansett administrators, albeit
13 on behalf of themselves and the Hazelton administrators.
14 In exchange for the Ansett administrators and the Ansett
15 Group and the Hazelton administrators and the Hazelton
16 Group each giving up something of value. Each of them
17 gave up such claims as they had against the Air New
18 Zealand Group and the directors arising out of relatively
19 directly or indirectly to the letter of comfort. The
20 giving up of those rights was confirmed by the emphatic
21 language of Clause 12A above.

22 Prior to the execution of the memorandum each group
23 had a claim or a potential claim against Air New Zealand
24 under the letter of comfort. The claim of each group
25 which had a value was exchanged for an interest in the
26 fund of \$150m which is to be measured by the relativity
27 of the claims of the two groups which we've forgone. In
28 the absence of any agreement as to the apportionment of
29 \$150m between the Ansett Group and Hazelton Group I
30 consider the measure of the respective proprietary
31 interest in the fund of \$150m is to be determined by the
32 reference to relative proportions of the value of the
33 rights or claims which each of them bargained away and
34 gave up in exchange for the receipt of the 150 million.
35 Each of them had a share in the fund of 150 million
36 proportionate to the value of what they had bargained
37 away'."

38 Then also at Paragraph 47 he said again, just a
39 short passage:

40
41 "Again against this background the maximum equity
42 quality is to be applied not by reference to the number
43 of companies in each group, three in the case of Hazelton
44 Group and four in the case of Ansett Group, but rather by
45 reference to the proportionate share of the fund measured
46 by the extent and value of the claims or rights given up
47 in exchange for an interest in the fund".

48 As the above evidence indicates, there is
49 uncertainty at this stage as to precisely what other
50 proprietary rights of the growers which are to be

51 transferred or surrendered as part of the consideration

1 for the payment of the purchase price for approximately
2 128 million. That is conceded by the liquidators, or
3 more than conceded, the liquidators have highlighted it.
4 Until those rights are identified according to law, it is
5 not possible to fairly assess the value of the rights
6 being surrendered on behalf of the growers.

7 Despite the matters raised by the liquidators as I
8 have referred to at length, in my view it is not
9 appropriate for the liquidators to accept the bank offer
10 merely because the banks assert they were not allowed
11 their securities over the property to be sold as part of
12 the Almond assets. The banks are entitled to the full
13 extent and benefit of their charge and securities. The
14 banks are under no obligation to give up or surrender any
15 of their rights, security rights that they so choose. On
16 the other hand, subject to any agreement as made between
17 the party, if the sale proceeds, the banks are only
18 entitled to that portion of the sale proceeds that
19 represents the property over which they hold securities.

20 In my opinion, the liquidators are not justified in
21 entering into the agreement to accept \$6m, less some
22 undefined costs, in full satisfaction for the property
23 rights, transport as surrendered by the growers, to
24 enable Ollum Orchards to obtain clear and unaccounted
25 title and rights to the Almond assets. As indicated,
26 there are well recognised legal principles for
27 determining the rights of several property owners whose
28 property is lost or converted into a common fund. The
29 fund, if it is created, is not to be allocated between
30 the property owners on the basis of bargaining power.

31 The fund is not to be allocated on the arbitrary measures

1 that may appear to be a fair and reasonable division of
2 the fund; rather, as the authorities establish, the fund
3 is to be divided:

4
5 "By reference to the proportionate share of the fund
6 measured by the extent and value of the claims and
7 rights given up in exchange for an interest in the
8 fund."

9 Accordingly, the amount owed to the banks appears to be
10 of residual relevance. The banks can obtain payment for
11 only so much of the property as they have a charge over.
12 The key issue is what proportion of the fund represents
13 the property over which they hold security. Subject to
14 any further submissions of counsel, I propose to make the
15 following orders and directions.

16 The liquidators, in their capacity as liquidators of
17 TSL, are justified in procuring TSL as the responsible
18 entity of the management investment schemes listed in
19 Schedule 1 of the order, to enter into and perform the
20 sale and purchase deed between each of TSL as the
21 responsible entity of the management investment schemes
22 listed in Schedule 1 of this order. Almond management,
23 in its capacity as manager of the unregistered management
24 investment scheme listed in Schedule 2 to this order, the
25 liquidators, Timbercorp Ltd, and Almond Land and Ollum
26 Orchards Australia Pty Ltd and International Ltd which
27 forms confidential Exhibit MAK14 of the affidavit of
28 Mr Korda as filed substantially in that form and
29 extinguishing and/or transferring the growers' rights as
30 provided therein.

31 The liquidators, in their capacity as liquidators of
32 Almond management are justified in disclaiming the
33 project management agreement as defined in the affidavit

1 in respect to the unregistered management investment
2 scheme listed in Schedule 2 of this order, the
3 unregistered Almond scheme and entering into and
4 performing the sale and purchase deed in extinguishing
5 and/or transferring the growers' rights as provided
6 there. The liquidators, in their capacity as liquidators
7 of TSL, are not justified in entering into an agreement
8 with Almond Grove to accept \$6m to extinguish growers'
9 rights in accordance to the terms of the bank offer as
10 defined in the affidavit.

11 The liquidators, in their capacity as liquidators of
12 Timbercorp Ltd are not justified in entering into an
13 agreement with Almond Land to accept \$6m to extinguish
14 growers' rights in accordance with the terms of the bank
15 offer as defined in the affidavit. The liquidators, in
16 their capacity as liquidators of TSL, Timbercorp Ltd,
17 Almond management and Almond Land, are justified in
18 instituting or participating in proceedings to determine
19 the extent and measure of the interest in the fund
20 constituted by the proceeds of the sale of the Almond
21 assets of some \$128m of Timbercorp Securities Ltd as the
22 responsible entity of the management investment scheme in
23 Schedule 1 to the order.

24 Almond Management as the manager of the unregistered
25 management investment scheme listed in Schedule 2 to this
26 order, Timbercorp Ltd, Almond Land and any other person
27 whose property rights are to be extinguished, sold or
28 transferred to Ollum Orchards Australia Pty Ltd under the
29 sale and purchase deed. The liquidator is to justify in
30 holding the said fund in trust for those persons pending
31 the hearing and determination of such proceeding or

1 further order of this court. Otherwise I will make the
2 orders referred to on Paragraphs 5 to 8 of the draft
3 orders.

4 Now that is probably very long and complicated but
5 in very much lay terms, I want to make it clear what the
6 position is. The ball is in the bank's court, if they
7 agree the sale can go ahead, but if it does the proceeds
8 must be held in trust until the growers proprietary
9 rights to those moneys are established or agreed.

10 - - -

1 MR ZWIER: Thank you Your Honour, can I - - -
2 HIS HONOUR: I will give leave for the transcript to be
3 released and I don't have - I can discuss with counsel
4 with the terms of those orders, but it's obviously now a
5 matter for negotiation.
6 MR ZWIER: It is Your Honour, just for my own clarification of
7 the issues, Your Honour's cleared the - - -
8 HIS HONOUR: I should just say, if you want any other orders to
9 facilitate the sale, I'm happy to do it.
10 MR ZWIER: Thank you Your Honour. Your Honour's cleared the
11 way for the sale, the issue is the proceeds of the sale
12 and to have some further curial proceeding to determine
13 rights specifically as occurred before Justice Goldberg
14 in the Hazleton proceeding.
15 HIS HONOUR: Exactly.
16 MR ZWIER: So in other words the sale - - -
17 HIS HONOUR: That can be started by the banks or somebody else
18 or you, whatever.
19 MR ZWIER: Thank you Your Honour. I think it would be
20 appropriate if we could have the matter stood down Your
21 Honour, perhaps till tomorrow morning so we can all
22 consider our respective positions and come back - - -
23 HIS HONOUR: It's just you've got these competing views as to
24 what the value of the properties, it's just not right in
25 that state to settle, the take is six million because we
26 don't know what they are.
27 MR ZWIER: Your Honour, this is not an uncommon problem.
28 HIS HONOUR: No.
29 MR ZWIER: The Air New Zealand settlement was taking \$150m and
30 no one knew for what.
31 HIS HONOUR: You know more about that case than I do.

1 MR ZWIER: Yes I know Your Honour. Your Honour, can I just say
2 this before I finish. The liquidators want to express
3 their thanks for Your Honour finding the time to deal
4 with such a complex matter on such short notice and to
5 deliver a judgment to clear the way for that transaction
6 to be completed.

7 HIS HONOUR: I should say that it's probably the only time I
8 haven't given the liquidators what they want in this case
9 but although it's not part of my reasons, it appeared to
10 me that if this process is pursued, the banks aren't
11 going to be short changed one penny, they're going to get
12 what they're entitled to at law, this is not a procedure
13 to short change them, it's just a procedure to make sure
14 that both parties get their just deserts, what they're
15 entitled to.

16 MR ZWIER: That's right, and Your Honour shouldn't assume it's
17 not what the liquidators wanted.

18 HIS HONOUR: No. I will then not make those orders as you've
19 requested, but otherwise adjourn the matter, saving what
20 Mr Bigmore has got to say.

21 MR BIGMORE: I was going to echo our thanks for Your Honour's
22 time and attention to the time but I was then going to
23 descend to the mundane and ask if the costs could be
24 reserved.

25 HIS HONOUR: Yes, they're reserved. I'm doing directions
26 tomorrow so you can come along if you want to mention it.

27 MR ZWIER: Thank you Your Honour.

28 HIS HONOUR: Thank you all parties for your assistance.

29 MR CAWTHORN: So Your Honour is not pronouncing those orders?

30 HIS HONOUR: No, Mr Zwier's ask that I not, because I imagine
31 that - but I will if he asks for them to be pronounced

1 tomorrow morning. They're his orders he's seeking. We
2 will adjourn now sine die.

3 - - -

4