

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE**

**COMMERCIAL AND EQUITY DIVISION**

**Olive Schemes**

[SCI 2011 6777](#)

[SCI 2010 1354](#)

**Citrus Schemes**

[SCI 2011 6606](#)

**COMMERCIAL COURT**

**LIST**

**BETWEEN**

**BOSI SECURITY SERVICES LIMITED ( ACN 009 413 852) AS TRUSTEE FOR AUSTRALIA AND NEW  
ZEALAND BANKING GROUP LIMITED (ACN 005 357 522) AND BOSI INTERNATIONAL (AUSTRALIA)  
LIMITED (ACN 066 601 250) AND WESTPAC BANKING CORPORATION(ACN 007457 141) & ORS  
(according to attached schedule)**

Plaintiff

**AND**

**B.B.OLIVES PTY LTD (IN LIQUIDATION) (ACN 083 992 367) & ORS (according to attached Schedule).**  
Defendant

**AND**

**TGG CITRUS INC. A0053635L**

Defendant

**AND**

**TGG OLIVE INC. A0053490J**

Defendant

**OUTLINE OF SUBMISSIONS OF  
TGG CITRUS AND OLIVE COMMITTEES INC**

**Proceeding** [SCI 2011 6777](#) (Fenceport Rights Proceeding)

**Proceeding** [SCI 2010 1354](#) (BB Olives Rights Proceeding)

**Proceeding** [S CI 2011 6606](#) (Solara Rights Proceeding)

Date: 28 September 2012

Prepared by: TGG CITRUS & OLIVE COMMITTEE INC

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### **SUBMISSION OF KERREE ANNE BEZENCON (Chair)**

#### **Introduction**

1. This outline of submissions is filed on behalf of:

- TGG Citrus & Olive Committee Inc

Specifically, the Court has been asked to approve the compromise for the following proceedings (and bind absent parties represented by the representative growers

2. For the reasons set out below, it is respectfully submitted that the Court ought to NOT approve the Deeds of Compromise and make orders to NOT include the Citrus and Olive growers in the Deeds of Compromise executed in relation to the

- BB Olives Rights Proceeding,
- Solora Rights Proceeding,
- the Fenceport Rights Proceeding
- .

**SET OUT BELOW ARE THE REASONS WHY CITRUS & OLIVE GROWERS SHOULD BE GIVEN A SEPARATE RIGHTS HEARING AND NOT BE PART OF THE COMPROMISE**

#### **GROWER RIGHTS - A DIFFERENT LOGIC & NEW APPROACH**

1. We understand the almond arguments have centred around

What are the rights of the growers?

What is the value of those rights?

2. This leads to the wrong logic, we believe and too much focus on the RE. **The question of the value of the rights should be asked first.** In fact, if you answer that, it does not perhaps matter very much how you define those rights. Find first the value of those rights, then define them if necessary.

3. Justice Davies found that without the projects continuing with a willing RE, the growers rights had no value. We suggest that there is an error in logic here. The value of the rights of growers is not based on the continuity of some project. Rather it is surely based on the difference in sale price where the land is sold subject to growers right - versus where the land is sold free of grower rights.
4. This is what Justice Robson alluded to when he suggested that the value was the value of the rights given up, we believe.
5. The liquidators could get a better price if they could sell the assets unencumbered. There were more buyers to be had and a higher price to be attained was the argument. The fact that there was a better sale value and more buyers if growers rights were extinguished, is itself evidence that growers rights had some value.
6. Both banks and KORDA MENTHA have continually argued that to get that best sale price they needed to extinguish growers rights and sought the court's approval to do so. It is eminently logical that the difference between a sale without growers and one with growers still on board could be attributed to the value of growers rights.
7. If we ask this question first, then what makes up these rights is largely irrelevant or academic
8. The banks covenanted with Timbercorp on the basis that their security was subject to these rights. The fact that a higher price was paid with growers rights extinguished does not mean the value of those rights falls away. It was as if the growers had decided to sell their rights.
9. Assuming they were willing sellers (despite never being consulted on this - see Citrus constitution changes), giving up those rights was a bargaining tool that had implicit value. Why would anyone give up rights for no knowledge of their worth.
10. This would be the first thing any commercial seller would want to know. They would most likely look at the actual cost over time of the exercise then do their sums to decide what margin of profit would be added to arrive at an acceptable sale price. That KORDA MENTHA agreed to extinguish grower rights without knowing their value did not mean that those rights became worthless. They were given up on the basis that this was in the interests of the growers which carried an assumption that they had some value
11. They would need a willing buyer, either one who accepted grower remain or one who would pay growers out to remove them. There were plenty of those buyers available if the rights were extinguished according to the banks & KORDA MENTHA. They would likely look at the cost to establish a similar asset versus buying an already established asset at fire-sale value. They would also factor in the cost to pay out the growers. So they would have two costings - one to buy the land and infrastructure and secondly, to buy-out the growers. They would not assume that this would be zero This is evidenced by the higher prices they would pay with growers no longer included.
12. Issues of a willing RE, funding, defaults, wastage are irrelevant to this argument. The simple logic of the difference in the price obtained with and without growers is the value of the rights.

13. The question is then what were those two prices. We know the sale price and we should know the price offered with growers remaining. Where there were no offers including the growers, clearly that sale price is zero - the difference between that and an unencumbered sold asset is the grower rights value.
14. Adopting the stance that growers rights are simply the NPV value of the annuity like income stream from the produce is utterly flawed. It ignores the impact on marketing margins if such contracts were lost and for which a premium was paid.
15. This applies to almonds, citrus and olives growers rights

## **OTHER IMPORTANT NEW ARGUMENTS**

Should this argument not be accepted, there are other compelling reason for the olives and citrus projects to be separated from the almond cases. Starting with the olive case :

### **IN THE OLIVE & CITRUS CASE**

#### **NO TGG CONSULTATION- MEANING IMPORTANT INFORMATION HAS BEEN OVERLOOKED**

16. There has been no consultation with the TGG Olive Committee about the matter. Even if some court documents may have been provided, no requests for information was made. It now appears that many facts are unknown to counsel that would affect their advice.
17. Clarendons have never sought advice on the Olives from the TGG Olive Committee Inc. This is despite knowing very well that this group had had an avid and ongoing interest, appearing and being named in court, and known to Garnaut & Lennie who advised/instructed Clarendons.
18. The TGG Committee Inc had been known from birth by Clarendon, Garnaut & Lennie - it was actually set up as a result of Garnaut declaring that he had no interest in continuing fighting for growers post July. He had decided to step down from the original group that he & I had set up - where he (with Lennie) had self anointed himself as chair, despite protests from our group (The TGG - not incorporated). He was also of the opinion that it was very much over and better to give in to the banks.
19. Whereas the various committees Inc wished to continue to fight the issues not only for almonds, but olives, avocados, olives and citrus. Garnaut had declared openly that he "couldn't give a stuffed olive about olives" or anything else. It was thus I who represented growers at the first public meeting of growers run by KORDA MENTHA and continued in an ongoing capacity over now some three and half years as chair of the

group - and one reason why we say we represent olive growers irrespective of which lawyers run the case.

20. The information and research gained over all that time has not been sought by Clarendons. The committee had been active and various members had a wealth of knowledge but were not consulted, despite being well known to Clarendons.
21. Except for a very recent email, but only referring to citrus, no such request for information ever came about olives or almonds.
22. At the time of the request for information from Clarendons regarding citrus my family were facing considerable financial stress. My unpaid hours have been enormous (running over 11,000 hours). Clarendons hoped but could not even ensure that our photocopy costs would be covered. I felt that I could not, in fairness spend any more unpaid time, despite my keen interest. Some small citrus committee help was nevertheless offered but not taken up. One can only assume they were not particularly interested in seeking TGG Committee Inc citrus grower input.
23. This reply, was nevertheless at odds with known payments to various advisers, such as Owen Lennie and others.
24. Furthermore the 1.68 Million for the appeal case also included payments to advisers - even though these advisers had no knowledge of olives and thus had to start from scratch and research this. WE had done the same exercise as the TGG Citrus & Olives Committee Inc olives. They were, of course under no directive to seek our input, but it would have been a reasonable thing to do we believe and might have avoided some of the issues we now raise.
25. It appears that none of this money whatsoever was spent on Citrus experts and cash flows. Although they would have had to undertake similar research to that done by the TGG Committees Inc for Olives & Citrus to ascertain correct inputs and cash flows, they decided to only focus on olives for some reason.
26. One can only assume that there was a deliberate decision not to contact the TGG Olive (& also Almond Committee), despite the knowledge base and constant presence and interest in the cases which was obviously known to Clarendons.
27. WE reiterate that that is their prerogative of course, but, that has meant that certain valuable information seems not to have been taken into account by counsel. It is this aspect that warrants that the compromise for olives should not be sanctioned by the court until further evidence and argument is sought.

## CONFLICT

28. We question still the conflict of interest that Garnaut & Lennie poses. Garnaut had openly declared that he & Lennie would make money out of this. Garnaut and Lennie operate from the same Garnaut offices. Clarendon act as their lawyers. Lennie has had a history of running property funds such as WRS Securities and others. They were both involved in property syndicates as explained to me by Owen Lennie, involving the very

banks we were fighting with and posing a real conflict of interest. This conflict has not been addressed

29. Certainly Lennie ( whose charge time is \$300 p hr I believe)has been paid for his time, which is not unfair per se, but may indicate an monetary bias by Clarendons. Given particularly his lack of knowledge regarding olives and the valuation issues that arose in the almond hearing, one wonders about his selection and expertise.
30. More importantly, Clarendons choice of representative growers for olive and citrus as well as almonds are all clients/associates of Mr Chris Garnaut. He has their proxy - there are no independent-of-Garnaut growers. Many have given him their power of attorney to make decisions for them as evidenced in court documents. Obviously if they have given him their power of attorney, which would not be given lightly, he has their absolute trust and they would listen to Garnaut and be influenced by his views.
31. Effectively therefore Clarendons are under instructions from one man, Mr Garnaut. They themselves have a vested interest to co-operate with Garnaut as he provides business to them for both his firm and personal issues including the property syndicates/deals of Garnaut & Lennie.
32. Many growers are not aware of all the issues nor able to debate them with counsel. With only one meeting convened for all these grower representatives and a third of the representative growers missing, it is hard to understand how they could be fully informed. Unless you are a lawyer or deeply involved it would be hard to accept any other view but Counsels. But Counsel is under instruction from Clarendons; and Clarendons reflect the views if not instructions given by Mr Garnaut
33. Neither the Clarendon selected grower representatives nor Garnaut have shown any interest in citrus and olive growers meetings, grower representative action groups and various TGG Olive & Citrus Committees and cannot be said to represent them. It is unlikely therefore that Chris Garnaut nor the representative growers reflect the sentiment nor knowledge of the many other growers, whereas the TGG Citrus & Olive Committees do

#### MISSING INFORMATION FOR BOTH OLIVES & CITRUS

34. The issue that is most important is that they are therefore unaware of various events and information that the TGG Olive Committee Inc possess that might effect and influence and actually change Counsels advice and the reason we believe that a compromise should not be agreed to for olive growers and citrus growers.
35. The fact that certain of this information affects analysis, cash flows and conclusions yet has not been taken into account suggests that counsel advice for olive growers may be flawed
36. The fact that no information at all regarding cash flows has been taken into account for citrus means that this Counsel advice might also be flawed. No comparative cash flows with the compromise amount at all have been instigated for citrus and the issues raised below bears evidence to that fact of Garnaut's/Clarendon disinterest particularly in citrus .

37. Counsel thus clearly have not considered citrus issues, dismissing citrus growers case based simply on erroneous and missing information. This is not the ground for recommending a compromise.

#### ISSUES RELEVANT TO CITRUS 05 (& 04) PROJECTS

1. The 05 citrus growers have an interest in both Solora and another property - Kangara. The Citrus growers in 05 share the Kangara property with 04 citrus growers. They should be dealt with at the same time in there own separate rights hearing, - rather than having extra costs for 2 separate 04 & 05 legal hearings
2. As we are in discussions with debenture holders and any such precedent will affect that result, we would like the opportunity to air arguments involving them also in our own hearing.

#### RESPONSIBILITY ENTITY RELEVANCE

3. In the case of citrus, we debate that the RE issue is even relevant. The growers had the power to direct the current existing RE, Korda Mentha, without any need for a change of RE. A meeting was held and a motion was passed that instituted a constitutional change to allow the growers to direct the existing RE actions. This would have included the right to direct the RE to **not** extinguish the rights of growers, the instruction to issue invoices, the direction to obtain an independent liquidator, the instruction to account for their actions etc - this didn't require any change of RE. Without the necessity for a change of RE, the arguments around the RE fall away. ASIC had indicated it would extend KORDA MENTHA's licence as RE for a considerable time. This has not been taken into account in the compromise for citrus. It was not wishful thinking by growers - it was actioned and instigated
4. It is the same wording that was further vetted by legal experts and in place in the trust deed for debenture holders. No question as to the validity of that document has ever been raised.
5. It is also current in other current ongoing MIS agri industry projects who have adopted the same changes to their constitutions after seeking legal verification of the wording. Different legal opinions upheld the wording as being effective. It was adopted by these project RE's in order to protect growers rights and ensure continuation of the projects by growers should the RE fail. This indicates that this is not fanciful or wishful thinking but is effective legally. (Despite this Korda Mentha failed to notify ASIC of the constitutional change.)
6. There is no issue that the Constitution cannot be altered. Korda Mentha themselves had no issue with changing the constitution in relation to growers to allow them to sell the assets and extinguish the growers rights - even though it could be argued that it adversely affected the growers rights.
7. We therefore contend that the arguments about possible RE's is not even relevant in this case, where growers did initiate such a constitutional change and could act on it. It is irrelevant whether this could be done before or after the sale - the fact that its been done is evidence of growers intentions and progress.



**Much of the following information has not been considered by Counsel and other parties. Growers of both the citrus and olives object to the current compromise and seek to have the rights proceeding go ahead to air these arguments (the initial grounds for an appeal suggested by Clarendons would apply as arguments for citrus and olives with a number of other issues to be raised)**

### **Other issues raised by Other parties**

#### **A. GROWERS RIGHTS**

##### LEASE, LICENCE ANALYSIS

8. Little assessment of the actual citrus leases has been discussed in the advice to growers to determine the issues raised by Justice Justice Davies and we would want to run a rights proceeding to address this

##### CONTRACTUAL VERSUS PROPRIETARY RIGHTS

9. We contend that the narrow definition of rights by Justice Justice Davies does not accord with Justice Justice Robson's interpretation, taking into account his knowledge of the circumstances.
10. Nor was any of this argued by the banks, as it was assumed by both sides that growers rights took precedence - somewhat akin to having a lease of a shop in a shopping complex, owned by say, Stockland. The lease did not fall away just because Stockland failed as the complex owner - Stockland would just get replaced. And we had a willing RE for the citrus
11. In the case of Kangara, it's arguable that the RE for growers could simply have facilitated to by-pass the sub-lessors and inter-entities and deal directly with the land-owner/debenture holders Trustee. All rights would then have been preserved. That they chose not to, does not diminish the grower rights
12. Most of the appeal arguments raised regarding almonds apply to Citrus & Olives and we want the opportunity to rebut these in a fresh rights proceeding for citrus and olives. I will not go into detail on these issues, except to say that these same arguments on almonds would be proffered on citrus and we would want the opportunity to argue this in a rights proceeding prior to any compromise

##### DOCUMENTS SUPPORTING THE KNOWLEDGE OF THE GROWERS RIGHTS OVER ANY CREDITOR

13. The citrus growers head lease had a "lease" with references to "lessons" and "lessees" -language which clearly imputed a proprietary right not a contractual one and traced down to the sub lease and then growers.
14. The head lease, and sub leases contain multiple references to growers clearly reinforcing the growers rights - egg the Project sub leases and to TSL entering into

Occupancy Agreements with Growers mentioned under "Background", under definitions "occupancy Agreements" are clearly mentioned. many of the terminology is repeated in the documents

**15. Most importantly the lease, sub-lease and Licence states that TSL must "not create any encumbrances over the Solora Estate or existing Citrus lots ranking in priority to the interests of Participant Growers under this Agreement"**

**16. Banks signed Deed of Covenant reflecting the same aspect**

17. The mortgage document on the Kangara land also notes that this is subject to other documents, debenture holders documents and is traceable to the lease and growers rights.
18. The debenture holder deed also notes the rights of growers having precedent over those of the debenture holders. There was every indication that growers and other entities all understood that growers rights took priority over any others encumbrances
19. The solicitor for Timbercorp, Gideon Metzger also provided information to that effect in a letter to growers
20. Much of the same arguments can be said for olives

#### WATER RIGHTS

21. It refers to water - under definition of "lessee approvals" including licence and permits" includes the "lessee's works that incorporates trees, infrastructure including irrigation infrastructure, and other structural improvements" There are many other references to the licence - which refers to permanent water (nothing of a licence exists for temporary water.
22. Again many of the documents cross-reference to each other and what is true about almond projects has substance for olive and citrus growers albeit there are differences in the contracts

#### CAVEATS

23. Irrespective of the narrow definition of Justice Justice Davies, we contend that the fact that caveats were able to be applied and payments for removal of such, indicates that the banks also considered that growers had proprietary rights
24. This proprietary right was clearly evidenced by the fact that growers could initiate a caveat over the assets. In South Australia especially, caveats are not easily obtained. Growers had to get legal verification and approval with the signature of a lawyer to the effect that that this proprietary right existed, before any caveat would be acceptable to the Titles office. This was done by several different lawyers for several different growers - indicating it was not an isolated view. AAR used the very same lawyer used by a grower, evidencing their acknowledgement of that lawyers expertise in this type of matter and essentially growers rights

25. AAR & KORDA MENTHA were fully cognisant of all this and did not refute the rights of growers in any way.
26. AAR in fact paid monies to growers to remove the caveats, clearly indicating that growers had rights which in turn had value, albeit they never paid the full value. Under threat of legal action, growers gave in - they were unmatched to fight an organisation with deep pockets and huge resources - somewhat akin to greenmail.
27. Clarendons had also noted on their web-site at one point that this action was available. No disagreement to this was lodged.
28. Almonds, olives and citrus and eucalypts assets all had caveats lodged against them in various different states, further indicating that growers were considered by several states titles offices as having proprietary rights, including over water.

## **B. RESPONSIBLE ENTITY ISSUES**

### RE's MARKET

29. There was a number of interested RE's available and thus a market of possible RE's.
30. The TGG Committees met with around six RE's for Citrus and similarly for Olives,. We then undertook a selection process reducing down to the most favourable and selecting those that seemed to have the best credentials and conditions. Comparisons were done along with interviews, so it was not a mere hope. We were aware of the issue of liabilities and that was one of the selection criteria. We had found an RE for citrus and olives who did not raise this as an issue. This aspect has not been addressed by Counsel and is another reason that growers wish to run the rights proceedings for citrus and olives.
31. Most of this information has not been considered by Counsel

### REQUEST FOR LIABILITIES

32. We had on multiple occasions raised the question with Korda Mentha about the liabilities to get some certainty. KORDA MENTHA had the information when the Form 535 was collected from all potential creditors listing monies owed and had compiled a spreadsheet to that effect (Br). We repeatedly asked what those liabilities might be, with no answer.
33. They were in a perfect position to provide this information as they received monthly, quarterly and 6 monthly and annual reports from the farm managers in regard to continuing costs. The COI requested analysis of these costs by independent experts but this was never done despite repeated requests and offers for free analysis. Any liability would be clearly noted and analysed as a real and true cost. To date we still have no answer on this.
34. Information was difficult to obtain - growers lists, information on leases, licences etc was not readily available to growers, and was not available til years later. The ABL site even now is not comprehensive (eg 04 citrus growers info not available)

Unless one was a potential buyer, it was difficult to obtain such information for making assessments

35. Further KORDA MENTHA 's lawyers ABL had stated contrary views on the issue of the crop-sale agreement noting for the COI that there was no poison pill , but then stating the opposite to one RE. Such actions did not help the replacement RE's decisions

#### RE WILLINGNESS

36. Despite all this, RE's did replace KORDA MENTHA in both the mango and avocado projects - again not a mere hope but it actually eventuated.
37. The RE selected for citrus and olives were also equally willing to act.
38. In the case for Citrus, Fabal was threatened/blackKORDA MENTHAiled by a powerful PWC with their vast resources - just 2 hours prior to the meeting. They were threatened with a law suit for- "thwarting an imminent sale".
39. It eventuated that the sale was not really imminent taking some several months to be signed, but the threat was certainly posed months prior to this. it was nothing short of simply blackKORDA MENTHAail against a willing RE. We in fact contend that this was done to "thwart, not the sale but the very growers trying to replacing their RE and salvage the projects". This is clearly different from the position of an RE unwilling to run the projects due to liabilities.
40. Thus this is vastly different to the Almond case - the RE was willing, they were not reluctant.
41. They had already evidenced a record of willingness by taking over another Timbercorp project, the avocado scheme - clearly proving their willingness and history as a willing RE.
42. It was not just a theoretical pie in the sky, they had consented.
43. Furthermore they had put resources of both time and money into assessing the viability of the project and in being present at the various committee and grower meetings..

#### VIABILITY/CASHFLOWS

44. The CITRUS projects had been conducted for over 5 years and were well underway - and at the point of producing positive cash flows. Little, if any cash input would be required to continue the projects. Somewhat like the Avocado project, funding was not an issue as this was largely covered. This is vastly different to the almond case at hand.
45. No cash flows were ever considered by Clarendons and therefore the compromise figure is not compared to likely NPV's or anything measurable.
46. A likewise positive view of olives can be argued for much of the projects

#### FUNDING

47. The concern about growers not funding the projects is not an issue as overwhelmingly growers had indicated on - not just one, but several occasions that they were unified and would fund a restructure or continuation of the projects. The extent of our support is evidenced by the 86% of 2005 growers and 78% of 2004 growers who voted initially in February and again, later in August to finally in November change the RE - in order to facilitate any available opportunities to restructure. -This was an unheard of result, due to the difficulty in getting 50% of the total growers (not just a special resolution of 75% of the meeting). The only people not participating were either overseas, Timbercorp executives or simply uncontactable. The high level of response from growers, despite the time-lapse of some 19 months since administration illustrates the degree of grower interest. Further evidence of this support and interest has been communicated by
48. A survey which was conducted and which required a written response from growers (this was not just an easy telephone survey) 80% of citrus growers replied to say they were interested to participate in a proposal to own the citrus project assets
49. Previous surveys which showed keen grower interest - a 72% interest in a proposed almond assets and purchase following a survey in October 2009,
50. the ASIC survey, which are in July 09 showed 64% of growers were interested in paying monies to continue the project. This survey was conducted across all projects covering a total of some 18,000 growers.
51. The very strong response from growers who are not currently growers in the citrus project projects, but are keen to take up an interest in purchasing assets and continuing to participate in the agricultural industry .
52. A further indication of grower interest per se, illustrating the same high level of interest by growers. The real test of any interest is when it comes to pay. This has been tested with the issuing of invoices in the avocado project -where over 83% take-up/payment by growers in the Avocado project has occurred
53. the fact that we have been continually in touch with growers. over this timeframe is also further evidence of a very strong interest by growers
54. This is not just one indication but evidences a history of interest shown by growers in continuing the enterprise and owning the assets over a long timeframe.
55. Contrasting this that there has been no analysis or evidence from Korda Mentha or PwC that growers or debenture holders or others involved have any "appetite" for the PwC sale proposal.
56. The growers in the schemes are mainly mums and dads, not Collins Street farmers, with a large proportion of ownership held by self managed super funds , whose motivation to invest was not for tax (15% or 0 if in pension phase), but because they very much liked the aspect of having a different non- correlated asset class with an annuity type income stream that suited very much the long term timeframe of super funds. This aspect hasn't changed . Many had a real interest in supporting the

agricultural industry, and still do as evidenced by the support to date.

57. More importantly super funds are well known for being a very consistent and reliable source of funding. They are unlikely to default because of the consequences and risk to the funds assets

## RESTRUCTURE

58. Restructure is considered by Justice Davies as theoretical. However, there are a number of industry restructures of MIS projects that have taken place and been possible (AH, AI) - they are not just mere theory, but real proposals on very similar lines to the proposals that were on foot for olives & citrus. Therefore such reconstruction cannot be discounted as improbable or unlikely.
59. Obtaining growers consent to a restructure would not be unlikely as we had already proven that we had the numbers and support of the growers on the issue of changing the RE.-
60. Furthermore, whether it was a restructure or a continuation of the project, the issue of funding could be easily addressed. There was strong evidence of a developing market for sale of lots. Any defaulting growers lots could be sold to others at auction and another grower step in to continue funding, without jeopardising the entire project. These auctions had occurred on several occasions and as recently as 05, with a potential one planned at the time that Timbercorp went into liquidation.
61. A deepening secondary market was also developing with a number of institutional investors buying and selling these lots as a viable business enterprise outside of the auctions. They saw value in these lots and valued the longterm uncorrelated annuity like income stream.
62. Alternatively there is evidence of other types of solutions/restructure from other agri industry MIS schemes where the defaulting growers lots could be isolated to a particular area and simply leave those lots without any maintenance or upkeep costs applied. Financial and continuing growers with lots in this area would be reassigned lots in the land interests where maintenance was continued. This then avoided the issue of a shortfall
63. A variety of legal opinions concerning these restructures are further evidence that this could be done and was, in fact done
64. Rent adjustments/deferrals are also not mere theory but have been initiated both at the industry level in restructures and in continuing projects such as the Avocados run by FABAL and other industry agri projects (AI, AH). Changes to quarterly payments have been instigated in the industry with ongoing projects so is not mere theory. Again legal opinions supported these actions
65. Farm Management Fees are also negotiable or changeable, not just conjecture, and have been revised as evidenced in the case of Avocados run by FABAL and other industry projects (AI). There was a market of available farm operators as

evidenced by contracts to take over the farm management should the existing farm operator fail or refuse to continue.

66. In any case Crop sale agreements had been negotiated and similar arrangements could always be extended or adapted to a new manager. there was no reason to suspect farm operator would resign - they were utterly dependant on maintaining "category king" status and needed the crop to maintain their leadership
67. Senior management of Timbercorp were in the process of selling water in late 2008/early 2009, so the argument that an owner of this asset would not restructure and sell water is not valid. They were aware at that time that they would have had to compensate growers for the change to their rights to water under the contracts with growers. Therefore the water rights do have a value and should be considered in any calculations.

#### VALUATION MODELS

68. Valuation models have been proposed on a NPV valuation. However, there are letters from Timbercorp to growers evidencing and indicating a number of valuation models. One value -and particularly adopted for the early establishment years - was the cost value of the lots based on monies paid less tax. This was the transfer value used by many accountants and accepted by ATO. As many were owned by super funds the tax was minimal or non-existent if in pension phase
69. Justice Robson also proposed another method - that is the value of the land prior to growers projects versus the land value after growers projects were in place, including the water rights. This relates back to the first premise explained above
70. Discount values are very subjective and can vary enormously at any particular time. Korda Mentha's values reflect the discount rates shortly before the liquidation which is more realistic than using the current market rates in an economic downturn with risk awareness at an all time high after GFC. Timbercorp management also used discount rates that were reflecting this view (Dar)
71. Industry research suggests that discount values vary with the product which has not been analysed
72. Timbercorp had done calculations for growers of the sale value of their rights using current discount values which have not been considered.
73. Timbercorp auctions provide evidence that the grower rights have a value - this has not been considered
74. The Banks should apply that same analysis to their claim and prove their claim similarly.
75. The marriage difference appears not to have been discussed and citrus and olive growers would want the opportunity to debate this
76. Marketing operators such as Boundary Bend and Costa would pay a premium above the simple NPV calculations employed as their business was not just reliant

on owning the land. It was imperative to them to maintain control to negotiate supermarket margins that came with "category king" status. If that were lost to rival parties, their marketing operations were severely affected. This aspect has been ignored in calculations and is another reason that the rights proceedings should go ahead and the compromise not be accepted

## **OLIVES SPECIAL ISSUES**

### **SEPARATION OF ASSETS, SALE AND CONSEQUENCES**

77. Restructure could occur with Water being sold - as was evidenced by the actions of Boundary Bend. Therefore using this view as the point of valuation which equates to what actually did happen is more sound than a hypothetical view of continuation of the project holding the water asset
78. Separation of the assets into water, land and different products was clearly an industry option. It was a technique employed not just by Boundary Bend but by the industry for other sales. It was also applied by PWC for citrus on the basis that it would get a better sale value.
79. Thus, separation and sale of the assets could have been done for olives. The contracts mention the "water licence" that was contractually required to be in place by 15 august each year. Clearly this is a permanent water licence as no such "licence" with ongoing rights is awarded for temporary water purchases. The landlord contractually " was to avoid any actions that would prejudice the Sublessee's rights and growers rights under the licence agreement. " If permanent rights had been sold, and water rights were prejudiced, then a breach of contract might be envisaged and some means of compensation would be sought. This would impact on cash flow results . This has not been taken into account nor quantified with any comparative analysis to the compromise figure.
80. Senior management of Timbercorp were investigating the process of selling water in late 2008/early 2009, so the argument that an owner of this asset would not sell water is not valid. They were aware at that time that they would have had to compensate growers for the change to their rights to water under the contracts with growers. Therefore the water rights do have a value and should be considered in any calculations.
81. There was a lively trade in water at the time with companies such as Tandou, Vic super other water funds and the Commonwealth vying for the purchase. Evidence that the water was quickly and easily sold by Boundary Bend indicates a ready market and one can assume the same in any modelling.
82. Rent adjustments are also not mere theory but have been initiated both at the industry level in restructures ( AH) and in continuing projects such as the Avocados run by FABAL.



83. All this would effect the final likely cash flows and NPV values but this has not been analysed or put to the growers

### **PROJECTS ARE NOT ALL THE SAME - CITRUS & OLIVE GROWERS**

84. All projects are not the same. The structures do vary with each one and whilst there may be similarities, the total end picture can and is quite different.
85. his should be acknowledged without using blanket rules applying 5% of sale proceeds to all projects.
86. No viability analysis has been done by any judge to ascertain if these projects are different to the almonds. To lump them together is a gross injustice. To not hear the arguments for their viability is unjust
87. Different locations and different farm properties yield different results.
88. Different produce yield different results - citrus, olives and almonds have very different factors. Different discount rates would apply and other valuation methodology might be more appropriate
89. Different marketers, their marketing and distributions yields different results.
90. Different operating costs yield different results
91. Different factors in the contracts yield different results. Different structures yield different results and inter-entity relationships
92. Different constitutions yield different results
93. Different arguments can be mounted for each project, yielding different results
94. Lumping them altogether simply does not do justice to the outcomes to growers
95. Olives and Citrus should have the same opportunity as Almond growers to present their significantly different arguments regarding the growers rights

### **IN SUMMARY**

#### **CITRUS**

96. Citrus growers do not need to run the almond appeal, they can debate the rights in their own proceeding and address and rebut the issues raised in the almond case to date
97. Growers should have the opportunity to address and rebut the points raised in the appeal arguments especially in regard to the narrow application of proprietary rights and Justice Robson's view
98. More importantly, the issues around a willing RE to continue the projects is not relevant as there was no need to immediately change the RE to issue invoices and

preserve growers rights . Changing the constitution could give effect to growers requests. This was consequently done for Citrus - this was initiated before the sale, but could not be finalised until shortly after the sale as a direct result of the thwarting actions of the liquidators. However it was passed, indicating grower resolution to implement it

99. Citrus in particular differs from almonds in that

- The citrus scheme had a willing RE for the projects who had the votes and had consented prior to the sale of the Kangara assets
- The RE did not impose any conditions. No issues with S601FS & FT concerned the RE
- The RE included all projects with no exceptions.
- The RE had unilateral support from a huge number of growers evidenced by the votes
- The RE had already analysed the viability of the schemes and believe that it could be successfully continued. They did not require funds for a further analysis
- They had a history and record of continuing projects successfully. They were able to successfully negotiate with landlords and farm operators
- Any funding would be met by willing and consistently keen growers who had indicated their interest in reconstruction and/or continuing the project
- Any defaulting growers could be addressed by either the usual action with defaulters through the 1) auction process; or 2) institutional and secondary market players might purchase the lots; or 3) a part of the property would be sectioned off, left fallow and unmaintained whilst continuing growers would be reallocated to the continuing project land.
- Crop-sale agreements addressed the interim funding issues and contained no poison pills and could be very likely continued as there is very little lag between income and expenses. In any case the project would be cash positive within months
- There was a market for farm operators should that pose a problem, and who had consented to such and were willing to step in
- There was a "pass through" basis for continuing the rental lease. There was strong evidence of a willing land-owner in the debenture holders, as evidenced by the many discussions with them as well as the potential buyers of the properties and the farm operators
- No changes to the assumptions would still see the project viable

OLIVES -

100. Similar arguments stand for olives
101. Importantly the RE selected by the TGG Committee has been totally ignored and not even been considered yet was available . The olives growers should have the opportunity to have this aired and argued

## **FURTHER ISSUES**

### **S568 B DISCLAIMER OF ONEROUS LEASES**

102. This is in process of being further appealed by Willmott and provides another reason for olive and citrus growers to have the opportunity to argue their specific points. The viability and the grossly out of proportion effects of the disclaimer are points to be raised

### **NO ALTERNATE/CONTRARY VIEWS AIRED & CRITICAL INFO MISSING**

103. Critical cash flow analysis is missing on citrus and further analysis for olives and different scenarios. Debate as to these pros and cons is therefore also missing.
104. No information is given about the basis for agreeing to the compromise - why should it be on a seeming proportion of sale proceeds - why not on the basis of the investment made by growers or some other point?
105. This time we want our voice heard and the truth known. We will answer and provide any evidence that might be required, and seek any guidance in this respect, not being lawyers

### **ACCESS TO INFORMATION**

106. As chairperson of the Committee, I am also in regular email and/or telephone contact with approximately 1,800 financial advisers and accountants who obtain views from their grower clients and communicate them to me. We have a database covering over 80% of olive growers and 96% of citrus growers with whom we are in contact.
107. Many have complained about the complicated process to get information and the lack of detail and simple explanation of the Clarendon/Counsel position. A meeting rather than this Q&A or phone contact with the opportunity to hear and debate the pros' and cons of the matter and provide a better understanding of the issues has been demanded
108. Further KORDA MENTHA & Clarendons have not tested the water by asking for positive feedback, but rather taken the default position - if no objection then it is understood that growers agree. We suggest the opposite view should be taken.

### **NO URGENCY**

109. As there is no pressing urgency, no crops are about to die ( as if they ever were with crop sale agreements in place) we request that the olive and citrus proceedings regarding growers entitlements are dealt with separately with appropriate representation as to the various issues that are peculiar to these projects and products

#### GROWERS APPETITE FOR RISK

110. There has been much talk about "the best interests of the growers." The growers, unlike counsel however are not conservative and did not chose certainty when investing in agriculture - one of the most volatile investments of all - in that it varies greatly from the standard mean, much like equities. However, over long-term time frames the probability of a loss in such volatile assets approaches zero according to actuaries. Adding to this, this asset class is very much uncorrelated to other assets classes and is regarded as aiding the diversity and minimising the risks of a model portfolio.
111. Thus, many of us took a calculated risk with these investments. Many appreciated the issues after reading in the PDS about the various risks that we might face - of climate, pest, water, AUD dollar, price variations, operating costs variations etc (forgetting here the issue of the one risk generally not highlighted of the RE going into liquidation and the liquidators actions)
112. Many want their day in court to argue the differences that exist between almond growers and citrus and olives

FILED BY KERREE BEZENCON

28TH SEPTEMBER 2012

CHAIR FOR TGG CITRUS & OLIVE COMMITTEE INC