

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

List D

No. S CI 2011 6777

BETWEEN

FENCEPORT PTY LTD (ACN 139 604 121) & ORS (according to the attached  
Schedule)

Plaintiffs

and

CON MOSHOPOULOS & ORS (according to the attached Schedule)

Defendants

THIRD AFFIDAVIT OF CELIA JANE ARMSTRONG

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Date of document:	19 September 2012
Filed on behalf of:	the First, Second, Third, Fourth and Fifth Defendants
Prepared by:	
Clarendon Lawyers	Tel: 03 8681 4400
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I, **CELIA JANE ARMSTRONG** of Level 17, Rialto North Tower, 525 Collins Street, Melbourne, make oath and say that:

- 1 I am an employee of the firm Clarendon Lawyers Pty Ltd (**Clarendon Lawyers**), the solicitors for the First, Second, Third, Fourth and Fifth Defendants, being the Representative Growers in this proceeding. Subject to the supervision of my principal, Michael Fernon, I have the carriage of this matter on behalf of the Representative Growers and I am authorised to make this affidavit on their behalf.
- 2 Except where otherwise indicated, I make this affidavit from my own knowledge. Where I depose to matters from information or belief, I believe those matters to be true.
- 3 This is my third affidavit in connection with the application for approval of the Deed of Compromise entered into by the parties to the proceeding and TSL on 25 July 2012 (**Deed of Compromise**). My first and second affidavits were each sworn on 30 August 2012 and filed in this proceeding on that day. They were headed, respectively, "Affidavit of Celia Jane Armstrong" and "Second Affidavit of Celia Jane Armstrong" and I adopt that terminology in this affidavit. Except where otherwise stated, defined terms used in this affidavit have the meaning ascribed to them in my earlier affidavits.
- 4 The Deed of Compromise is exhibit CJA-4 to the Second Affidavit of Celia Jane Armstrong filed in this proceeding on 30 August 2012.
- 5 Pursuant to clause 9(b) of the Deed of Compromise the Representative Growers requested that TSL establish and, in the period 14 August 2012 to 14 September 2012, operate effectively an appropriate telephone hotline facility and email facility to receive and, in accordance with instructions from the Representative Growers, address comments and questions from growers in connection with the Deed



of Compromise and the Approval Application and receive any objections to the Deed of Compromise made by the growers (**Grower Notification and Consultation Process**).

- 6 Pursuant to clause 9(c) of the Deed of Compromise, in respect of the growers who raised comments, questions or made objections, TSL was required to record in appropriate detail the identity of those growers, the comments and questions raised by those growers and the responses provided to those growers and any objections made by those growers and any response provided in relation to those objections.
- 7 Pursuant to clause 9(e) of the Deed of Compromise, TSL was required to provide the Representative Growers, on a timely basis, a record with appropriate detail, of:
- (a) all comments, questions and answers given by TSL in accordance with the protocol agreed pursuant to clause 9(d) of the Deed of Compromise, which did not require preparation of a response by the Representative Growers;
  - (b) all comments and questions requiring preparation of a response from the Representative Growers;
  - (c) any objections by the Growers to which TSL has provided a response in accordance with the agreed protocol; and
  - (d) any objections requiring the preparation of a response by the Representative Growers.
- 8 The details of how TSL conducted the Grower Notification and Consultation Process and complied with its obligations under clause 9 of the Deed of Compromise are set out in the Affidavit of Mark Anthony Korda (*Fenceport Rights Proceeding*) sworn on 18 September 2012 in relation to this proceeding. That affidavit explains, among other things, that TSL prepared what Mr Korda refers to as a "Communication Spreadsheet" which recorded details of all telephone and email communications with Growers for a particular day during the course of the Grower Notification and Consultation Process (**Communication Spreadsheets**) and exhibits the Communication Spreadsheets as confidential exhibit MAK-6.
- 9 During the Grower Notification and Consultation Process I received regular emails from Antony Munro of KordaMentha, on behalf of TSL, attaching the Communication Spreadsheets. I received Communication Spreadsheets for 14-17 (inclusive), 20-24 (inclusive) and 27-31 (inclusive) August 2012 and 3-7 (inclusive), 10-14 (inclusive) and 17 September 2012.
- 10 In accordance with clause 9(d) of the Deed of Compromise, TSL referred to Clarendon Lawyers the comments, questions and objections in respect of which it was unable to respond and in respect of which Clarendon Lawyers, on behalf of the Representative Growers, was to prepare an appropriate response. In this affidavit I refer to the requests, comments or objections passed onto Clarendon Lawyers collectively as **Escalated Queries and Comments**.
- 11 TSL also referred to Clarendon Lawyers any requests for a copy of the advice prepared by Counsel for the Representative Growers in respect of the Deed of Compromise. In my first Affidavit of Celia Jane Armstrong I exhibit the Advice, being the original advice prepared by Counsel, the Updated Advice, being than updated version of the Advice and the Supplementary Memorandum prepared by Counsel



as confidential exhibits CJA-1, CJA-2 and CJA-3 respectively. In this affidavit I generally refer to the Updated Advice and the Supplementary Memorandum as the '**Advice**'.

- 12 Alexandra Gleed, a graduate employed by Clarendon Lawyers has assisted me in managing the Escalated Queries and Comments. To manage this process, I asked Ms Gleed to prepare extracts of the Communication Spreadsheets which included only the Escalated Queries and Comments (**Escalated Queries and Comments Call Sheet**).
- 13 On behalf of the Representative Growers, I responded, or caused responses to be sent, to any Escalated Queries and Comments that required a response. Details of any responses were recorded in the Escalated Queries and Comments Call Sheet. The Escalated Queries and Comments Call Sheet also records various comments which did not require response but which the Representative Growers consider it appropriate to bring to the attention of the Court. Now produced and shown to me marked **confidential exhibit CJA-9** is a true copy of the Escalated Queries and Comments Call Sheets together with copies of any related emails with growers.
- 14 Exhibit CJA-9 is sealed. The Escalated Queries and Comments Call Sheets contain personal information of growers and the Representative Growers will seek orders that CJA-9 remain confidential.

#### **Results of the Grower Notification and Consultation Process**

- 15 I have read the Communication Spreadsheets and set out below an overview of all communications received from Growers as noted on the Communication Spreadsheets:
- (a) a total of one hundred and thirty-seven (137) growers have made comments, questions or objections in relation to the Deed of Compromise;
  - (b) seventy (70) growers requested the First Letter to Growers, Notice to Growers, Frequently Asked Questions, Bank Account Nomination Form and/or Direction to Pay be emailed or posted to them;
  - (c) twenty-seven (27) growers requested information in relation to the particulars of their investments, such as how many lots they had invested in or which scheme they had invested in;
  - (d) twenty-three (33) growers requested financial information, such as how much they were entitled to under the Deed of Compromises or how much TSL or TFL indebtedness they had;
  - (e) thirty-seven (37) growers returned their Bank Account Nomination Form and/or their Direction to Pay to TSL;
  - (f) thirteen (13) growers requested more information about the Deed of Compromise in general;
  - (g) six (6) growers notified TSL of a change of address or change of contact details; and
  - (h) eleven (11) growers made Escalated Queries or Comments (as addressed further in paragraph 16 below).
- 16 I have read the Escalated Queries and Comments Call Sheet and set out below an overview of all communications received from Growers as noted on that document (paraphrasing):



- (a) On 14 August 2012 a grower emailed TSL requesting a "brief" from Clarendon Lawyers explaining the compromise. I replied to the grower's request by return email on 16 August 2012 summarising the compromise and the proceedings on foot. On 16 August 2012 I received a return email from the grower questioning their entitlement to water rights in relation to the 2002 olive project. On 16 August 2012 I responded to the grower's question by return email informing the grower that they did not own the water licences and that for the purposes of the compromise the amount offered is in satisfaction of any claim that growers have in relation to the water rights.
- (b) On 14 August 2012 a grower called TSL and commented that they did not think the compromise was worth accepting as 5% of the sale proceeds was not enough.
- (c) On 16 August 2012 a grower called TSL and commented that the amount received under the compromise was a pittance and that the grower would be prepared to pay a rudimentary sum to continue as a grower and to continue to receive harvest funds. I responded to the grower by return call on 20 August 2012. The grower outlined that they had received payments as recently as March 2012. We discussed the matters relevant to saving the scheme for the growers and I indicated to the grower that the window of opportunity to save the schemes had closed.
- (d) On 20 August 2012 a grower emailed TSL and commented that they are happy with the outcome reached in the compromise and want the compromise to proceed.
- (e) On 20 August 2012 a grower emailed TSL and commented that they had no objection to the proposed compromise arrangements.
- (f) On 20 August 2012 a grower called TSL and commented that they were very happy with the compromise.
- (g) On 20 August 2012 a grower emailed TSL and raised their concerns that unpaid management fees owed to Timbercorp should not be paid as they were incurred whilst Timbercorp was insolvent. I responded to the grower's concern on 21 August 2012 by calling the grower. During our conversation:
  - (i) we discussed the grower's concerns and thoughts generally;
  - (ii) the grower asked whether TSL would provide a receipt for any payment of the settlement amount.

On 21 August 2012 I emailed Jane Sheridan of Arnold Bloch Leibler about the grower's question regarding a receipt. On 22 August 2012 Jane Sheridan replied to my question by return email stating that the next statement the grower received from TFL or TSL would show the payment of any settlement money has been credited against any amount owing. Later that day I caused an email to be sent to the grower informing the grower that TSL would notify growers that their entitlement had been dealt with in accordance with the Deed of Compromise and informing the grower that they would need to seek their own taxation advice.



- (h) On 20 August 2012 a grower called TSL and asked if there was any opportunity to opt out of the compromise. The grower did not wish to have their call marked as escalated.
  - (i) On 20 August 2012 a grower emailed TSL seeking a response to whether once the compromise is accepted whether that completely winds up Timbercorp. I responded to the grower's question by return email on 28 August 2012 and outlined to the grower that the simple answer was "no". The compromise relates only to the growers' (and other parties') claims to share in the proceeds of sale of the assets used to run the relevant schemes (including the land upon which the schemes were run). As for the winding up of the Timbercorp companies, I informed the grower that process is ongoing, however, I informed the grower further that Clarendon Lawyers could not speak to the winding up as we did not act for Timbercorp or its liquidators. I said to the grower that there may be some matters between Timbercorp and the growers outside the terms of the compromise which will be ongoing.
  - (j) On 21 August 2012 a grower called TSL and commented that they were happy to receive something from the compromise.
  - (k) On 12 September 2012 a grower emailed TSL and noted their objection to the Compromise. On 17 September 2012 I emailed the grower requesting whether the grower wished to maintain their objection and if so, whether they would like to make any additional points know to the Court. On 17 September 2012, I received a return email from the grower, in which the grower responded that they would like to maintain their objection.
- 17 On 18 September 2012 Jane Sheridan forwarded to me an email from a grower that was sent to TSL. The grower's question was directed to Clarendon Lawyers and attached an email that the grower had received from another grower encouraging the recipient to object to the compromise. The grower asked if the email they had received was related to the proceedings. By return email on the same day I informed the grower that the email had been sent to them by another grower who is involved in various grower groups which are not related to Clarendon Lawyers. I further informed the grower that the emailed they had received had not been sent or authorised by Clarendon Lawyers or the Representative Growers an invited the grower to contact me to discuss the matter further. The grower has not contacted me again.

#### **Advice**

- 18 At paragraph 7 of the first Affidavit of Celia Jane Armstrong filed and served on 30 August 2012 I refer to the Supplementary Memorandum of advice from counsel to the Representative Growers. The Supplementary Memorandum was provided to the Representative Growers by email on 29 August 2012.
- 19 I have reviewed the Advice and confirm that Clarendon Lawyers agrees with its contents.

**Deed of Covenant**

20 On 8 March 2005 the Commonwealth Bank of Australia (**CBA**) entered into a Deed of Covenant which provided, *inter alia*, that the CBA was only entitled to exercise its rights under its security subject to the rights of the Growers. Now produced and shown to me marked **CJA-10** is a true copy of the Deed of Covenant.

SWORN by CELIA JANE ARMSTRONG )

at Melbourne in the State of Victoria )

this 19<sup>th</sup> day of September 2012 )

Before me:.....

**SARAH DORN**  
of Clarendon Lawyers Pty Ltd  
Level 17, Rialto North Tower  
525 Collins St, Melbourne Victoria 3000  
an Australian Legal Practitioner within the  
meaning of the *Legal Profession Act 2004*

## **SCHEDULE**

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

**BETWEEN**

**FENCEPORT PROPRIETARY LIMITED (ACN 139 604 121)**

First Plaintiff

**OLIVECORP LAND PTY LTD (IN LIQUIDATION) (ACN 090 141 512)**

Second Plaintiff

**MARK ANTHONY KORDA**

**(in his capacity as liquidator of Olivecorp Land Pty Ltd (in liquidation))**

Third Plaintiff

**MARK FRANCIS XAVIER MENTHA**

**(in his capacity as liquidator of Olivecorp Land Pty Ltd (in liquidation))**

Fourth Plaintiff

**CON MOSHOPOLOUS**

**(in his capacity as a Grower in the 2000 Timbercorp Olive Project (Private Offer)  
(Unregistered))**

First Defendant

**PAULINE EMMA HAMMER**

**(in her capacity as a Grower in the 2001 Timbercorp Olive Project (ARSN 094 382 082))**

Second Defendant

**DAVID SYDNEY BUTTERFIELD**

**(in his capacity as a Grower in the 2002 Timbercorp Olive Project (ARSN 098 233 455))**

Third Defendant

**GRAHAM GOLDENBERG**

**(in his capacity as a Grower in the 2003 Timbercorp Olive Project (ARSN 104 648 473))**

Fourth Defendant

**SHUN KING LI**

**(in his capacity as a Grower in the 2004 Timbercorp Olive Project (ARSN 108 744 378))**

Fifth Defendant

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

List D

No. S CI 2011 6777

BETWEEN

FENCEPORT PTY LTD (ACN 139 604 121) & ORS (according to the attached  
Schedule)

Plaintiffs

and

CON MOSHOPOULOS & ORS (according to the attached Schedule)

Defendants

EXHIBIT NOTE

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Date of document:	19 September 2012
Filed on behalf of:	the First, Second, Third, Fourth and Fifth Defendants
Prepared by:	
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525 Collins Street	Solicitors Code: 101294
MELBOURNE VIC 3000	Ref: MJF:1000182
	michael.fernon@clarendonlawyers.com.au

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This is the exhibit marked "**CJA-10**" now produced and shown to **CELIA JANE ARMSTRONG** at the time of swearing her affidavit on 19 September 2012.

Before me:.....

**SARAH DORN**  
of Clarendon Lawyers Pty Ltd  
Level 17, Rialto North Tower  
525 Collins St, Melbourne Victoria 3000  
an Australian Legal Practitioner within the  
meaning of the *Legal Profession Act 2004*

**Exhibit CJA-10**

**Deed of Covenant**

Bourke Place  
600 Bourke Street Melbourne VIC 3000  
GPO Box 9925 VIC 3001  
Tel (03) 9672 3000  
Fax (03) 9672 3010  
www.corrs.com.au

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WESTGARTH**  
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Perth  
Canberra  
Gold Coast

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Commonwealth Bank of Australia

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The Beneficiaries

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# Deed of Covenant

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- 8 MAR 2005

**Date**

## Parties

**Commonwealth Bank of Australia** ABN 48 123 123 124 of Level 14, 385 Bourke Street, Melbourne, Victoria (**Lender**)

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## Agreed terms

### 1 Interpretation

#### 1.1 Definitions

In this document:

**Beneficiaries** means:

- (a) each Grower;
- (b) Timbercorp Securities Limited ABN 12 092 311 469 on behalf of the Growers for which it acts as Responsible Entity under any Project; and
- (c) Olivecorp Management Ltd ACN 089 542 343 on behalf of the Growers for whom it acts as a representative under any Project, and on behalf of the Growers for which it acts as project manager under any Project.

**Borrowers** means Olivecorp Land Pty. Ltd. ABN 36 090 141 512 and Olivecorp Processing Facility Pty. Ltd. ABN 58 098 581 081.

**Controller** has the meaning given in the *Corporations Act 2001*.

**Facility Agreement** means the facility agreement between the Lender and the Borrowers, dated on or about the date of this document.

**Guarantor** means each person (other than the Borrower, the Lender or a related body corporate of the Lender) who has provided to Security.

**Grower** means each person who has participated in any Project.

**Growers' Rights** means:

- (a) in respect of existing Growers, all of their present rights and interest under the Project Documents and any other rights and interests under the Project Documents which are on terms consented to in writing by the Lender; and
- (b) in respect of future Growers, all of their rights and interests which are on the same terms as the rights and interest of Growers under the Project Documents as at the date of this document and any other rights and interests under the Project Documents which are on terms consented to by the Lender in writing,

in each case to the extent that those rights are in respect of the Secured Property.

**Security** means any Security Interest granted to the Lender to secure the obligations of the Borrowers under the Facility Agreement (and includes any rights of set off, lien over funds or combination).

**Security Interest** means any interest or right which secures the payment of a debt or other monetary obligation or the compliance with any other obligation. It includes any retention of title to any property and any right to set-off or withhold payment of any deposit or other money.

**Secured Property** means any property subject to a Security.

## 1.2 Terms used

Terms used but not defined in this document have the meaning given to them in the Facility Agreement.

## 1.3 Construction

Unless expressed to the contrary, in this document:

- (a) words in the singular include the plural and vice versa;
- (b) if a word or phrase is defined its other grammatical forms have corresponding meanings;
- (c) "includes" means includes without limitation;
- (d) no rule of construction will apply to a clause to the disadvantage of a party merely because that party put forward the clause or would otherwise benefit from it;
- (e) a reference to:
  - (i) a person includes a partnership, joint venture, unincorporated association, corporation and a government or statutory body or authority;
  - (ii) a person includes the person's legal personal representatives, successors, assigns and persons substituted by novation;
  - (iii) any legislation includes subordinate legislation under it and includes that legislation and subordinate legislation as modified or replaced; and
- (f) headings do not affect the interpretation of this document.

## 2 Covenants by the Lender

- (a) The Lender acknowledges, covenants and agrees in favour of all of the Beneficiaries that:
  - (i) notwithstanding any other provisions of this document, the Transaction Documents or any Project Document, it takes the

Security, and is and will be only entitled to exercise its rights under the Security, subject to all of the Growers' Rights;

- (ii) if the Lender enforces any of its Security then if the Lender, or any Controller appointed by the Lender to any party who has granted a Security, decides (in its absolute discretion) to adopt any or all of the Project Documents, then the Lender will ensure that the Lender or the Controller (as the case may be) complies with, observes and performs the obligations of the relevant Borrower or Guarantor (as the case may be) under each Project Document which has been adopted;
  - (iii) if a Project Document adopted by the Lender or any Controller includes an agreement under or in respect of which management fees are payable by a Grower (**Management Agreement**), then the Lender or the Controller (as the case may be), in their absolute discretion (but without limiting their respective obligations under paragraph (ii)), must first make any management fees received during or after the enforcement of any Security available to either:
    - (A) the relevant Timbercorp manager to the extent reasonably required to satisfy or perform (or procure the satisfaction or performance of) that manager's obligations under the relevant Management Agreement (after which any surplus remaining may be applied in or towards payment of the Amount Owed); or
    - (B) the Growers who paid them; and
  - (iv) if, during or after the enforcement of any Security, the Lender or any Controller receives management fees relating to a Management Agreement that it has not adopted, it must repay those fees (or procure their repayment) to the Growers who paid them.
- (b) Nothing in this Deed requires the Lender or any Controller appointed by the Lender to pay money to any Grower, except to the extent required under any Project Document adopted pursuant to **clause 2(a)(ii)** or **clause 2(a)(iii)**.

### 3 General

#### 3.1 Governing law and jurisdiction

- (a) This document is governed by and is to be construed in accordance with the laws applicable in Victoria.
- (b) Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Victoria and any courts which have jurisdiction to hear appeals from any of those courts and waives any right to object to any proceedings being brought in those courts.

Executed as a deed.

SIGNED for and on behalf of )  
COMMONWEALTH BANK OF AUSTRALIA )  
ACN 123 123 124 by its attorney )

*TIMOTHY BLACKMORE*

under power of attorney dated 17 November )  
1997 who certifies that he/she is )

of COMMONWEALTH BANK OF )  
AUSTRALIA in the presence of: )

COMMONWEALTH BANK OF AUSTRALIA  
by its attorney



Signature of Witness