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

Not Restricted

LIST E
No. 10699 of 2009

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

Plaintiff

v

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

Defendants

JUDGE:	Davies J
WHERE HELD:	Melbourne
DATE OF HEARING:	14-17, 21-24 and 28 February, and 1, 21-22 March 2011
DATE OF JUDGMENT:	15 June 2011
CASE MAY BE CITED AS:	BOSI Security Services Limited v Australia and New Zealand Banking Group Limited & Ors
MEDIUM NEUTRAL CITATION:	[2011] VSC 255

MANAGED INVESTMENT SCHEMES – Horticultural schemes for the cultivation of almonds – Investment in scheme gave rights to use orchards and land owned by Timbercorp Group – Companies in Timbercorp placed in liquidation – Liquidators to sell orchards and land unencumbered by any interest – Land and orchards subject to mortgages and securities – In earlier proceedings Court gave direction authorising the liquidators to proceed with sale of schemes – Court directed proceeds to be placed into trust pending rights proceeding – Fund created out of sale proceeds – Orders preserving rights of claimants to assert entitlement to a share of the net proceeds – Question of entitlement reserved to Rights proceeding – This is the Rights proceeding – Competing claimants are the investors on the one hand and the secured creditors on the other – Part 5C of the *Corporations Act 2001* (Cth) – *Corporations Act 2001* (Cth) ss 601FA, 601FJ, 601FL, 601FM, 601FN, 601FQ, 601FS, 601FT

APPORTIONMENT – Principles to be applied to determine the extent of the respective interests in the fund – Rights of a proprietary nature must be shown to the assets – Contractual rights insufficient to establish entitlement to share in proceeds – Basis for apportionment of interests in the fund to be measured by the respective proprietary interests in the fund – Rights to the assets sold must be founded in property rights – Measure of apportionment to be determined by the value of property rights pre-extinguishment

NATURE OF GROWERS RIGHTS – Those investors with rights to use and occupy assets under licence contractual in nature – Whether rights of use and occupation granted under lease proprietary in nature – Whether leasehold interest in land only or whether leasehold interest extends to the orchards, capital works and water licenses – Question of construction of lease – Principles to be applied to construction of leases – Leasehold interest in the orchards and capital works – Contractual licence in relation to water licences

VALUATION – Projects unviable under their existing structures – Whether opportunity for projects to be restructured if rights not extinguished – Opportunity to be shown on the balance of probabilities – Value of opportunity to be determined on evaluation of the degree of likelihood of projects if restructured continuing to full term – Opportunity of restructure mere hope – No value established in relation to proprietary rights of investors extinguished

EVIDENCE – Expert opinion – Experts' duty to the Court – Role of expert in provision of independent, objective and impartial assistance to the Court – Expert as advocate – Admissibility of Evidence – *Evidence Act 2008* (Vic) s 79

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr P.E. Anastassiou SC Mr R.G. Craig Ms K.E. Foley	Blake Dawson
For the First Defendant	Mr A.C. Archibald QC Ms W.A. Harris SC	Allens Arthur Robinson
For the Second to Fourth Defendants	Dr O. Bigos	Arnold Bloch Leibler
For the Fifth to Eighth Defendants	Mr G.T. Bigmore QC Mr S. Hopper	Clarendon Lawyers

TABLE OF CONTENTS

HER HONOUR:

A. INTRODUCTION

1 The Timbercorp group of companies went into administration on 23 April 2009. On 29 June 2009, the creditors voted at their second meeting[1] for the companies to be wound up and the companies, which included the second defendant ("AL"), were placed into liquidation. The third and fourth defendants ("the liquidators"), who had been the administrators of the companies, were appointed as the liquidators.

2 Before liquidation, the Timbercorp group had established, managed and operated several horticultural managed investment schemes. These schemes had included managed investment schemes for the cultivation and harvesting of almonds for commercial gain. Five of the schemes (collectively "the Almond Projects") had used commercial almond orchards established by AL on its land, which AL made available for the purposes of the projects. Investors in these projects ("growers") subscribed for interests in "Almondlots", which carried rights to use and occupy AL's orchards for the terms of the projects of which they were members ("the growers' rights").

3 All of the Almond Projects had many years left to run when the Timbercorp group went into external administration but the insolvency of the Timbercorp group had the consequence that the Timbercorp companies could not continue their involvement in the projects. The liquidators brought the projects to an end when they extinguished the growers' rights on 2 December 2009 so that they could sell AL's land, almond trees and water licences ("the Almond Assets") free of any encumbrance on title. As the plaintiff ("BOSI") and the first defendant ("ANZ") (collectively "the banks") held securities over the Almond Assets for loan facilities given by them, the banks also had to give releases and discharges of those securities.

4 Competing claims to the net proceeds were made. The growers claimed an entitlement to a share of the sale proceeds measured by the value of their rights that were extinguished by the liquidators. The banks asserted their rights as secured

---

1 *Corporations Act 2001* (Cth) s 439A.

creditors. Due to the competing claims, the net proceeds have been held by the liquidators in an interest bearing account since 2 December 2010 pursuant to a court order pending a court proceeding ("the Rights Proceeding") to determine which person or persons has rights to the whole or any part of the net proceeds.

5 The court order was made by Robson J for reasons published in *Re Timbercorp Securities Ltd (In liq)(No. 3)*.[2] Before settlement, the liquidators had applied to the Court for directions that they were justified in proceeding with the sale and the extinguishment of the growers' rights. Robson J gave those directions but required the sale proceeds to be placed into trust pending the Rights Proceeding. Robson J also made orders to the effect that neither the release of the banks' securities upon completion of the sale contract, nor the extinguishment of the growers' rights would prejudice those parties' respective rights to the assets sold - insofar as they had such rights - for the purposes of making a claim to all or any part of the net proceeds.

6 This is the Rights Proceeding. The claimants are the banks on the one hand and the growers on the other hand. The liquidators do not claim any portion of the net proceeds as it was common ground that the net proceeds of sale were insufficient to repay the balances outstanding under the facilities from the banks secured by the Almond Assets.

7 In this proceeding, the growers have claimed that their rights were valuable just before they were extinguished which entitles them under the orders of Robson J to receive the measure of their value out of the net proceeds held in trust. They have also claimed priority of payment over the banks by reason of Deeds of Covenants under which the banks covenanted that they took their securities, and were only entitled to exercise their rights under their securities in respect of the secured property, "subject to all of the Growers' Rights",[3] which were defined in the deeds to mean:

> ... all of their present rights and interests under the Project Documents and

---

2 (2009) 74 ACSR 626.

3 Deeds of Covenant, Cl 2(a)(i).

any other rights and interests under the Project Documents.[4]

"Project Documents" was a reference to the constituent documents governing the Almond Projects.[5]

8 The banks have not disputed that the Deeds of Covenant operate to give the growers priority of payment out of the net sale proceeds, if and insofar as the rights of the growers that were extinguished were property rights in the assets sold holding a measure of value at the time of extinguishment. However, they disputed that the growers held any rights of that nature or that if they did, that their rights held any value at the time they were extinguished.

B. PRIMARY ISSUES FOR DETERMINATION

9 The primary issues for determination in the Rights Proceeding are:

(a) the intent and effect of the orders of Robson J in *Re Timbercorp Securities Ltd (In liq)(No. 3)*.[6] The issue is whether Robson J reserved to the Court in the Rights Proceeding the task of valuing the pre-extinguishment rights and interests of the growers and the banks in the assets sold in order to determine the division of the net proceeds between them, as contended for by the growers, or whether it was incumbent on both claimants to establish rights of a proprietary nature in the assets that were sold in order to found an entitlement to share in the net proceeds, as contended for by the banks;

(b) if rights of a proprietary nature in the assets sold must be shown to found the entitlement, whether the project arrangements gave the growers any proprietary interest in those assets;

(c) given that the projects could not continue under the Timbercorp structure, whether the growers' rights held any value just before they were extinguished; and

---

4 Ibid, Cl 1.1.
5 Ibid, Cl 1.1.
6 (2009) 74 ACSR 626.

(d) if so, the value to be ascribed to those rights.

10 The banks did not raise any issue for determination in this proceeding concerning the priority of payment as between them. The banks have agreed to determine that issue separately, if it becomes relevant and necessary.

C. BACKGROUND

11 The background to the dispute explains how the issues arise.

12 The Timbercorp group had been in the business of agribusiness investment. The group's primary business activities were the establishment, development, marketing and management of primary industry based projects, the acquisition of land, water rights and infrastructure and the provision of finance to investors in projects. Timbercorp Ltd ("TL") was the parent entity of the Timbercorp Group and a publicly listed company on the Australian Securities Exchange. At the time that the Timbercorp group was placed under administration, the group had thirty three managed investment schemes registered with the Australian Securities and Investments Commission ("ASIC") under Part 5C of the *Corporations Act 2001* (Cth) ("the Act"). Timbercorp Securities Ltd ("TSL"), a wholly owned subsidiary of TL and the holder of an Australian financial services licence,[7] was the responsible entity ("RE") of these schemes. It was charged with the responsibility of operating the schemes and performing the functions conferred on it by the schemes' constitutions as prescribed by s 601FB of the Act. These schemes included four of the five Almond Projects which are the subject of this proceeding, namely the 2002, 2005, 2006 and 2007 Almond Projects (collectively "the registered projects"). The Timbercorp group also managed private offer investment schemes that were not required to be registered under Part 5C of the Act nor required to be operated by an RE. Those schemes included the other Almond Project the subject of this proceeding namely, the 2002 Private Offer Almond Project ("the 2002 private offer project") managed by Almond Management Pty Ltd ("AM"), another TL subsidiary.

---

7 *Corporations Act 2001* (Cth) s 601FA.

13 The registered projects and the 2002 private offer project were conducted on AL's land and used AL's almond orchards and infrastructure, including its water licences and irrigation equipment. Although the legal structures differed, it was a key feature of each project that the Almond Assets remained AL's property. The project documents only gave growers rights to use and occupy AL's property for the terms of their projects for the purpose of cultivating and harvesting almonds.

14 Growers participated in the projects by subscribing for Almondlots and paying a fee per Almondlot. Subscription was by application and the completion of a power of attorney. By signing the application the grower agreed to be bound by the constituent legal documents governing the project. By completing the power of attorney the grower appointed the attorney to enter into the applicable agreements underpinning the projects on the grower's behalf.

15 The liquidators, upon their appointment as administrators, commenced investigations into the financial position of the Timbercorp group and the viability of the various horticultural operations of the group, including the viability of the Almond Projects. The liquidators concluded that the companies in the Timbercorp group were hopelessly insolvent and specifically that TSL and AM had no funds to meet obligations to third party managers and were unable to continue managing the Almond Projects, which still had many years to run to completion. The liquidators would not invoice the growers for the contributions that were due from them for the 2010 crop because of the insolvency of the Timbercorp companies and the inability of TSL and AL to continue to perform or implement their obligations in relation to the projects. The liquidators also investigated the insolvency and long term viability of the Almond Projects. They determined that the Almond Projects were insolvent as the projected proceeds of sale for the 2010 harvest were less than the total operating expenditure and, in the liquidators' view based on their investigations, those projects had no long term viability in any event.

16 The liquidators decided that the only option available to them was to wind up the Almond Projects. In June 2009 they applied for, and obtained, a direction from the

Court that they were justified in applying to wind up the registered Almond Projects formally[8] and in mid July 2009 the Court heard the winding up applications. A growers' group, the Timbercorp Growers Group ("TGG"), opposed the applications and sought the appointment of a temporary RE for the Almond Projects. TGG's opposition was partly based on the concern that the winding up may immediately extinguish growers' rights, which the growers wanted to avoid. The Court adjourned the winding up applications by consent to enable meetings of the growers in each Almond Project to consider various resolutions directed at enabling the Almond Projects to continue in a restructured form. These meetings were held on 31 July 2009, but no specific recapitalisation proposal was able to be put before the meetings, and the meetings were adjourned to a date to be fixed. No further occasion arose for the meetings to resume because no restructure proposal could be formulated before the Almond Assets were sold and the growers' rights extinguished.

17 AL's almond orchards continued to be maintained over this time but only as the consequence of short term arrangements that the liquidators had entered into with Select Harvest Limited ("SH"), which had been managing the day to day operations of the almond orchards under the project structures. The liquidators considered that the almond orchards were at serious risk of wasting and impairment unless they were sold or the projects were recapitalised in the near future. Accordingly, on 4 August 2009 they published an advertisement seeking expressions of interest for the purchase of the Almond Assets (identified as "comprised of owned and leasehold interests in freehold, and owned and leasehold interests in water rights") or the recapitalisation of the Almond Projects.

18 The liquidators also decided that in order to facilitate and maximise the realisation of the Almond Assets at the best achievable price, they would need to demonstrate to a potential bidder that the buyer could, if it wished, buy the Almond Assets with title unencumbered by the growers' rights and the rights of the banks as secured

8 Orders of the Honourable Justice Robson made 17 June 2009 in proceeding no. S CI 2009 7114. The 2002 Private Offer Project was not the subject of those court proceedings.

creditors. On 17 August 2009, the liquidators renewed their application to wind up the Almond Projects. In the alternative, they sought directions from the Court that they were justified in amending the constitutions of the Almond Projects to give the RE an express power to terminate the growers' rights to enable the sale of Almond Assets unencumbered by the growers' rights. The Court would not wind up the projects and adjourned the application to a date to be fixed but did authorise the liquidators to cause TSL to make the amendments to the constitutions which were effected on 28 August 2009.

19 The liquidators received seven bids for the Almond Assets. All of the bids were for the transfer of clear title to the Almond Assets, unencumbered by any rights of the growers or of the secured creditors. No bid was received for the recapitalisation of the Almond Projects. The liquidators selected Olam Orchards Pty Ltd ("Olam") as the preferred bidder and on 18 September 2009, a Sale and Purchase Deed ("SPD") for the sale of the Almond Assets to Olam for $128m was executed.

20 The assets sold under the SPD were:

- the Properties;
- the Water Rights;
- the Almond Orchards;
- (subject to clause 10.3) the benefit of the Almond Contracts.[9]

"Properties" was a reference to "the real property owned by [AL]";[10] "Water Rights" was a reference to the permanent water rights and licences issued to AL under the *Water Act 1989* (Vic) and AL's water allocation balance as at completion of the sale; and "Almond Orchards" was a reference to:

> ... the almond trees situated on the Properties and includes the future crop from those trees.[11]

In other words, the assets sold were the assets that the growers used for the purposes

---

9 Sale and Purchase Deed (18 September 2009), Cl 1.1.

10 Ibid.

11 Ibid.

of their projects.

21 The terms of the SPD included that Olam's purchase was conditional upon the liquidators having obtained a direction from the Court that they were justified in causing TSL and AM to terminate or surrender the "Grower Leases" (defined as the growers' sub-leases or Licence and Joint Venture Agreements (as the case may be) under the Almond Projects[12]), and also upon the banks' agreement to discharge or release their securities, as the amounts owed to the banks at the time exceeded the purchase price payable.[13] In October 2009, the liquidators, TSL in its capacity as RE of the registered projects, AM in its capacity as the manager of the 2002 private offer project, AL as the owner of the Almond Assets, and TL sought directions from the Court under ss 477(2)(b), 511 and 568(1)(a) of the Act, first: that the liquidators were justified in entering into and performing the SPD; and secondly: that they were justified in procuring TSL and AM to extinguish all of the growers' rights in respect of the Almond Assets. The liquidators also sought directions from the Court that they were justified in accepting an offer from the banks in relation to the apportionment of the net proceeds. The banks had offered the growers $6m (net of costs) out of the sale proceeds in full satisfaction for the growers' rights transferred or surrendered to enable Olam to obtain clear title to the Almond Assets. The liquidators had formed the view that the offer should be accepted having regard, amongst other things, to a report from a special purpose liquidator appointed to give independent consideration to the apportionment of the sale proceeds.

22 In *Re Timbercorp Securities Ltd (In liq)(No. 3)*[14] Robson J considered that the directions sought should be made, other than the direction with respect to the liquidators' acceptance of the banks' offer which his Honour declined to make. His Honour reasoned that there was uncertainty as to precisely what property rights of the growers were to be terminated or surrendered as part of the consideration for the sale price of $128m. It was his Honour's view that it was not possible to assess fairly,

---

12 Ibid, Cl 1.1, definition of "Grower Leases".
13 Ibid, Cl 3.1(b) and (c).
14 (2009) 74 ACSR 626.

according to law, the value of the rights being surrendered on behalf of the growers until those rights were identified.[15] His Honour also observed that the banks were only entitled to that portion of the sale proceeds that represented the property over which they held securities.[16] His Honour concluded:

> 79. The banks are entitled to the full extent and benefit of their charges and securities. The banks are under no obligation to give up or surrender any of their security rights if they so chose. On the other hand, subject to any agreement that is made between the parties, if the sale proceeds, the banks are only entitled to that portion of the sale proceeds that represents the property over which they hold securities.
>
> 80. ... The fund, if it is created, ... is to be divided "by reference to the proportionate share of the fund measured by the extent and value of the claims or rights given up in exchange for an interest in the fund".
>
> 81. ... The banks can obtain payment for only so much of the property as they have a charge over. The key issue is what proportion of the fund represents the property over which they hold security.[17]

His Honour was firmly and, with respect, properly of the view that he could not determine on the material before him whether the banks' offer was an appropriate apportionment according to law and, accordingly, that he could not direct that the liquidators were justified in accepting that offer. Robson J accordingly directed that the liquidators were not justified in entering into an agreement to accept $6m to extinguish the growers' rights in accordance with the terms of the banks' offer.[18] Robson J held though that the liquidators were justified in instituting or participating in proceedings to determine the extent and measure of the interest in the fund constituted by the proceeds of the sale of the almond assets.[19] In the event, BOSI instituted these proceedings and joined the liquidators, ANZ and the growers (by way of a representative claim) as defendants.

23 Robson J authorised the liquidators in their capacity as liquidators of TL, TSL, AL and AM to enter into and perform the SPD and ordered the net proceeds to be held in trust pending the hearing and determination by the Court of the Rights

---

15 Ibid, [77]-[78].
16 Ibid, [79].
17 Ibid, [80]-[81].
18 Ibid, [85].
19 Ibid, [87].

Proceeding to determine which person or persons had any rights to all or any part of the net proceeds. The terms of his Honour's orders were:

> 6. [The liquidators] in their capacity as liquidators of [TSL], [AM], [TL] and [AL] may enter into and perform: the SPD; and any document referred to, in connection with, or necessary to give effect to the SPD.
>
> 7. Upon completion of any sale under the SPD the net proceeds of sale (after payment of selling costs and expenses, retentions (if any) and the costs and expenses of the liquidators....referable to the preservation and realisation of the assets the subject of the SPD.... be held...in an interest bearing trust account....pending the hearing and determination by the Court of a proceeding (Rights Proceeding) to determine which person or persons have any rights to all or any part of the Net Proceeds (Claimants), and to be held on trust for the Claimants until further order of the Court.

The terms of his Honour's orders preserving the claimants' rights were:

> 8. Insofar as each of the Secured Creditors have any rights to the assets the subject of the [Sale and Purchase Deed ("SPD")], whether under their securities over those assets or otherwise, nothing in the release of those securities upon completion of the SPD will prejudice those rights for the purposes of their claim to all or any part of the Net Proceeds.
>
> 9. Insofar as the Growers have any rights to the assets the subject of the SPD nothing in orders 1 to 5 above, or any action taken thereunder by the [liquidators], will prejudice those rights for the purposes of their claim to all or any part of the Net Proceeds.[20]

24 Settlement of the sale of the Almond Assets to Olam occurred on 2 December 2009. TSL surrendered, with effect on and from 2 December 2009, all of the rights, title and interests of the growers in the registered Almond Projects "in, arising under, or in connection with" the grower sub-leases and licences and "those parts of all of the Almondlots as were located on the land"[21] on which the Almond Projects were conducted. AL and AM disclaimed the licences and Joint Venture Agreements relating to the Almondlots allotted to each grower under that project. The banks also released and discharged their securities insofar as they were held over the Almond Assets sold. The net sale proceeds of $99,774,174.60 were placed into an interest bearing trust account in accordance with Robson J's orders, pending the hearing and determination of the Rights Proceeding.

---

20 The full terms of the orders are set out in *Re Timbercorp Securities Limited (In liq)(No. 3)* (2009) 74 ACSR 626, 645-6.

21 2002-2007 Timbercorp Almond Project Surrender Deeds, Cl 2.1.

D. THE COMPETING CLAIMS

25 The parties disagreed on the effect of Robson J's orders. The banks argued that Robson J's orders were directed to preserving the rights of the banks and the growers to the assets sold for the purposes of making a claim on the net proceeds based on their pre-extinguishment rights. The growers argued that Robson J found that the growers had valuable rights and that Robson J's orders were directed to preserving the status quo for the purpose of valuing the pre-extinguishment rights of the respective parties to determine how the proceeds were to be apportioned. The difference between the parties was reflected in the primary case that each advanced.

26 The banks' primary case was that their securities over the Almond Assets entitled them to the whole of the net proceeds because the pre-extinguishment rights of the growers in relation to the Almond Assets were not proprietary in nature and therefore did not give the growers an interest in the fund constituted by the net proceeds of sale. The banks argued that the growers' rights were in the nature of encumbrances or contractual rights which did not found an entitlement to any portion of the sale proceeds. They also argued that the growers' pre-extinguishment rights were worthless in any event by the time that the Almond Assets were sold and, hence, that their rights carried no measure of value in the sale proceeds referrable to the extinguishment of those rights.

27 The growers' primary case was that the task for the Court, pursuant to the orders of Robson J, was to apportion the net proceeds based on the value of the respective pre-extinguishment rights of both the growers and the banks.[22] The growers placed reliance in particular on paragraphs 77, 78 , 79 and 80 of his Honour's reasons, including his Honour's reference to *Re Hazelton Air Charter*.[23] Robson J had cited *Re Hazelton Air Charter* for the legal principle that in "determining the rights of several property owners whose property is lost or converted into a common fund ... the fund is to be divided 'by reference to the proportionate share of the fund measured by the extent and value of the claims or rights given up in exchange for an

---

22 Cf *Re Hazelton Air Charter* (2001) 41 ACSR 472.

23 Ibid.

interest in the fund'".[24] The growers argued that they held rights of a contractual and proprietary nature in respect of the Almond Assets pursuant to the constituent documents that governed each of the Almond Projects. They also argued that those rights were valuable as at 2 December 2009 when they were extinguished to enable the completion of the sale to Olam and that the value of those rights is the measure of their entitlement to share in the net proceeds. They argued further that AL took its rights in the orchards subject to the growers' rights of tenure under sub-lease and licence and accordingly that the banks' rights as mortgagees under their securities over the Almond Assets were no greater than AL's "reversionary" interest in those assets and should be valued on that basis. The growers reasoned that the banks' securities are a "red herring in this case"[25] because AL could not give the banks an interest greater than the "reversionary interest" that AL possessed at the time. Further they argued that if, and insofar as, there was any amount of the net sale proceeds remaining after accounting for the respective entitlements of the growers and the banks, the remaining balance should be apportioned between the growers and the banks on the "marriage principle".

28 Robson J did not rule that each party's proportionate share of the net proceeds was to be determined by the value of their respective rights, without regard to whether the rights given up were rights of a proprietary nature in the assets sold. It is apparent from a consideration of the reasons of Robson J that his Honour was concerned with the measure of the growers' *property* rights surrendered or transferred as part of the consideration paid by Olam. This is explicit in paragraph 77 of his Honour's reasons, where his Honour stated:

> 77. As the evidence in this case indicates, there is uncertainty at this stage as to precisely what property rights of the growers are to be transferred or surrendered as part of the consideration for the payment of the purchase price of approximately $128 million. Until those rights are identified it is not possible according to law to fairly assess the value of the rights being surrendered on behalf of the growers.

---

24 *Re Timbercorp Securities Limited (In liq)(No. 3)*, Ibid [80].

25 *Transcript of proceeding*, 21 March 2011, 833.

In *Re Hazelton Air Charter*[26] Goldberg J held that fairness and appropriateness is not a sufficient basis on which to determine the extent and measure of the respective *proprietary* interests of two groups in a fund as apportionment must be determined by appropriate principles of law and equity. Robson J's reasoning in paragraph 77 was entirely consistent with *Re Hazelton Air Charter*. Robson J did not determine that the growers had a right to share in the net proceeds or more specifically that the extinguishment of their rights would give them an interest in the net proceeds, the extent and measure of which was to be determined according to the principles laid down by Goldberg J in *Re Hazelton Air Charter*. His Honour did no more than preserve the growers' ability to make that claim.

29 The misconception in the growers' primary case is that it presupposes that rights were given up in exchange for an interest in the net proceeds so that, pursuant to the orders of Robson J, the growers' and the banks' proportionate shares of the fund are to be measured by the value of the rights that each gave up. The difficulty with that submission is that Robson J's orders did not create in the growers any entitlement or any right to share in the net proceeds that the growers did not otherwise possess nor, in my opinion, on a fair reading of his Honour's decision, did his Honour purport to do so. Robson J could not create any interest for the growers in the net proceeds that they did not possess in law or equity. Order 7 explicitly reserved to the Rights Proceeding the determination of the question as to whether the growers had rights of a nature that entitled them to a share of the net proceeds. Orders 8 and 9 explicitly preserved the respective rights of the parties "only insofar as" each of them "have any rights to the assets the subject of the SPD". The growers' argued that the phrase "the assets the subject of the SPD" was a shorthand expression for referring to "the assets over which the respective parties had a claim immediately before extinguishment of their rights".[27] That submission should also be rejected. The phrase "the assets the subject of the SPD" could only be, and was a clear reference to, the assets sold to Olam.

---

26 (2001) 41 ACSR 472.

27 Growers' Closing Submissions – Rights and Valuation Issues (11 March 2011), 2 [1.3(c)].

30 It was therefore incumbent upon the growers in this proceeding to found their entitlement to a share of the net proceeds. In order to do so they needed to establish that they held rights of a proprietary nature in and with respect to the Almond Assets that were converted into the fund constituted by the net proceeds from the sale of the Almond Assets. It was not sufficient for the growers merely to establish that the rights that were extinguished to enable the SPD to be completed were rights that had value.[28]

31 Thus, it is necessary to consider the growers' pre-extinguishment rights in respect of the Almond Assets and ask with respect to those rights whether they were of a proprietary nature and if so, to determine the value of those proprietary rights. No conclusion can be drawn about the nature of those rights merely from the fact that Olam would not purchase the Almond Assets without the termination or surrender of the "Growers' Leases" (as defined) nor can any conclusion about value be drawn merely because Robson J preserved those rights for the purposes of making a claim.

E. NATURE OF THE GROWERS' RIGHTS

32 It is useful to start with an overview of the Almond Projects to put the analysis that follows into context.

Overview

33 The Almond Projects were projects for the management, cultivation and harvesting of almonds. The projects were designed and marketed as tax effective structures that gave growers an immediate tax deduction for their application fees, as well as for their ongoing fees and expenses. The application fees were constituted by amounts payable as management fees and as licence or rental fees, which the Australian Taxation Office ("ATO") considered were of a revenue character and hence deductible. The tax deductibility of the application fees was confirmed by the ATO in product rulings concerning the tax consequences of participation in each of the Almond Projects.[29] For each project, the ATO ruled that the application fees would

---

28 Cf *Re Hazelton Air Charter Pty Ltd* (2002) 41 ACSR 472.

29 PR 2002/15 - Income tax: 2002 Timbercorp Almond Project (Private Offer No. 1); PR 2002/24 - Income

be deductible in full to the growers as outgoings on revenue account incurred in the course of carrying on a business of primary production, namely the cultivation of almond trees, the growing of almonds and the harvesting of almonds for processing and sale.

34 Management fees were payable by the growers because the actual cultivation and harvesting of the almonds was done on their behalf under management agreements. For the 2002 private offer project, the growers' management agreements were with AM. For the registered projects the growers' management agreements were with TSL as RE, which TSL contracted out to AM. For all of the projects, AM engaged SH as an independent contractor to manage the almond orchards on a day to day basis and to harvest, process and market the almond crops.

35 Licence and rental fees were payable by the growers because the growers did not acquire the land or the orchards which they used in and for their primary production businesses. It was essential for tax deductibility that the growers did not get rights as owners of the orchards and the constituent documents expressly provided that the land, the almond trees, the capital works and the water licences would be, and would remain, the property of AL.[30] These assets did not become "scheme property" of the projects.[31]

---

tax: 2002 Timbercorp Almond Project; PR 2002/83 - Income tax: 2002 Timbercorp Almond Project (Carina West Site); PR 2005/15 - Income tax: 2005 Timbercorp Almond Project - Early Growers (to 15 June 2005); PR 2005/16 – Income tax: 2005 Timbercorp Almond Project – Post 30 June Growers (to 15 June 2006); PR 2006/1 – Income tax: 2006 Timbercorp Almond Project – Early Growers (to 15 June 2006); PR 2006/2 – Income tax: 2006 Timbercorp Almond Project – Post 30 June Growers; PR 2006/145 – Income tax: 2007 Timbercorp Almond Project – Early Growers (to 15 June 2007); PR 2006/146 – Income tax: 2007 Almond Project – Post 30 June Growers; *Taxation Administration Act 1953* (Vic), div 358, sch 1; PR 2007/71 – Product Ruling: The Product Rulings System.

30 2002 Licence and Joint Venture Agreements, Cl 2.2; 2005, 2006 and 2007 Sub-leases, Cl 2.2

31 The leases and sub-leases expressly provided that these assets were not "scheme property": Head Leases, Cl 2.2; Sub-leases, Cl 1.7.

Section 9 of the *Corporations Act 2001* (Cth) defines ***scheme property*** of a registered scheme to mean:

(a) contributions of money or money's worth to the scheme; and
(b) money that forms part of the scheme property under provisions of this Act or the ASIC Act; and
(c) money borrowed or raised by the responsible entity for the purposes of the scheme; and
(d) property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in paragraph (a), (b) or (c); and
(e) income and property derived, directly or indirectly, from contributions, money or property referred to in paragraph (a), (b), (c) or (d).

36 The growers derived their income from the sale of the almonds. All sales of almonds were pooled and each grower was entitled to a share of the net proceeds determined in accordance with a formula set out in the relevant constitution governing each registered project and in the management agreement applicable to the 2002 private offer project.

37 Each of the projects was intended to run for several years. The terms of the 2002 Project and the 2002 Private Offer Project were 20 years and the terms of the 2005-2007 Projects were between 20 and 24 years.

38 I now set out the constituent elements of each of the projects in greater detail for the purposes of identifying with specificity the nature of the rights that the growers acquired as participants in the projects.

The 2002 Private Offer Project

39 A schematic diagram of the structure of the 2002 private offer project is attached to these reasons in schedule A.

(a) Analysis

40 This project was conducted as a joint venture between AL and each participant grower under the terms of a Licence and Joint Venture Agreement. The joint venture activity, pursuant to the terms of that agreement, was "a primary production business of developing and cultivating an almond orchard and producing and processing Almonds for commercial gain".[32] The joint venture interests of AL and the growers in the almonds produced and the harvest proceeds were 10% and 90% respectively.[33]

41 Pursuant to the agreement, AL contributed the "Almondlots" on which the joint

---

Note 1: Paragraph (a)—if what a member contributes to a scheme is rights over property, the rights in the property that the member retains do not form part of the scheme property.

Note 2: For provisions that are relevant to paragraph (b), see subsections 177(4), 1317HA(1A), 1317HB(3) and 1317HD(3) of this Act and subsection 93A(5) of the ASIC Act.

32 Licence and Joint Venture Agreement – 2002 Timbercorp Almond Project (Private Offer No. 1), Cl 11.1.

33 Ibid. Cl 1.1 and Cl 11.4; Project and Management Agreement – 2002 Timbercorp Almond Project (Private Offer No. 1) Cl 1.1.

venture operations were to be carried out. An "Almondlot" was:

> Each separate identifiable area of the Land comprising approximately 0.25 hectares on which a Grower will carry on the business of primary production in a joint venture with [AL] and includes the Capital Works [i.e. the infrastructure and capital works, including the Almond Trees that [AL] has carried out, at its cost, on the Land[34]] and Water Licences [i.e. the water licences owned or acquired by [AL][35]] attributed to the Project.[36]

Namely, AL supplied the land, the almond trees, the infrastructure for the orchards and the water licences.[37]

42 It is apparent from a consideration of the terms of this agreement that the Almondlots were not a joint venture asset. The term "Joint Venture Assets" was defined as the "Participating Interest of the Joint Venturers in the Project Assets under the Project and Management Agreement."[38] The definition of "Project Assets" under the Project and Management Agreement notably did not extend to the land, almond trees, water licences or capital works comprising the Almondlots. This was underscored in the Licence and Joint Venture Agreement which contained an express acknowledgment from the growers that the capital works on the Almondlots and the water licences attributed to the project were, and would at all times remain, the property of AL.[39]

43 The Licence and Joint Venture Agreement provided for the growers to use and occupy the Almondlots under licence from AL and for the growers to pay a licence fee to AL per Almondlot for their rights of use and occupation.[40] The licence that AL granted to the growers was only for the purposes of the joint venture operations, that is for growing, cultivating and harvesting the almonds[41] and conferred no rights of exclusive occupation on the growers.[42] The agreement also obliged the growers to

---

34 Licence and Joint Venture Agreement: 2002 Timbercorp Almond Project (Private Offer No. 1), Cl 1.1.
35 Ibid.
36 Ibid.
37 Ibid, Cl 2.
38 Ibid, Cl 1.1.
39 Licence and Joint Venture Agreement: 2002 Timbercorp Almond Project (Private Offer No. 1), Cl 2.2.
40 Ibid, Cl 7.
41 Ibid, Cl 8.
42 Ibid, Cl 3.1 and 3.2.

use the Almondlots solely for the purpose of the joint venture operations.[43]

44 The licence was limited in duration.[44] The term of the agreement was expressed to continue until the earlier of the termination of the joint venturers' participating interest in the project, 30 June 2022 or termination of the project.[45]

45 It appears that security of tenure for the growers for the duration of the project in respect of those Almondlots was effected, or intended to be effected, by a head lease of the land used by this project (as well the land used by the 2002 registered project) from AL to TSL and a sub-lease from TSL back to AL for licence to the growers. The prospectus for the 2002 registered project stated that the head lease secured the growers' tenure of the land for the duration of the project by giving TSL exclusive rights of possession of that land. The sub-lease back to AL was to enable AL to licence growers to use and occupy their Almondlots for the purposes of the joint venture operations.[46] The head lease and the sub-lease contained clauses limiting the use of the land for the purposes of the project[47] and limiting the duration of the leases to the duration of the project. Both leases provided for automatic termination if the project ended.[48]

46 The rights that the growers acquired as participants in the project in relation to AL's property may be summarised as:

(a) the right to grow almonds on AL's trees;

(b) the right to manage the orchards for the purpose of growing almonds;

(c) the right to harvest the almonds;

(d) the right to 90% of the sale proceeds from the harvests (shared with AL which

---

43 Ibid, Cl 8.1(a).
44 Ibid, Cl 4.
45 Ibid, Cl 4.1.
46 2002 Timbercorp Almond Project Prospectus, 18
47 Sublease Carina: 2002 Almond Projects, Cl 6; Sub-underlease Carina: 2002 Almond Projects, Cl 4.1
48 Sublease Carina: 2002 Almond Projects, Cl 3 and 12; Sub-underlease Carina: 2002 Almond Projects, Cl 2 and 8.

was entitled to 10% of the sale proceeds);[49] and

(e) a limited licence to use and occupy AL's land, orchards and infrastructure for the orchards, including the water licences for the purpose of growing and harvesting almonds.[50]

(b) Conclusion

47 Relevantly, the growers only acquired rights of a proprietary nature in the almonds that they grew. They did not acquire any proprietary interest in the land, the almond trees, the capital works or the water licences, which they were authorised to use and occupy by licence only.[51]

48 The growers accepted that any rights of participating growers in the 2002 private project in relation to those assets were contractual in nature and did not confer a proprietary interest in those assets.[52] In view of my earlier conclusion that the growers must show a proprietary interest in the Almond Assets to found an entitlement to share in the net proceeds, it follows that the contractual rights of the growers in the 2002 private offer project did not found an entitlement to share in the fund constituted by the sale of the Almond Assets. In view of this finding, I have not considered the growers' submission that those contractual rights were rights of value because the rights were amenable to specific performance against the liquidators.[53]

---

49 Licence and Joint Venture Agreement – 2002 Timbercorp Almond Project (Private Offer No. 1), Cl 11.4.

50 Ibid. Cl 3.1

51 *Cowell v Rosehill Racecourse Co Ltd* (1937) 56 CLR 605, 616-7 (Latham CJ), 627-8 (Strake J); 629-30 (Dixon J); *Reid v Moreland Timber Co Pty Ltd* (1946) 73 CLR 1; *Howie v New South Wales Lawn Tennis Ground Ltd* (1956) 95 CLR 132.

52 Contentions of Fact and Law for the Fifth to Eighth Defendants ("Growers' Submissions") (26 February 2010), 3-4 [10-11].

53 *Re S&D International Pty Ltd (No 4)* [2010] VSC 388 at [208]-[210] Robson J (2 September 2010); *Housing Commission of New South v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378, 385-86 per Mahoney JA; affirmed *Tatmar Pastoral Co Pty Ltd v Housing Commission of New South* (1984) 54 ALR 155; *Specialist Diagnostic Services v Healthscope Ltd* [2010] VSC 443 [164] per Croft J; *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc (No 2).* [2011] VSC 153 [99] per Pagone J; *Kheirs Financial Services Pty Ltd v Aussie Home Loans Pty Ltd* [2010] VSCA 355 [103] (Maxwell P; Tate JA and Habersberger AJA)

2002 Almond Project

49 A schematic diagram of the structure of the 2002 Almond Project is attached to these reasons in schedule B.

50 This project was also a joint venture between AL and the growers. The provisions of the Licence and Joint Venture Agreement were in like terms to the Licence and Joint Venture Agreement applicable to the 2002 private offer project to which TSL, in its capacity as RE of this project, was also made a party.

51 As this project was a registered scheme it had a constitution. Clause 13.1 of the Constitution provided that, subject to clause 13.2 (which was concerned with defaulting growers), a grower:

> is entitled to the whole of the Crop [i.e. the Almonds taken from the Almond Trees grown on the Growers' Almondlots[54]] and Product [i.e. Almonds in saleable condition[55]] in each Financial Year in proportion to the Grower's Participating Interest".[56]

A "Participating Interest" was defined in clause 1.1 to mean the entitlement of the grower to the "Project assets", the "Crop", the "Product" and the "Proceeds" calculated in accordance with the formula set out in that definition. Relevantly, that entitlement did not extend to conferring any proprietary rights in the growers in the land, the almond trees, the capital works or the water licences.

52 The growers accepted that the rights of participating growers in the 2002 Almond Project in relation to those assets were also contractual in nature.[57] Those contractual rights likewise did not give those growers an interest in the fund constituted by the sale of the Almond Assets.

2005, 2006 and 2007 Almond Projects

53 A schematic diagram of the 2005, 2006 and 2007 Almond Projects is attached to these reasons in schedule C.

---

54 Constitution: 2002 Timbercorp Almond Project, Cl 1.1.
55 Ibid. Cl 1.1.
56 Ibid. Cl 13.1.
57 *Transcript of Proceedings*, February 21 2011, 369.

(a) Analysis

54 Growers who participated in these projects had the same rights under these projects as under the 2002 projects with respect to a several share of the almonds produced and the proceeds from the harvesting of those almonds, save that they were entitled to 100% of the sale proceeds as there was no joint venture with AL.[58] However, instead of rights under licence, growers took a sub-lease of identifiable areas of AL's land for the purposes of their horticultural activities. In dispute is whether those sub-leases included the demise of the trees, capital works and water licences.

55 The demise was contained in clause 3.1(a) of the sub-leases in the following terms:

> [TSL] grants to the Participant Grower and the Participant Grower takes from [TSL] a sub-lease, effective from the Commencement Date, to use and occupy the relevant ...Land Lots for the sole purpose of conducting the Almondlot operations.[59]

56 "Land Lots" was defined in the sub-leases to mean "that part of an Almondlot that is situated on ... Land consisting of approximately 0.15 hectares".[60] "Almondlot" was defined, although the definitions in the various sub-leases were not identical. "Almondlot" was defined variously as:

(a) (i) in the 2005 Wangera sub-lease:

> an interest in the Project held by the Participant Grower, including its interest in, and rights in relation to, each separately identifiable area of the Land comprising approximately 0.25 hectares on which a Participant Grower will conduct the Almondlot Operations and which includes the Almond Trees, the Capital Works and the Water Licences attributed to the Project.[61]

(ii) in the 2005 Carina-West and Nenandie sub-leases:

> a separate identifiable area of the Land of approximately 0.25 hectares

---

58 Constitution: 2002 Timbercorp Almond Project, Cl 13.1.

59 Clause 3.1(a) of the sub-lease for the 2005 Wangera project used slightly different wording. It provided that:

> [TSL] grants to the Participant Grower and the Participant Grower takes from [TSL] a sub-lease, effective from the Commencement Date, to use and occupy the relevant Almondlots for the sole purpose of conducting the Almondlot Operations.

The difference is not material for the purposes of the analysis.

60 2005, 2006, 2007 Sub-leases, Cl 1.1.

61 Sub-lease Deed: 2005 Timbercorp Almond Project, Cl 1.1.

> on which a Participant Grower will conduct the Almondlot Operations and which includes the Almond Trees, the Capital Works and Water Licences...[62]

(b) in the 2006 sub-leases:

> an interest in the Project held by the Participant Grower, including an interest in, and rights in relation to, each stapled and separately identifiable area of the Land comprising approximately 0.25 hectares on which a Participant Grower will conduct the Almondlot Operations and which includes the Almond Trees, the Capital Works and the Water Licences attributed to the Project.[63]

(c) (i) in the Menegazzo and Westmores 2007 sub-leases:

> each separately identifiable area of approximately 0.25 hectares of the Project Land allocated to the Participant Grower by [TSL] for the purposes of the Project together with the right to conduct Almondlot Operations and use the Almond Trees and Capital Works thereon and the Water Licences attributed thereto.[64]

(ii) in the Annuello 2007 sub-lease: [65]

> An interest in the Project held by the Participant Grower, including its interest in, and rights in relation to, each stapled and separately identifiable area of the Annuello Land and the Menegazzo Land...on which a Participant Grower will conduct the Almondlot Operations and which includes the Almond Trees, the Capital Works and the Water Licences attributed to the Project.

57 The growers argued that the definition of "Almondlot" included the trees, the capital works and the water licences and that the demise of "Land Lots" was a demise of that part of the "Almondlots", including the trees, the capital works and the water licences, situated on the relevant property.

58 The banks argued that the demise of a "Land Lot" was a demise of the physical property only, not the growers' interests comprised by an Almondlot. They argued that TSL did not have power to demise the growers' interests comprised by an Almondlot because the constitutions of the projects only empowered TSL to take a

---

62 Sub-lease Deed (Carina West): 2005 Timbercorp Almond Project, Cl 1.1; Sub-lease Deed (Nenandie): 2005 Timbercorp Almond Project, Cl 1.1.

63 Sub-lease: 2006 Timbercorp Almond Project [Mitchell Property – Post Supplementary], Cl 1.1; Sub-lease: 2006 Timbercorp Almond Project [Westmore Property – Post Supplementary], Cl 1.1; Sub-lease: 2006 Timbercorp Almond Project [Narcooyia Property – Post Supplementary], Cl 1.1.

64 Sub-lease: 2007 Timbercorp Almond Project [Menegazzo Property] Post 30 June Growers, Cl 1.1; Sub-lease: 2007 Timbercorp Almond Project [Westmores Sub-lease – Post 30 June Growers], Cl 1.1.

65 Sub-lease: 2007 Timbercorp Almond Project [Annuello Property], Cl 1.1.

head lease of the land from AL and to sub-lease that land. Further they argued that TSL only took a demise of the physical land under the head leases from AL and thus could only sub-lease the physical land to the growers and had no ability to effect a demise of the trees, capital works and water licences.

59 In my view, the banks' construction fails to give due regard to the project arrangements, which involved integrated legal relationships between AL, TSL and the participant growers. Those integrated legal relationships provide the context in which the Court is to determine the meaning of the language used by reference to what a reasonable person would have understood that language to mean. As the High Court held in *Toll (FGCT) v Alphapharm Pty Ltd*[66]:

> References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.[67]

This approach to construction recognises that the meaning of a text may take on a different understanding when the text of the contract is considered in a broader context, having regard to the object of the transaction and the surrounding circumstances in which the transaction was entered into.

60 A consideration of the constitutions, the head leases and the sub-leases, as an integrated commercial arrangement, makes it evident that the interest conveyed by lease to TSL was a leasehold interest in land on which commercial almond orchards were or would be established and that the "Land Lots" demised were those parts of the orchards on the relevant land that TSL allocated to growers as "Almondlots".

61 The starting point are the constitutions of the 2005, 2006 and 2007 projects. Each constitution gave the RE the express power in clause 11(l):

---

66 (2004) 219 CLR 165.

67 *Toll (FGCT) v Alphapharm Pty Ltd* (2004) 219 CLR 165, 179 [40]. See also *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451, 462-3 [22].

to lease the Land from the Land Owner, and sub-lease it to, the Participant Grower[68]

62 Each constitution also included clause 18.1 which required the terms of the sub-leases of "the Land" to be read subject to the constitutions. Clause 18.1 provided as follows:

> 18.1 **Status of Agreements**
>
> The Sub-leases[69] entered into between [TSL] in its personal capacity, [AL] and each of the Participant Growers and the Almondlot Management Agreement entered into between [TSL] in its personal capacity and each of the Participant Growers must be read subject to the terms and conditions of this Deed.[70]

63 "Land" was a defined term in each constitution and meant:

> the land on which the Project will be conducted, as described in the PDS and such other land which is used in the Project.[71]

64 Each relevant PDS described the land as including the orchards, the capital works and the water licences. In the 2005 PDS, the "Land" was described as:

> those parts of the Wangera, Carina West and Nanandie [sic] properties on which the Orchards will be established and the project will be conducted and includes the Water licences and the Capital Works. [72]

In the 2006 PDS, the "Land" was described as:

> those parts of the Narcooyia and Mitchell properties on which the Orchards will be established and the project will be conducted and includes the Water licences and the Capital Works. [73]

In the 2007 PDS, the "Land or Project Land" was described as:

> Those parts of the Annuello and Menegazzo properties on which the Orchards will be established and the project will be conducted and includes the Water licences and the Capital Works. [74]

---

68 Constitution: 2005 Timbercorp Almond Project; Constitution: 2006 Timbercorp Almond Project; Constitution: 2007 Timbercorp Almond Project.

69 In the 2005 constitution the phrase "Deed of Sub-lease" is used.

70 Constitution: 2005 Timbercorp Almond Project; Constitution: 2006 Timbercorp Almond Project; Constitution: 2007 Timbercorp Almond Project.

71 Ibid. Cl 1.1

72 2005 Timbercorp Almond Project: Product Disclosure Statement, 59.

73 2006 Timbercorp Almond Project: Product Disclosure Statement, 59.

74 2007 Timbercorp Almond Project: Product Disclosure Statement, 71.

65 Considered in the broader context of the project arrangements, the power conferred on the RE in clause 11(l):

> to lease the Land from the Land Owner, and sub-lease it to, the Participant Grower[75]

should not, in my view, be read restrictively as a power to lease and sub-let the physical land only but rather the physical land with the attributes of a commercial almond orchard.[76]

66 This construction is reinforced by clause 1.2 in each constitution which contained "construction" provisions. The clause relevantly provided as follows:

> 1.2(k) **Participant Grower and Deed**
>
> i. The term "Participant Grower" in this Deed is a reference to the particular Participant Grower *in respect of the Almondlot or Almondlots that have been sub-leased to it* under the sub-leases.[77]
>
> ii. The term "Participant Growers" in this Deed is a reference to all Participant Growers that hold Almondlots in the Project and according to the context, the term "Participant Growers" may also include the Participant Grower.
>
> iii. This Deed is entered into *in respect of the Participant Grower's Almondlots referred to in the sub-leases* and must be read as if it were a separate Deed on the terms and conditions of this Deed in respect of the relevant Almondlots held by the Participant Grower.
>
> (italics added for emphasis)

"Almondlot" was defined in clause 1.1 of the constitutions as:

> *An interest* in the Project held by the Participant Grower, *including* its interest in, and rights in relation to, each stapled and separately *identifiable area of the Land comprising* approximately 0.25 hectares on which a Participant Grower will conduct the Almondlot Operations *and which includes* the Almond Trees, the Capital Works and the Capital Water Licences attributed to the Project, and in relation to a Participant Grower means the Participant Grower's Almondlots. (italics added for emphasis)

67 In other words, the definition of "Almondlot" reflects that an Almondlot comprised a bundle of rights constituting the grower's "interest in the Project" which carried

---

75 Ibid.

76 Ibid. Cl 1.1

77 In the 2005 constitution the phrase "Deed of Sub-lease" is used.

with it rights "in and in relation to" the land "*which* [land] *includes* the almond trees, the capital works and the water licences". Properly construed, the phrase *and which includes* relates back to the land *as* including the almond trees, the capital works and the water licences.

68 Consistently, each PDS represented that TSL had leased from AL the whole of the project land and capital improvements, comprising the orchards. The apparent purpose was to give TSL exclusive possession of the orchards to secure the growers' tenure for the duration of the projects.[78] The head leases however described the "land" leased to TSL by reference to Torrens system volume and folio references. There was no mention in those head leases of any of the trees, the capital works and the water licences forming part of the demise. Hence the banks' submission that the lease was of the physical land only. However, it would be artificial and wrong to construe the head leases in isolation from the project documentation. The head leases need to be considered in the whole legal context governing the project arrangements.

69 Considered in context, the leases and sub-leases were part of the interconnected arrangement by which growers obtained rights to cultivate and harvest almonds on orchards that AL had planted or made available to the growers for that purpose. The land that AL leased to TSL was land on which AL had or would establish almond orchards to be used in and for the projects.[79] That land under the terms of the leases could only be used by TSL for the purposes and duration of the projects.[80] To that end, the leases expressly provided that AL consented and authorised TSL to enter into the sub-leases with the participant growers.[81] Under the project arrangements, the growers obtained their rights to cultivate and harvest the almonds grown on those orchards on subscription for, and allotment of, Almondlots. Each allotment had a bundle of rights attached to it and these Almondlots were situated on the land

---

78 Each PDS represented that TSL had leased the whole of the project land and capital improvements comprising the orchards from AL: 2005 Timbercorp Almond Project: Product Disclosure Statement, 26; 2006 Timbercorp Almond Project: Product Disclosure Statement, 31; 2007 Timbercorp Almond Project: Product Disclosure Statement, 55.

79 2005, 2006, 2007 Sub-leases, Cl 2; 2005, 2006 and 2007 Leases, Cl 1.1, definition of "Orchard".

80 2005, 2006 and 2007 Leases, Cl 5.1.

81 Ibid. Cl 9.2.

that TSL leased from AL. Those bundles of rights included rights to the use and occupation of the almond trees, capital works and water licences attributable to the land on which the Almondlots were situated. The sub-lease of the "Land Lots" from TSL to the growers, which AL had consented to and authorised, was for the purposes of the growers' horticultural operations under the project arrangements. In my view, on the proper construction of clause 3.1(a) considered in the broader context of the project arrangements, the "Land Lots" demised under the sub-leases were the individual parts of the leased orchards established or made available by AL for the purposes of the projects that growers were allocated on allotment of Almondlots, in respect of which the growers took possessory rights of use and occupation.

70 Viewed in this context, the intent of clause 2 of the sub-leases which the banks relied on to support their construction, was to confirm that ownership of the assets was to remain with AL, although the works that AL was required to carry out under clause 2.1 were for the purposes of the project.[82] Clause 2.1 contained a warranty from AL to the growers that AL would at its own cost carry out and complete all capital works required to establish an orchard on the land being sub-leased, including the planting of almond trees. Clause 2.2 contained acknowledgments by the growers that the Capital Works, Almond Trees and Water Licences "attaching to [the growers'] Almondlots are, and will at all times remain, the property of [AL]". Although AL was obliged to establish the orchards for project use, the contractual scheme did not intend that the orchards would become scheme property as it was essential to the tax effectiveness of the schemes from the growers' perspective that they did get rights as owners in the assets deployed in their projects.

71 The banks further argued that the creation of a proprietary interest in the capital works would be "nonsensical" since the definition of "Capital Works" comprehended services that were not susceptible of ownership. I reject that submission. The definition of "Capital Works" clearly comprehended tangible plant

---

82 Cf *Capelli v Shepard* (2010) 264 ALR 167, 196 [143]

and equipment which may be the subject of a lease.[83]

72 However, I accept the banks' submission that there was no demise of the water licences under the head leases or sub-leases. The terms of the head leases did not include the water licences as part of the demises. The water licences were instead subject to separate and express grants of "licence" to TSL "under" the head leases "to use and exploit" the water licences.[84] The grant was of a licence in relation to the use of the water licences co-extensive with the grant of lease of the land, and the rights given by licence were contractual in nature. The grant of licence was required because TSL was subject to the contractual obligation to cultivate and maintain the orchards on behalf of the growers in accordance with the Almondlot Management Agreements.[85] Consistently, clause 3.2 of the sub-leases then operated to impose on AL the obligation to ensure that TSL was able fully to exploit AL's water licences "for the benefit of all of the Participant Growers in the Project under and in accordance with the Almondlot Management Agreement".

(b) Conclusion

73 In summary the growers in the 2005, 2006 and 2007 projects:

a) held rights of a proprietary nature in the land, trees and capital works; and

b) rights of a contractual nature in the water licences.

(c) Alternative arguments

74 In case it should become necessary, I should also deal with the growers' alternative arguments on the nature of their rights. The growers alternatively contended that it would be a derogation from the grant of the sub-lease for AL or TSL to interfere with or to deny the growers access to those assets and consequently that those assets

---

83 2005, 2006 and 2007 Sub-leases, Cl 1.1, definition of "Capital Works" means the "infrastructure and capital works that [AL] has carried out, and any other works that [AL] may be required in future to carry out, at its cost, on the Orchard."

84 Ibid. Cl 1.1, definition of "Lease" "includes the licence granted under this Lease to use and exploit the Water Licences".

85 Almondlot Management Agreement: 2006 Timbercorp Almond Project, Cl 5.

formed part of the demise.[86] It may be accepted that it would have been a breach of TSL's obligation not to derogate from the grant if the assets had formed part of the demise and TSL had interfered with the growers' rights of use and occupation.[87] The inherent flaw in this argument is that the growers seek to use the principle of non-derogation from grant in order to create property rights. The principle of non-derogation from grant entitles a lessee to remedies against the landlord[88] but does not operate to create property rights that did not already exist under the terms of the grant. Accordingly if the assets were not part of the demise, this principle would not have advanced their case.

75 The growers had also argued that the "tenants'" rights to use and enjoy those assets, if not part of the demise, formed covenants that touched and concerned the land and bound the reversion. The claim was put variously but was essentially based on the proposition that the growers' rights were appurtenant to and necessary for the completion of the permitted and required purposes of the use of the demised land under the sub-leases for the cultivation of almonds. That is, that they were rights that would be of no benefit if separated from the demised land, and that the growers' use and enjoyment affected the nature, quality mode of use or value of the land of the reversioner.[89] The argument has superficial attraction but the argument does not withstand scrutiny.

76 First, no attempt was made to specify the covenant that was claimed to touch and concern AL's land or the source of the putative covenant. Merely describing the covenant in terms of the "tenants'" rights to the use and enjoyment of the assets begged the question.

77 Secondly, no privity of estate existed between AL and the growers. The privity of estate existed between AL as landlord and TSL as tenant and between TSL as sublessor and the growers as sublessee. TSL could not confer any interest in the

---

86 Contentions of Fact and Law for the Fifth to Eighth Defendants ("Growers' Submissions") (26 February 2010), 11 [41].

87 *Specialist Diagnostic Services v Healthscope Ltd* [2010] VSC 443 [151] (Croft J).

88 *Aldin v Latimer, Clark, Muirhead & Co* [1894] 2 Ch 437, 444 (Stirling J).

89 *Rodgers v Hosegood* [1900] 2 Ch 388, 395 (Farwell J).

growers in relation to the land that it did not hold.

78 Thirdly, there was no covenant expressed in the head leases to the effect argued by the growers.[90] Nor as a matter of law could one be inferred.[91] The covenant running with the lease and sub-lease was the restriction on the use of the demised land for the purposes of the Almondlot operations.[92] The putative covenant is not found in that covenant (and nor was it argued that it could be). Accordingly, the rights that the growers claimed were not rights that could have passed with the subtenancy of the land. Accordingly, this argument also would not have advanced the growers' case as AL's obligations to the growers under the sub-lease to establish the amenity of the demised land as a commercial orchard were personal covenants only.

Conclusion

79 I have reached the conclusion that the growers in the 2002 projects have no legal entitlement to a share of the net proceeds because they held no proprietary interest in the assets that Olam purchased. Although they owned the almonds grown on the trees, there were no almonds on the trees at the time of sale. The growers in the 2005, 2006 and 2007 projects are in a different position because they held leasehold interests in the land, almond trees and capital works (but not the water licences) that were "given up" so that the SPD could be completed unencumbered by those interests. Those leasehold interests entitled the growers to make a claim on the sale proceeds to be measured by the value of those leasehold interests pre-extinguishment.[93]

80 The next issue is the valuation of those rights in order to establish the measure for apportionment.

F. VALUATION

81 The analysis that follows concerns the 2002 projects as well as the 2005, 2006 and

---

90 Cf *Jourdain v Wilson* (1821) 106 ER 935.
91 *O'Keefe v Williams* (1910) 11 CLR 171, 220 (Higgins J).
92 2005, 2006, 2007 Sub-leases Cl 3.1(a); 2005, 2006, 2007 Leases, Cl 5.
93 *Re Hazelton Air Charter* (2001) 41 ACSR 472.

2007 projects, in case I am wrong in my finding that growers in the 2002 projects have no entitlement to a share of the net proceeds.

82 The first issue for determination is whether any of the projects were viable at the time that the growers' rights were extinguished. If the projects were not viable, it follows that there is no measure of value to be attributed to those rights to support an apportionment of the proceeds to the growers. The growers' rights under the sub-leases could only be exercised for the purposes of the projects[94] and thus any value attributable to the growers' rights was coterminous with the continuation of the projects. If they were viable, the value of the growers' rights measures the extent of their legal claim to the proceeds of sale.

Were the projects viable under the existing structures?

83 I am satisfied that the evidence established that by the time the growers rights' were extinguished, the projects could not continue under their existing structures and were at risk of imminent and inevitable termination.

84 First, the insolvency of the Timbercorp Group meant that the projects could not continue under their existing structures. It was not a disputed fact that TSL, AL and AM were hopelessly insolvent. Nor was it a disputed fact that the Timbercorp group had no capacity to fund the capital expenditure for which it was responsible and that it had no capacity to absorb any funding shortfall arising from any defaults on participant grower invoices. All of the projects required significant cash contributions above the fees that the growers were contractually obliged to pay in order to meet operating requirements in relation to the management and harvesting of the 2010 crop. The lack of immediate funds meant that the continued operations could not be funded.

85 Secondly, the operating and capital expenses of each of the projects were expected to exceed the anticipated 2010 harvest returns. The projects themselves had cash flow deficiencies and, in the view of the liquidators (which was not challenged), were

---

94 2005, 2006, 2007 Sub-leases Cl. 3.1(a); 2005, 2006, 2007 Leases, Cl 5.

insolvent because the projected returns were less than the project expenses, which the projects could not meet.

86 Thirdly the orchards were at risk of wastage and impairment because of the lack of immediate funds available to the projects and the lack of any means of funding the continued operations.

87 I find that the growers' rights under the projects as they were structured held no value at the time of extinguishment of those rights. The insolvency of the Timbercorp group and the cash flow deficiencies of the projects meant that the projects could not be funded and that they were at imminent and inevitable risk of termination as the purpose of the projects could not be accomplished.

Were the projects viable if restructured?

88 Nonetheless, the growers argued that the insolvency of the Timbercorp group did not mean that the projects could not continue, if restructured. They referred to an article by Barrett J, writing extra judicially, in which his Honour made the observation that "a simple replacement of the [RE] under the statutory provisions should be feasible" where a scheme is "on a financially healthy footing".[95] They argued the projects were feasible if TSL was removed as the RE and replaced by a new RE with a new structure to put the projects on a financially healthy footing and therefore were capable of running their full term, if restructured. They submitted that their rights were accordingly valuable when extinguished, measured by the net present value of the future income from the projects on the hypothesis that they would have continued on a restructured basis for their full term.

89 Significantly, the growers did not submit that the projects would have been restructured, if their rights had not been extinguished. Certainly, the objective evidence showed that the projects were unable to be restructured before the Almond Assets were sold. There was evidence that the liquidators had sought, but had received no expressions of interest for the recapitalisation of the Almond Projects

95 Reginald Barrett, 'Insolvency of Registered Managed Investment Schemes' (2008) *Banking and Financial Services Law Association*, Queenstown, New Zealand.

from their advertisement published on 4 August 2009. There was also evidence that the growers had attempted before the Almond Assets were sold to secure a restructure proposal to put to members for voting but had not been successful. However the growers' contention was that it was sufficient to set up the hypothesis (or counterfactual as counsel for the parties each called it) for the purposes of valuation by establishing on the balance of probabilities that the projects could have been restructured in a way that would have made them viable and that there was the legal ability to effect that restructure. They contended that they did not have to prove that the projects would have been restructured, which they argued was in the realm of hypothesis "where proof is necessarily unattainable".[96] Rather, it was put, they had the evidentiary burden of demonstrating that:

(a) there was a market of reasonably priced RE's for hire;

(b) REs of viable schemes are routinely replaced; and

(c) that the projects as restructured would have been viable –

from which "the Court [could] safely assume that the schemes would continue".[97] They argued that for this purpose the market, that is a purchaser prepared to purchase the land subject to the growers' rights, is to be assumed.[98]

90 The banks argued that the authorities on loss of opportunity claims were apposite to what the growers must establish as the growers' case on valuation was founded on the loss of a chance, being the loss of a chance to earn an income stream by having the Almond Projects run to term under a replacement RE on the basis of the various assumptions for which they contended. They contended that the evidentiary burden on the growers required them to prove on the balance of probabilities that there existed a chance that the posited counterfactual would have happened.

91 The growers in turn argued that the loss of opportunity cases were not apposite

---

96 *Poseidon Ltd & Sellars v Adelaide Petroleum NL* [1992-1994] 179 CLR 332

97 Growers' Closing Submissions: Rights and Valuation Issues (11 March 2011), 19 [4.2].

98 *Spencer v Commonwealth of Australia* (2010) 241 CLR 118.

because Robson J had already determined that the extinguished rights of the growers must be valued so that the task of the court was to value those rights. It was also argued that the value of those rights involved an assessment of the relevant possibilities of restructure, which the growers argued, necessarily was a matter of evaluation, not proof on the balance of probabilities, because the assessment was based on hypothesis, not fact.

Burden of proof on the counterfactual claim

92 Contrary to the growers' submissions, Robson J did not determine that the growers' rights must be valued nor did his Honour make a finding that the growers' rights were valuable. His Honour simply preserved the ability for the growers to assert their claim.

93 The undoubted fact was that the projects could not have continued under the existing structures. The growers did not seek to challenge that fact. Instead the growers' postulate was that the projects would have continued to full term if they had been restructured and their rights had not been extinguished. It was argued, that their rights accordingly held value at the time that those rights were extinguished. In my view, this postulate is analogous to a loss of opportunity claim.

94 The authorities on loss of opportunity claims were considered in *Poseidan Ltd & Sellars v Adelaide Petroleum NL.*[99] In that case the High Court confirmed the distinction between proof of causation and proof of loss, which must be established on the balance of probabilities and proof of the value of the loss for which recovery is sought, which is to be assessed by reference to the probability or possibility that an event would have happened, with the award of damages adjusted to reflect the degree of probability. The plurality of the High Court stated:

> ...the general standard of proof in civil actions will ordinarily govern the issue of causation and the issue whether the applicant has sustained loss or damage. Hence the applicant must prove on the balance of probabilities that he or she has sustained *some* loss or damage. However, in a case such as the present the applicant shows *some* loss and damage was sustained by demonstrating that the contravening conduct caused the loss of a

99 [1992-1994] 179 CLR 332.

> commercial opportunity which had *some* value (not being a negligible value), the value being ascertained by reference to the degree of probabilities or possibilities.[100]

Brennan J stated that the loss of a mere opportunity to acquire a benefit is not itself a loss but the loss of a benefit will be such a loss if the plaintiff proves that the opportunity would have been taken:

> Up to that point, the plaintiff must establish both the historical facts and any necessary hypothesis on the balance of probabilities.
>
> [...]
>
> Although the issue of *a* loss caused by the defendant's conduct must be established on the balance of probabilities, hypotheses and possibilities the fulfilment of which cannot be proved must be evaluated to determine the amount or value of the loss suffered. Proof on the balance of probabilities has no part to play in the evaluation of such hypotheses or possibilities: evaluation is a matter of informed estimation.[101]

Thus, the opportunity lost must be established on the balance of probabilities, even if that proof of the loss of that opportunity involves an hypothesis. Once the opportunity has been established, the value of that loss is to be ascertained by reference to the degree of likelihood of that event happening.[102]

95 The growers' case on valuation depended on them showing on the balance of probabilities that the extinguishment of their rights lost them the opportunity to have the projects restructured and continued to full term. In order to value that lost opportunity the Court then makes an assessment of the probability or possibility of a viable restructure occurring, based on a consideration of the evidence.[103] The value is ascertained by reference to the degree of probability or possibility of the event happening so that to have value, the possibility must be more than a mere hope or speculation.[104] Thus the growers' case required some evidentiary basis from which

---

100 Ibid, 355.

101 Ibid, 368.

102 See also *Tabet v Gett* (2010) 240 CLR 537, [137] (Keifel J); *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666; *La Trobe Capital & Mortgage Corp Ltd v Hay Property Consultants Pty Ltd* (2011) 190 FCR 299, 322-3 [110-112].

103 *Poseidon Ltd & Sellars v Adelaide Petroleum NL* [1992-1994] 179 CLR 332.

104 *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666; *La Trobe Capital & Mortgage Corporation Ltd v Hay property Consultants Pty Ltd* (2011) 190 FCR 299; *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638, 643 (Deane, Gaudron and McHugh JJ).

the Court could evaluate the likelihood of the restructure counterfactual eventuating had the growers' rights not been extinguished.[105]

Was there a chance that the projects could have been restructured and continued as viable projects?

(a) Legal issues

96 A restructure would have required a change of RE and constitutional and contractual amendments.

(i) Change of RE

97 TSL could not have continued as RE and for the registered projects to continue a new RE would need to have been appointed.

98 It is possible under the Act to replace a RE and to have a new RE appointed subject to compliance with the requirements of Division 2 of Part 5C.2 of the Act.[106] The legislative scheme regulating managed investment schemes contemplates that there may be a need from time to time for an RE to be replaced because the extant RE wants to retire or the members of the registered scheme want to remove the RE.[107] However, any appointment will not be effective unless made in accordance with Division 2 of Part 5C.2 of the Act.[108] The requirements are as follows.

99 First, to be an RE, the entity must be a public company holding an Australian financial services licence authorising it to operate a managed investment scheme.[109] That company must also consent in writing to becoming the scheme's new RE.[110]

100 Next, if an RE wants to retire, it must call a members' meeting to explain its reason for wanting to retire and enable the members to vote on a resolution to choose a company to be the new RE. The resolution must be an extraordinary resolution if the scheme is not listed. An extraordinary resolution requires the resolution to be

---

105 *St George Bank Ltd v Quinerts Pty Ltd* (2009) 25 VR 666; *Tabet v Gett* (2010) 240 CLR 537.
106 *Corporations Act 2001* (Cth) s 601FJ(2).
107 *Corporations Act 2001* (Cth) ss 601FL, 601FM.
108 *Corporations Act 2001* (Cth) s 601FJ(2).
109 *Corporations Act 2001* (Cth) ss 601FA, 601FK.
110 *Corporations Act 2001* (Cth) s 601FL(2), (3) and (4); s 601FM(2) and (3).

passed by at least 50% of the total votes that may be cast by members entitled to vote on the resolution, including members who are not present in person or by proxy.[111] If members do not choose a company to be the new RE or the company they choose does not consent in writing to becoming the scheme's RE, the current RE may apply to the court for the appointment of a temporary RE under s 601FP.[112]

101 If members of a registered scheme want to remove the RE they may call a members' meeting to consider and vote on a resolution that the current RE should be removed and a resolution choosing a company to be a new RE. These resolutions must also be extraordinary resolutions if the scheme is not listed.[113] If the members vote to remove the RE but do not at the same meeting choose a company to be the new RE or the company does not consent, the scheme must be wound up.[114]

102 There is also provision for the appointment of a temporary RE by the Court on an application by a retiring RE under s 601FL(3) or by application of ASIC or a member of the registered scheme under s 601FN. In either instance, the Court is only empowered to appoint a temporary RE if the Court is satisfied that the appointment is in the interests of the members.[115]

103 If such an appointment is made, the temporary RE must take certain steps to have a new permanent RE appointed: s 601FQ. The temporary RE must call a members' meeting for the purpose of the members, by resolution, choosing a company to be the RE. Again the resolution must be an extraordinary resolution if the scheme is not listed. The meeting must be called as soon as practicable and, in any event, within three months of the temporary RE being appointed. The temporary RE must apply to the Court for an order directing it to wind up the scheme and the Court may make the order if no meeting is called within three months (or any extended period under s 601FQ(2)) or the meetings called for that purpose have not resulted in the members

---

111 *Corporations Act 2001* (Cth) s 601FL and the definition of "extraordinary resolution" in s 9.
112 *Corporations Act 2001* (Cth) s 601FL(3).
113 *Corporations Act 2001* (Cth) s 601FM and the definition of "extraordinary resolution" in s 9 of the Act.
114 *Corporations Act 2001* (Cth) s 601NE(1)(d).
115 *Corporations Act 2001* (Cth) s 601FP(1).

choosing a company to be the new RE that consents to becoming the scheme's RE.[116]

104 There are statutory consequences that result from a change of RE. Relevantly, the new RE assumes "the rights, obligations and liabilities" of the former RE "in relation to the scheme" except with respect to "liabilities" that the former RE could not have been indemnified for out of scheme property if it had remained the scheme's RE.[117] This is provided for in ss 601FS(1) and (2)(d) as follows:

> (1) If the [RE] of a registered scheme changes, the rights, obligations and liabilities of the former [RE] in relation to the scheme become rights, obligations and liabilities of the new [RE].
>
> (2) Despite subsection (1), the following rights and liabilities remain rights and liabilities of the former [RE]:
>
> .....
>
> (d) any liability for which the former [RE] could not have been indemnified out of the scheme property if it had remained the scheme's [RE].

(b) and in s 601FT which in effect provides for statutory novation of the rights obligations and liabilities of the former RE to the new RE.

105 The scope and effect of s 601FS and 601FT were the subject of considerable argument in this proceeding and it will be necessary to return to those provisions in the context of the consideration of the evidence on whether there was any company willing to become the new RE for any of the projects. However for present purposes it is sufficient to conclude that there was the power under the Act to have TSL replaced as RE of the registered Almond Projects.

(ii) Constitutional amendments

106 There was also power under the Act to amend the constitution of the projects. Section 601GC of the Act provides relevantly:

> (1) The constitution of a registered scheme may be modified, or repealed and replaced with a new constitution:
>
> (a) by special resolution of the members of the scheme; or

---

116 *Corporations Act 2001* (Cth) s 601FQ(5).

117 *Corporations Act 2001* (Cth) s 601FS(1).

(b) by the [RE] if the [RE] reasonably considers the change will not adversely affect members' rights.

107 For present purposes it is sufficient to note that the section does not fetter the kind of amendment that can be made to the constitution of a registered scheme. The limitation is in the statutory prescription that any amendment can only be effected by the RE if the RE reasonably considers that the amendments will not adversely affect members' rights and otherwise by special resolution of the members.[118]

(iii) Amendments of growers' agreements

108 Whilst the state of the law is that amendments to the constitution would not operate to effect amendments to the growers' agreements,[119] the growers' agreements expressly permitted modification or amendment subject to the prescription that any such modification or amendment must be in writing and duly executed.[120] Thus, the growers' agreements were also capable of amendment.[121]

(iv) Conclusion on legal issues

109 These legal issues were not impediments to a restructure.

(b) Factual issues

(i) Market for hire REs

110 The growers led evidence that was not challenged, that there is a market for hire of replacement REs. The evidence showed that there are companies holding Australian financial services licences that are authorised to act as REs and which contract out

---

118 *Great Southern Managers Australia Limited (Receivers and Managers Appointed) (In Liquidation)* (2009) VSC 557, [9] (Davies J); see also *Re Great Southern Managers Australia Limited (Receivers and Managers Appointed) (In Liquidation)* [2009] VSC 627, [7]; *Re Timbercorp Securities Ltd (In liq)* [2011] VSC 24, [5]; *Re Timbercorp Securities Ltd* (2010) 77 ACSR 291; *Colonial First State Investments Limited v Commissioner of Taxation* [2011] FCA 16; *Re Colonial First State Property Trust Group (No 1)* (2002) 43 ACSR 143; Cf *Kearns v Hill* (1990) 21 NSWLR 107; *Permanent Trustee Co Ltd v National Australian Managers Ltd* (Unreported, McLelland CJ in Eq, 8 August 1994).

119 *Alpha Wealth Financial Services Pty Ltd v Franklin River Olive Co Limited* (2008) 66 ASCR 594, 597

120 Project and Management Agreement: 2002 Timbercorp Almond Project (Private Offer No. 1), Cl 28.7; Almondlot Management Agreement: 2002 Timbercorp Almond Project (Carina West Growers) (Public Offer) Cl 20.6; Almondlot Management Agreement: 2002 Timbercorp Almond Project (Liparoo/Carina Growers) (Public Offer) Cl 20.6; 2005, 2006 and 2007 Almondlot Management Agreements, Cl 20.6.

121 See also *Bailey v New South Wales Medical Defence Union Limited* (1995) 184 CLR 399, 439 (McHugh and Gummow JJ); *Great Southern Managers Australia Limited (Receivers and Managers Appointed) (In Liquidation)* (2009) VSC 557, [10].

their services as REs. Two such companies are Huntley Management Limited ("HML") and Primary Securities Ltd ("PSL"). The managing director of HML, John Knox ("Mr Knox"), and the managing director of PSL, Robert Garton Smith ("Mr Garton Smith"), both gave evidence about the market for hire of replacement REs and the work of their respective companies. Their evidence should be accepted.

(ii) HML: consent to act as RE

111 The growers also led evidence that they had a contract RE willing to act as temporary RE. That contract RE was HML. Mr Knox gave evidence that HML had consented in July 2009 to its appointment as temporary RE of all of the Almond Projects conditional on a meeting of growers for each project being called to pass a special resolution to amend the constitutions:

(a) to provide for a power to HML as RE to borrow monies and grant a crop lien as security for the borrowings to provide immediate working capital for the 2009 harvest; and

(b) to provide for payment of annual management fees to HML sufficient to fund the ongoing management costs of HML as RE.

An appointment as temporary RE would have been for a maximum period of three months (subject to extension by the Court).[122]

112 Mr Knox gave evidence that HML was also willing to act as a permanent RE of the Almond Projects "subject only to confirmation of the liabilities that it would have incurred on assumption of that role"[123] and as manager of the 2002 private project. HML had prepared a proposed action plan for the first three months for the operation of the 2002, 2005 and 2006 Almond Projects from which it is apparent that the plan contemplated the continuation of the projects beyond the three months of stewardship under HML as temporary RE, if achievable. As to the 2007 Almond Project, Mr Knox's evidence was that HML would conduct an assessment and

122 *Corporations Act 2001* (Cth) s 601FQ.

123 Affidavit of John Huntley Knox affirmed 2 August 2010, [5].

develop proposals once it was appointed as temporary RE.

113 Further, the growers led evidence directed to showing that HML would meet the requirements of s 601FA of the Act, that is as an RE that held an Australian financial service licence that authorised it to act as RE of the almond projects. The evidence was that HML had applied to ASIC for a variation to its Australian financial service licence to operate the Almond Projects in its capacity as RE and that ASIC by letter dated 25 June 2009 had indicated that it was "minded to grant the application for variation of the licence conditions" subject to HML lodging a form 5107 Change of Responsible Entity of a Registered Scheme for each additional scheme as evidence that it had been appointed as RE to the respective schemes.[124]

114 In the event, TSL was not removed as RE and HML was not appointed as temporary RE because the sale of the Almond Assets became the only achievable option.

(iii) Conclusion on factual issues

115 Despite the turn of events which saw the Almond Assets sold as the best option and no restructure proposal eventuating, I am satisfied on the strength of Mr Knox's evidence that there was a chance for restructure, albeit that Mr Knox's evidence was in the most general terms only. It was sufficient in my view for the growers to demonstrate that there was a company that was capable of taking over as RE which had indicated a preparedness to do so: viz HML, albeit that HML's consent to act was only as a temporary RE and was conditional. It was not incumbent upon the growers at this stage to prove on the balance of probabilities that HML would have been appointed to replace TSL as permanent RE.

Determination of the value of the chance

116 It is at this stage that the Court must evaluate and assess the likelihood of HML taking over as permanent RE. The value of the chance must reside in the probability or possibility of the continuation of the Almond Projects to term with HML assuming the functions and responsibilities as the permanent RE of the registered

124 Affidavit of John Huntley Knox affirmed 14 July 2009, [5].

projects on a restructured basis. The assessment must be on this basis as it was essential for the continuation of the registered projects that there was a company holding a licence that authorised it to act as RE of the almond projects that was prepared to assume that responsibility. Significantly the growers did not produce evidence of any other company willing to replace TSL as RE of the Almond Projects. On the evidence, HML was the only company willing to undertake that responsibility. There was no evidential foundation for the Court to evaluate the chance that some other company could, or would, have undertaken that responsibility.

117 There were a number of contingencies in the way of HML replacing TSL as permanent RE. It is tolerably clear, in my view on the state of the evidence, that those contingencies would have become insuperable so that there was at best no more than a theoretical possibility or mere hope that HML could be appointed in replacement of TSL.

(a) The need to restructure

118 First and foremost, HML could not simply replace TSL as RE so as to enable the projects to continue as the projects under the Timbercorp structure could not on any view continue. The Timbercorp companies were insolvent. That meant that a new structure had to be created for the projects, without the Timbercorp entities. That meant that the orchards had to be sold to a new entity prepared to purchase the orchards subject to the rights of the growers to use those orchards for the purposes of the projects. A new RE would have had to be appointed and a new manager contracted to carry out the management of the orchards on behalf of the growers.

119 The timing issue cannot, in my view, be ignored in assessing the value of the chance of restructure. Such rights as the growers possessed were rights that were valuable only insofar as the orchards themselves were cared for and managed and the growers' rights subsisted under the sub-leases. Critically, the tenure of the growers under the sub-leases was only for the life and for the purposes of the projects. The

sub-leases terminated if the purposes of the projects could not be accomplished.[125] Accordingly, there always was a temporal limitation on the ability of the growers to effect a restructure. The evidence bore out that there was an imperative for the Almond assets to be sold when they were, unless they were able to be restructured. The projects did not have the necessary funds to meet operating expenses. The interim arrangements that the liquidators had entered into with SH to manage the orchards were to come to an end on 9 October 2009. The liquidators would not invoice the Growers for their share of the costs of the 2010 harvest because the Timbercorp companies could not meet their contractual obligations, this included AL which was responsible for funding the capital expenditure and meeting the costs of the water requirements. Something had to happen otherwise the orchards were at risk of damage and wastage.

120 The fact was that no restructure proposal was able to be formulated before the Almond Assets were sold to Olam. Importantly, the liquidators had advertised for but not received any expressions of interest for the purchase of the almond assets subject to the growers' rights or for the recapitalisation of the projects. On the strength of that evidence, it is purely speculative that any restructure proposal would have eventuated if there had been more time available for the growers or the liquidators to come up with other options.

121 Indeed senior counsel for the growers candidly stated that there was no market for the growers' rights.[126] However, it was submitted that the task of the Court was to value the growers' rights on the hypothesis that there was a willing but not anxious buyer for those rights. The submission relied on the classic test for valuation of land adumbrated by the High Court in *Spencer v Commonwealth*.[127] In *Spencer v Commonwealth* the High Court held that the determination of the value of land should be approached on the basis of the hypothetical sale of the land to a willing but not anxious buyer. The hypothesis of the notional sale is then used as the proxy

---

125 See Sub-leases Cl 3.1(a) and 4.

126 *Transcript of proceeding*, 21 March 2011, 851.

127 (1907) 5 CLR 418.

for the market for the purpose of measuring value. However, whilst that value may be measured by what a willing but not anxious buyer may pay for the growers' rights on a notional sale, the application of the test does not mean that the Court is to disregard, as a factor relevant to the valuation of the growers' rights, that the projects could not continue unless there was a purchaser willing to acquire the land and orchards subject to the growers' rights. It was an undisputable fact that the value of the growers' rights lay in the continuation of the projects. [128]

(b) The need for constitutional and contractual changes

122 Secondly, HML was not prepared to step in as RE on the terms under which TSL carried out its functions as RE. Mr Knox's evidence was that HML would have required a number of constitutional and contractual changes to the projects. Although Mr Knox did not say so specifically in his evidence, it may be readily inferred that HML, unlike the Timbercorp companies, was not prepared to carry any risk. The constitutional and contractual changes to the projects that Mr Knox identified were all changes that would have had the effect of removing or significantly reducing any risk for HML by its participation in the projects. HML wanted fixed flat fees for its services as RE, irrespective of the performance of the projects, a right of indemnity from the agency account (the account into which the harvest proceeds were deposited and out of which the growers' entitlements were paid) for costs and expenses that it incurred as RE, the ability to borrow funds for working capital secured by the funds in the agency account and for the manager of the orchards to bear the risk that the harvest proceeds would be sufficient to cover operational expenses.

123 Under the Timbercorp structure, TSL was liable to SH for management fees. Mr Knox agreed in cross examination that HML would not have been prepared to accept that structure and would have needed to negotiate a change in arrangements with SH. Mr Knox stated that he had offers from other operational managers to take over the role of SH and had a financier willing to contribute working capital, although the

---

128 Cf *Airservices Australia v Canadian International Airlines Ltd* (1999) 202 CLR 133 at [444] and *In the matter of Philip Charles Weeden, a bankrupt; Rambaldi v Weeden* [2008] FCA 1597.

arrangements had not progressed to a point where funding was in place. Rather, Mr Knox stated that the financier which had expressed its willingness to contribute to transitional needs had provided the funding on one of the other failed Timbercorp projects and "so there was a precedent and they said they were also interested in helping on the almonds on a similar basis".[129] Nonetheless, the evidence was that HML would only have been prepared to borrow the money from this financier had it been possible to obtain an indemnity from the agency account for the repayment of the borrowings. Thus critical to any consent to becoming a permanent RE for the registered Almond Schemes were amendments to the constitutions of those schemes permitting HML to borrow for working capital purposes and to grant security over the agency account with respect to those borrowings.

124 Any constitutional amendment would have required a special resolution of the members of the project unless HML reasonably considered that the change would not adversely affect members' rights.[130] It is reasonable for the Court to infer that the nature of the proposed changes would have required a special resolution of the members of the scheme. The growers were criticised for not leading evidence that HML would have been able to secure the necessary grower approvals for such amendments. It is difficult to see how evidence to that effect could have been led. Rather, it is reasonable to surmise that growers would have passed the various resolutions to enable these constitutional changes to be effected, if these changes were part of some proposal before the growers at the time for the continuation of the projects as viable projects. The salient point is that there was no restructure proposal and thus no factual basis from which the Court could evaluate the possibility that any restructure proposal would eventuate.

(c) The need to find a consenting RE

125 Thirdly, the growers could not have removed TSL as RE without a new company having consented to act as permanent RE[131] and there was no prospect of that

129 *Transcript of proceeding*, 16 February 2011, 235.
130 *Corporations Act 2001* (Cth) s 601GC.
131 *Corporations Act 2001* (Cth) ss 601FM and 601NE.

occurring before the Almond Assets were sold to Olam. An earlier attempt on 31 July 2009 saw the adjournment of resolutions put to the growers of the various registered schemes for the removal of TSL as RE[132] and the choosing of a company to be the new RE.[133] There were fatal flaws with these resolutions. First the failure to identify the new RE to be appointed as replacement RE (as no entity had consented to being the RE) and secondly that there were insufficient numbers of members present or by proxy at those meetings to pass extraordinary resolutions. Recognising this, the vote was taken to adjourn those resolutions and no occasion arose for the resolutions to be put again before the growers.

(d) HML

126 Fourthly, the growers had secured HML's consent to act as temporary RE but the appointment required an order of the Court under s 601FP of the Act. In my view, there was no certainty that the Court would have made such an order under s 601FP of the Act. Indeed it is strongly doubtful that there was any real prospect that such an order would have been made. Robson J would not appoint HML as temporary RE in October 2009 because HML's consent was conditional.[134] Not only was there no suggestion in the evidence that HML would agree to its appointment other than on the conditional basis but there was no suggestion in the evidence that the conditions could have been met in a timely fashion so as to enable a court order to be obtained before action needed to be taken to protect the orchards.

127 Moreover, the appointment of HML as temporary RE would not ensure the continuation of the projects. The appointment as a temporary RE would only be for a 90 day period culminating in a meeting of growers where HML would report on their findings as to the viability of the projects. As Barrett J stated in his article on 'Insolvency of Registered Managed Investment Schemes'[135] the Act makes it clear that a temporary RE is just that: a RE which holds office on a temporary basis only

---

132 Concurrent Meeting of the Growers in the 2001-2007 Almond Projects (31 July 2009), Resolution 6.
133 Ibid. Resolution 7.
134 *Re Timbercorp Securities Ltd (In liq) (No. 3)* (2009) 74 ACSR 62, [64].
135 (2008) *Banking and Financial Services Law Association*, Queenstown, New Zealand, 11.

and has the specific task of calling a meeting of the scheme's members with a view to the appointment of a new responsible entity: s 601FQ. There was evidence from which the Court may deduce that it was unlikely that HML would have been prepared to take on the role of permanent RE unless the projects were viable. Mr Knox's evidence was that HML's "preferred route was to become a temporary RE to establish the viability of the projects".[136] Certainly, the action plan which he prepared for the projects included assessment of viability and other evidence showed that HML's pattern of conduct was to wind up unviable projects at the end of its 3 month appointment as temporary RE if the project was unviable.

128 Fifthly, Mr Knox's evidence was that HML's willingness to act as permanent RE was "subject only to confirmation of the liabilities that it would have incurred on assumption of that role".[137] The specific matter of concern to HML was the operation and scope of ss 601FS and 601FT with respect to the liabilities and obligations of TSL that HML would assume if it replaced TSL as RE. Mr Knox's evidence was that HML was not prepared to take on the role of permanent RE of the registered schemes without modifications to ss 601FS and 601FT as follows:

> 1 section 601FS of the Act, as in force on the date of this Exemption and Declaration, were amended as follows:
>
> (1) If the responsible entity of a registered scheme changes the rights, obligations and liabilities of the former responsible entity in relation to the scheme become rights, obligations and liabilities of the new responsible entity:
>
> (a) subject to each existing charge, mortgage and any other encumbrance ("Encumbrance") granted by the former responsible entity which relates to the scheme, *other* than an Encumbrance referred to in paragraph (c) or (d) below; and
>
> (b) free of any Encumbrance (and rights under that Encumbrance) granted by the former responsible entity which does not relate to the scheme (notwithstanding that the new responsible entity had notice of that Encumbrance); and
>
> (c) free of any Encumbrance (and rights under that

136 *Transcript of the proceeding*, 16 February 2011, 237.
137 Affidavit of John Knox affirmed 2 August 2010, [5].

Encumbrance) granted by the former responsible entity over, or in relation, to the former responsible entity's rights, interests and benefits as a party to each member's Licence and Joint Venture Agreement or Sub-Lease Agreement, as the case may be, and Almondlot Management Agreement relating to the scheme (whether or not the new responsible entity had knowledge of that Encumbrance); and

(d) free of any Encumbrance (and rights under that Encumbrance) granted by the former responsible entity over, or in relation, to the former responsible entity's rights, interests and benefits as a party to each member's Licence and Joint Venture Agreement or Sub-Lease Agreement, as the case may be, and Almondlot Management Agreement relating to the scheme (whether or not the new responsible entity had knowledge of that Encumbrance), *other than* any Encumbrance granted over a right of the former responsible entity to be paid fees for the performance of its functions before it ceased to be the responsible entity.

2 section 601FS(2)(d) as in force on the date of this Exemption and Declaration, were amended as follows:

(2) Despite sub section (1) the following rights and liabilities remain rights and liabilities of the former responsible entity:

(d) any liability for which the former responsible entity could not have been indemnified out of the scheme property if it had remained the scheme's responsible entity including any liability for which the former responsible entity could not have been indemnified out of scheme property by reason of the scheme property being sufficient to meet the amount of that liability.

3 Section 601FT of the Act, as in force on the date of this Exemption and Declaration, were amended as follows:

Section 601FT(2) sub section (1) does not apply to a right, obligation or liability that remains a right, obligation or liability of the former responsible entity because of subsection 601FS(2) as amended by this exemption and declaration in paragraph 2 above.

Section 601FT(3) section 601FT(1) does not apply to an Encumbrance where the new responsible entity acquires property from the former responsible entity (including rights, interest or benefits) free of that Encumbrance because of s 601FS(1).

129 HML sought those modifications from ASIC under s 601QA of the Act[138] by application made to ASIC on 23 July 2009. This application had been preceded by a joint submission from HML and PSL[139] to ASIC the day before in like terms, in which the application was foreshadowed. The modifications were sought as generic modifications on the basis that the scope and operation of ss 601FS and 601FT was a "common issue" in all of the Timbercorp managed investment schemes by reason that TSL had charged all of its property (other than scheme property), which included its contractual rights under the head leases and its contractual rights and benefits under the Licence and Joint Venture Agreements, the Sub-Leases and the Almondlot Management Agreements.[140] The concern of HML was that the security over the charged assets may carry across to HML as the new RE by virtue of ss 601FS and 601FT "obliging" HML to deal with the charged assets in accordance with directions from receivers appointed by secured creditors.[141] The draft modification in paragraph 1 was designed to avoid that outcome by making it clear that only obligations and liabilities in relation to the scheme would transfer to the new RE and that any security over the charged assets would not carry across to the new RE if the encumbrance did not relate to the scheme. HML was also concerned that ss 601FS and 601FT may operate to transmit liabilities to HML that HML had not identified or which HML could not identify at the time that it was appointed as RE. The draft modification in paragraph 2 was directed to making it clear that a liability of the former RE for which that RE could not be indemnified out of scheme property "by reason of the scheme property being insufficient to meet that liability" remained the liability of the former RE.[142] In the event, ASIC rejected the modification application.

130 Despite the rejection of the modification application, it was submitted for the

---

138 Section 601QA of the *Corporations Act 2001* (Cth) empowers ASIC to exempt a person from a provision of Chapter 5C or declare that it applies to a person as if specified provisions were omitted, modified or varied as specified in the declaration.

139 PSL had been separately approached to become the new RE for a number of Timbercorp's other agricultural managed investment schemes.

140 Exhibit 20 Letter from Piper Alderman to ASIC dated 23 July 2009, 2.

141 *Transcript of proceeding*, 16 February 2011, 271.

142 Exhibit 20 Letter from Piper Alderman to ASIC dated 23 July 2009, *Transcript of proceeding*, 16 February 2011, 272.

growers that Mr Knox's evidence, read fairly, established that HML would have consented to act as permanent RE.[143] The "fair reading" of Mr Knox's evidence related to his apparent misconception that a temporary RE would not assume the liabilities that a permanent RE would assume. Mr Knox's evidence was that he understood that there was a significant distinction between HML agreeing to become a temporary RE and HML agreeing to become a permanent RE on the basis that as temporary RE the liabilities that HML would incur would be "limited".[144] Senior counsel for the growers submitted that the distinction that Mr Knox drew did not exist as the legislation makes it clear that a temporary RE is in the same position as a permanent RE. Thus, it was put, "having consented and being ready, willing and able to be temporary RE, Mr Knox – whether he understood it or not at the time, and it seems he mightn't have – was going to be or [HML] would have been caught up with the potential argument about s 601FS notwithstanding".[145]

131 In fact Mr Knox obtained legal advice in August 2009 to the effect that TSL's liabilities under the charges that it had given over its property were entered into by TSL in its personal capacity with respect to its own property and not in its capacity as RE of any of these funds and that ss 601FS and 601FT would not apply to impose those liabilities on HML as replacement RE. It was argued that having regard to that advice, any concern that Mr Knox had about s 601FS would have been allayed.

132 I disagree with the growers' "fair reading" of Mr Knox's evidence. The fair reading of it was that Mr Knox did draw a distinction between the responsibilities and liabilities that a temporary RE would assume and the responsibilities and liabilities that a permanent RE would assume by operation of ss 601FS and 601FT, whether that view was one that was correctly held or not. That evidence explained why HML consented to act as temporary RE but qualified its willingness to act as permanent RE.[146] Secondly the application to ASIC in July 2009 is objective evidence of the concerns that HML had about the responsibilities and liabilities that it may assume if

143 *Transcript of proceeding*, 21 March 2011, 867.
144 *Transcript of proceeding*, 16 February 2011, 238.
145 *Transcript of proceeding*, 21 March 2011, 868.
146 Affidavit of John Knox affirmed 2 August 2010, [5].

it was appointed RE. Although HML obtained legal advice, that advice was directed only to one of Mr Knox's concerns.[147] HML did not receive legal advice on its other concern, namely whether ss 601FS and 601FT may operate to cause HML to assume TSL's obligations under the charges so that HML may become subject to directions of a receiver appointed over the charged property. Moreover Mr Knox was not asked whether his concerns were allayed by the legal advice he received nor did he give evidence to that effect. Moreover, the fact remained that ASIC did not make the declarations and exemptions sought under s 601QA and Mr Knox's unequivocal evidence was that he was not prepared for HML to take on the role of permanent RE without the modifications of the kind that were sought. In view of that evidence, I would not infer that HML would have been willing to be appointed as permanent RE merely from the fact that HML was a contract RE eager to take on schemes or from the fact that HML was willing to act as temporary RE, albeit on the basis that Mr Knox thought that the liabilities that HML would assume as temporary RE were limited or from the fact that Mr Knox had received legal advice that may have allayed one of his concerns about the scope and operation of ss 601FS and 601FT. The likelihood, on the evidence, was that HML would not have given its consent to act as permanent RE because of the rejection of the s 601QA modification application. On this evidence, the possibility that HML would have consented to act as RE cannot be made out.

133 The growers sought to bolster their hypothesis by the argument that it was apparent from the evidence of Mr Knox and Mr Garton Smith that the market for REs for hire did not seem to be fettered by the potential application of ss 601FS and 601FT. That may be so where the RE was not insolvent but as Barrett J commented in his paper[148] with regard to the situation where the current RE is in liquidation:

> When a new [RE] takes office, it becomes, under s 601FS, the statutory inheritor of the rights, obligations and liabilities of the old [RE] in relation to the scheme...the successor will come to owe the debts that brought the old [RE] undone and to have the rights of recoupment that were insufficient to

147 *Transcript of proceeding*, 21 February 2011, 321.

148 Reginald Barrett, 'Insolvency of Registered Managed Investment Schemes' (2008) *Banking and Financial Services Law Association*, Queenstown, New Zealand.

> allow it to continue. Simple replacement of the [RE] in liquidation therefore does not seem a practical possibility. The automatic vesting of the non-viable combination of liabilities and inadequate rights of recoupment must mean that, in the real world, there will never be a new [RE].[149]

The proposition that there is a market for hire of REs cannot carry much, if any, weight in this case, where the RE was insolvent beyond demonstrating that HML was prepared to take on the role of temporary RE to investigate whether the projects were viable.

134 Next it was argued that ss 601FS and 601FT would not have caused HML to assume TSL's liabilities and obligations under the charges. It is unnecessary and undesirable to deal with those arguments.[150] Whatever the correct position in law, the question to be focused on is the probability or possibility of HML consenting to appointment as permanent RE.[151] Even assuming that the position in law would not have imposed the liabilities and obligations on HML about which Mr Knox had concern, it remains a question of evaluating and assessing the evidence. Mr Knox's unchallenged and unequivocal evidence was that HML would not take that step without the modifications to ss 601FS and 601FT that it applied for, which ASIC rejected.

(e) Other contingencies

135 There were numerous other contingencies material to the continuation of the projects. Those contingencies included:

(a) that any restructure may put into jeopardy the tax benefits of participation, which may have made further involvement in the projects unattractive to investors;

(b) that HML would not get final approval from ASIC to act as RE of the registered schemes. There was some evidence that indicated that final

---

149 Ibid, 11-12.

150 *Kheirs Financial Services Pty Ltd v Aussie Home Loans Pty Ltd; Aussie Home Loans Pty Ltd v Bank of Western Australia; Kheirs Financial Services Pty Ltd v Bank of Western Australia* [2010] VSCA 355 [103].

151 Cf *Syncap Management (Rural) Australia Ltd v Lyford* (2004) 51 ACSR 223; *Huntley Management Limited v Timbercorp Securities Limited* (2010) 187 FCR 151.

approval may not be a foregone conclusion; and

(c) that there was funding available to meet the immediate and future operations of the projects.

136 It is unnecessary to say anything further about these matters, other than that they indicate the innumerable factors bearing upon the chance that the projects would have continued to term, if the growers' rights had not been extinguished and the purely speculative basis on which the growers' counterfactual was advanced.

(f) Conclusion

137 These matters demonstrated, in my view, that any prospect that the projects would have been continued was wishful thinking and unfounded in the reality of the situation that the growers found themselves in, regrettable as it was. I could not conclude on the state of the evidence that there was any possibility, other than a theoretical possibility, that the projects would have continued, if the growers' rights had not been extinguished. Accordingly, in my view no value can or should be attributed to the rights given up.

138 In so concluding I have taken into account the numerous other arguments advanced by the parties in support of their case on this issue. Where I have not dealt with an argument it is because the argument did not, in my view, materially bear upon the outcome having regard to the way in which I have analysed the case and reached my conclusion.[152]

Expert evidence on the value of the growers' rights

139 Each of the parties led expert evidence on the valuation of the growers' rights under the projects on the assumption that the projects continued to term. That assumption was not founded in the evidence. It is strictly unnecessary to deal with that expert evidence in view of my conclusion that the projects were unviable unless restructured, and that the continuation to full term on a restructured basis was no

152 *Kheirs Financial Services Pty Ltd v Aussie Home Loans Pty Ltd; Aussie Home Loans Pty Ltd v Bank of Western Australia; Kheirs Financial Services Pty Ltd v Bank of Western Australia* [2010] VSCA 355 [103].

more than a mere theoretical possibility on the state of the evidence. However, in case I am wrong, I should deal with certain aspects of the expert evidence.

(a) The role of an expert witness

140 This arises for comment because senior counsel for the growers abandoned reliance on their expert evidence, conceding that their experts lacked independence "even to the extent of appearing to actively cheer for the growers, kick goals for the growers".[153] The lack of independence was plainly evident from the testimony of those witnesses which revealed that they had assumed the role of the advocate in forming their opinions and did not bring objectivity and independence to bear in forming their opinions.

141 The Courts repeatedly emphasise that the role of an expert witnesses is to provide independent assistance to the Court on matters within the area of expertise of the witness, not for the expert to act as an advocate for a party. The reason is clear. On matters calling for special knowledge, the Court relies on expert evidence to furnish the judge with the knowledge that the judge requires in order to determine the case. Independence and objectivity are therefore critical facets of the expert's retainer as a witness in litigation, as an expert's evidence is admitted for the purpose of assisting the judge to decide the case impartially, presented with all the matters that may bear upon the outcome. The Court will not be assisted by an expert's evidence unless the Court has confidence that the expert's opinion on the specialist topic is an unbiased opinion, objectively formed, as the probative value of an expert's evidence is in the expression of objective and unbiased specialist knowledge. If expert evidence is to be useful for the Court, the expert must exercise independent judgment, uninfluenced by the expert's retainer. The integrity of expert evidence depends on the expert bringing to bear his or her independent and objective consideration. A lack of impartiality by an expert impacts upon the reliability of that evidence and the ability of the judge to take that evidence into consideration in forming his or her own impartial determination. The importance of experts giving independent and

153 *Transcript of proceeding*, 21 March 2011, 886.

objective consideration to the question or issue on which their specialist knowledge is sought is epitomised by the fact that this is a duty that experts owe to the Courts, in the same way that legal practitioners have the duty to the Court to exercise independent judgment in the conduct and management of a case.[154]

142 It is just as vital that the lawyers engaging the expert fully explain to the expert about the expert's role and duty to assist the Court impartially on matters relevant to their area of expertise and that the expert is cautioned that he or she is not to act as an advocate for a party. Lawyers seeking to rely on an expert's report have a responsibility to ensure that the report produced is the independent product of the expert uninfluenced as to its content by the exigencies of litigation.

143 It was very regrettable that the growers' experts lacked independence. This lack of independence resulted in a considerable waste of resources, including court time.

144 There was another basis for rejecting the testimony of the growers' valuer. Cross-examination of the growers' valuer revealed that he had opined on issues that were not within his expertise, and had stated opinions that were not his opinions but the opinions of others. A witness retained as an expert also has the responsibility to make it clear when a particular question or issue is outside the witness's expertise as the evidence is not admissible unless the witness has specialist knowledge of the question or issue based on the person's training, study or experience.[155] The lack of specialist knowledge was also a reason for eschewing reliance on the valuer's report. This was not just a question of weight but went to the admissibility of the report.

(b) Banks' expert evidence

145 Having eschewed reliance on their own experts to establish value, senior counsel for the growers sought to establish the value of the growers' rights based on the valuation of the banks' expert, Mr Michael Churchill, reconstructed using the integers and inputs in the calculation for which the growers' contended.

---

154 *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313, 350 (Eggleston J)

155 *Evidence Act 2008* (Vic) s 79

146 Mr Churchill's evidence was furnished in response to the evidence led by the growers, now abandoned by them. Mr Churchill was instructed to value the growers' rights on the basis of the projects continuing to full term either under the Timbercorp model or under the HML model on the terms that Mr Knox outlined in his evidence. Mr Churchill valued the rights using the discounted cash flow methodology based on various assumptions about the way in which the projects would have been restructured under those scenarios. The values attributed by Mr Churchill varied according to the inputs used and the integers that he took into account, but all values were predicated on the projects continuing to full term on some restructured basis.

147 Mr Churchill attributed substantial negative values to the rights of the growers in the 2006 and 2007 projects, despite the assumption that they continued to full term. Mr Churchill largely attributed positive values to the rights of the growers in both 2002 projects and the 2005 project. Those values of course were predicated on the projects continuing under some restructured basis.

148 The growers did not challenge Mr Churchill's valuation methodology but they sought to improve the values placed by Mr Churchill on the rights of the growers in each of the projects by challenging aspects of integers and inputs used by Mr Churchill in the application of the valuation methodology.

(i) Assumptions contended for by the growers

149 First the growers contended that the valuation should be conducted on the assumptions that:

(a) a new permanent RE of the registered projects and a new permanent project manager of the 2002 private scheme (either HML or some other entity) would have been appointed and the leases and sub-leases/ Licence and Joint Venture Agreements would have been assigned to it;

(b) the fee structure for remuneration of the REs and the project manager under the project documents would have been replaced with the fixed fees that

HML would have charged if it had been appointed;

(c) any rent received by the RE under the sub-leases in excess of the rent payable by the RE to the landlord would be refunded to the growers;

(d) the management agreements would have been terminated; and

(e) the purchaser(s) of the land would have continued to fund the capital works and water rights (previously paid for by AL) or the growers would have funded the water and non-water capital expenditure of the Almond projects over their entire terms.[156]

150 These assumptions are not sustainable on the evidence. First the evidence was to the contrary. The evidence was that no purchaser could be found for the land and orchards which was prepared to purchase those assets subject to the growers' rights. Secondly, there is no basis on the evidence for a contention that the same legal structure would have been adopted by a hypothetical purchaser. Thirdly, there is no basis on the evidence for a contention that the water and non-water capital expenditure ("capex") would have continued to be funded.

151 The growers argued that the Court could make the assumption that a purchaser of the land could be found who was willing to fund the capex because the rental on the land had a value allowing for those costs. It was put that the rental stream would have vastly exceeded the capital expenditure and water cost requirements for each scheme (with the exception of the 2002 projects, where there was only a relatively small requirement for expenditure on infrastructure capital). The evidence was quite to the contrary however – that is, the evidence was that there was no purchaser willing to purchase the land subject to the legal structure facilitating the conduct of the projects on AL's land.

152 The growers argued alternatively that the Court could make the assumption that the

156 Another assumption was that prior to or immediately following the purchase of the land, the 2007 Annuello and 2007 Menegazzo sub-lease would have been amended by the new RE so as to re-set the rent payable by the growers to a market rent. This assumption was not pressed in final submissions: Growers' Closing Submissions: Rights and Valuation Issues (11 March 2011), 39 [10.43].

growers could have funded the capex on the basis that it was open to them to offset those costs against the rent payable to the hypothetical successor to AL. However, the consideration of whether it would have been open to the growers to set off such costs against the rent payable by them would require a juridical analysis of the rights and obligations of the parties framed by their legal relations. The nature of these legal relations could not be assumed on the evidence for the purpose of undertaking that analysis.

153 In the circumstances, the assumptions contended for by the growers have not been shown to be justified. In any event, the growers' best case on valuation applying Mr Churchill's methodology on the integers for which they contend, showed substantial negative cash flows for all projects in the 2010 year to a total amount of $54,000,000 and negative cash flows for the 2006 and 2007 projects in the 2011 year of $21,500,000 and in the 2012 year of $7,200,000.[157] The growers' best case on valuation assumed the survival of the projects beyond the 2010 year notwithstanding such substantial negative cash flows. Nothing in the evidence before the Court provided any foundation for that assumption.

(ii) Discount rate

154 Secondly the growers contended that the discount rate of 25% used by Mr Churchill was too high. To determine that discount rate, Mr Churchill used the internal rate of returns ("IRRs") of the Almond Projects and the IRRs for similarly managed investment schemes for similar agricultural projects, adjusted for tax benefits. Mr Churchill concluded from his analysis that the appropriate discount rate for valuing the growers' rights was in the range of 20% to 31.5%, with a median of 25%. The growers argued that he should only have used the IRRs of the Almond Projects with no adjustment for tax benefit. As the median of the IRRs of the almond projects with no adjustment for tax benefit was 11.6%, the growers argued that median of 11.6% was the appropriate discount rate, not 25%.

---

157 Growers' Closing Submissions – Rights and Valuation Issues (11 March 2011), Attachment re Value (Modified G17).

155 Mr Churchill considered that it was not appropriate simply to adopt the IRRs of the Almond Projects, as the originally calculated IRRs took into account cash flows in the first several years of the projects, which had now gone and that the riskiness of the cash flows had changed over time in at least two respects. First the certain availability of tax deductions made available to investors at the outset of the projects had gone. Secondly the actual results of the Almond Projects had fallen well short of what had been forecast in the disclosure documents. Mr Churchill therefore preferred more contemporaneous evidence of IRRs attributable to agricultural managed investment schemes, although those schemes did not all involve almonds. Mr Churchill adequately explained his reasons for using the IRRs of other similar managed investment schemes and in my view, those reasons have cogency.

156 Mr Churchill also considered that the IRRs should be grossed up for the tax benefits available to the growers in order to arrive at a rate of return for the investors. Mr Churchill explained that the IRRs of the schemes were based on pre-tax project cash returns and therefore did not reflect the IRRs of the relevant schemes from the perspective of the investors, which would take into account tax benefits from participation. Accordingly Mr Churchill used the IRRs and grossed them up to arrive at an IRR which took into account investors' tax benefits. He explained that he did this on the basis that:

> ... any investor considering buying growers' rights would take into account the benefit to that buyer of the tax deductions as well.

157 The grossing up undertaken by Mr Churchill was done by taking the project IRR and dividing it by (1 minus the applicable marginal tax rate). Mr Churchill explained that:

> I conducted some basic calculations to see what the differential was in recharacterising the capital amounts as a deductible amount and found that whilst it wasn't a perfect relationship, that an adjustment of the tax rate consistently approximated the difference, that is the deduction, the value of the deductions available to investors in MISs was approximately equal to the tax rate differential between alternative investments and MISs.[158]

---

158 *Transcript of proceeding*, 28 February 2011, 785.

158 Mr Churchill performed two alternative calculations, one involving a personal tax rate of 48.5% and the other involving a personal tax rate of 41.5%. Mr Churchill's view was that the personal tax rate of 48.5% was a more appropriate proxy because of research that suggested that the average investor in schemes of this kind was in the highest marginal bracket.

159 Senior counsel for the growers criticised the logic of the grossing up. I do not accept the criticism as the analysis did not lack logic, in my view, but was well reasoned and realistic. As Mr Churchill explained, a median IRR at 11.6% was "below the same expected return for a fully liquid fully diversified portfolio of the ASX200 as at 2 December 2009 (12.54%)".[159] Mr Churchill considered that, without the tax advantages, investor appetite for highly illiquid investments with complex overlay structures such as the agricultural managed investment schemes ("MIS"), at a rate of return of 11.6%, would be miniscule or non existent because those schemes would attract a higher risk profile, but a lower return, than an investor would obtain from investment in an ASX200 portfolio. As Mr Churchill reasoned, if the MIS return was to be less than the ASX200 return, investors would not be attracted to the MIS schemes, without the tax benefits. And the fact was that these projects were designed and marketed as tax effective structures with tax advantages for investors supported by product rulings from the ATO.

160 Mr Churchill conducted two forms of cross checks on the reliability of his methodology. These cross checks were sufficiently consistent to provide some level of confirmation.

161 In the circumstances, I am persuaded by Mr Churchill's reasoning that the discount rate of 25% is justified and appropriate.

(iii) The cost of temporary water

162 Thirdly, the growers challenged Mr Churchill's input for the costs of temporary water. It was common ground that an integer in the calculation of value of the

---

159 *First Churchill Report* (29 October 2010), pg 13 [69].

growers' rights was the cost of temporary water that would be needed to meet water allocation shortfalls, expected to be 5% of the water requirements from 2012 onwards for the balance of the life of all of the Almond Projects.[160] Additionally, it was common ground that AL did not own sufficient permanent water rights to meet the water requirements of the 2006 and 2007 Almond Projects so that those projects had to meet a shortfall between the permanent water rights owned by AL and the permanent water requirements of those projects.[161] The banks' expert, Mr Mackenzie, assessed the price of temporary water rights at $185 per megalitre. The growers abandoned reliance on their expert but argued that Mr Mackenzie's assessment was high and should be something lesser. I accept Mr Mackenzie's assessment.

163 Mr Mackenzie's assessment was based on median price data published by the Victorian Water Register of temporary water for the preceding three years. Mr Mackenzie pointed out that his assessment was not an average of the three year trading history. He noted that if he did that "we would be looking at an average of more than $500 a megalitre three years ago, an average in the mid $300s two years ago, an average in the mid $100s ... for the 2009/10 year and significantly less again this year", reflecting the volatility of the market that was impacted by several factors, including volume of rainfall and drought conditions.[162] Mr Mackenzie said that he took into account in arriving at his view on the average annual temporary water cost over the balance of the Almond Projects that:

(a) the "weight of climate science" indicated that there would be a reduced water future and reduced inflows into the catchments over time;

(b) rainfall volumes would be intensely volatile in the future;

(c) the nine year average for the Murray supply system for the period 2002/3 to

160 The experts agreed that 100% of the water owned by AL would be allocated for use for 2010 and 2011: *Joint Expert Report of Mackenzie, Barnden and Lynch* (7 December 2010), pg 4.

161 The experts agreed that AL owned sufficient permanent water rights to meet the requirements of the 2002 Private Offer Scheme, the 2002 and 2005 Almond Projects: *Joint Expert Report of Mackenzie, Barnden and Lynch* (18 January 2010), pg 4.

162 *Transcript of proceeding*, 10 February 2011, pg 407.

2010/11 was an allocation of 94%;

(d) the fact that the Federal Government was proposing to acquire 640 gigalitres from Victoria over the first half of their buy back programme which would put upward pressure on the price of temporary water; and

(e) the ownership shortfall for the 2006 and 2007 Almond Projects would have a "significant impact in underpinning the market, particularly at average volume levels".

Mr Mackenzie also pointed out that the volatility of the history of the trade gives rise to areas for disagreement in assessing the likely future costs of temporary water.

164 I accept Mr Mackenzie's evidence that the temporary price of water can be impacted on by many factors and that valuers may well have differing views based on the same core empirical data by reason of the factors taken into consideration and the weighting of those factors in their influence on water price. I am not persuaded that Mr Mackenzie' assessment is unsupportable or that the factors that he took into account and his weighting of them led Mr Mackenzie to an assessment of price that was outside a realistic range. There was other evidence which indicated that Mr Mackenzies's assessment was not outside any realistic range.

165 Accordingly, I conclude on the evidence that a temporary water price of $185/ML was appropriate to be used as the input in Mr Churchill's valuation.

G. BANK'S RIGHTS WITH RESPECT TO THE ALMOND ASSETS

166 In view of my conclusion about the operation and effect of Robson J's orders, the question of the marriage principle does not arise.

167 The growers did not contest, and I am satisfied that the banks have established, that they held securities over the Almond Assets sold to Olam to the extent of the amounts outstanding under their respective loan facilities. Those securities entitled the banks to receive the entire amount of the net proceeds as the amounts secured were greater than the net sale proceeds presently held in trust and the growers have

not been successful in establishing their entitlement.

H. ORDERS

168 I will stand the matters over for a period of seven days to enable the banks to prepare a form of orders giving effect to my conclusions and for the question of costs, if any, to be argued.

CERTIFICATE

I certify that this and the 64 preceding pages are a true copy of the reasons for Judgment of Davies J of the Supreme Court of Victoria delivered on 15 June 2011.

DATED this fifteenth day of June 2011.

SCHEDULE OF PARTIES

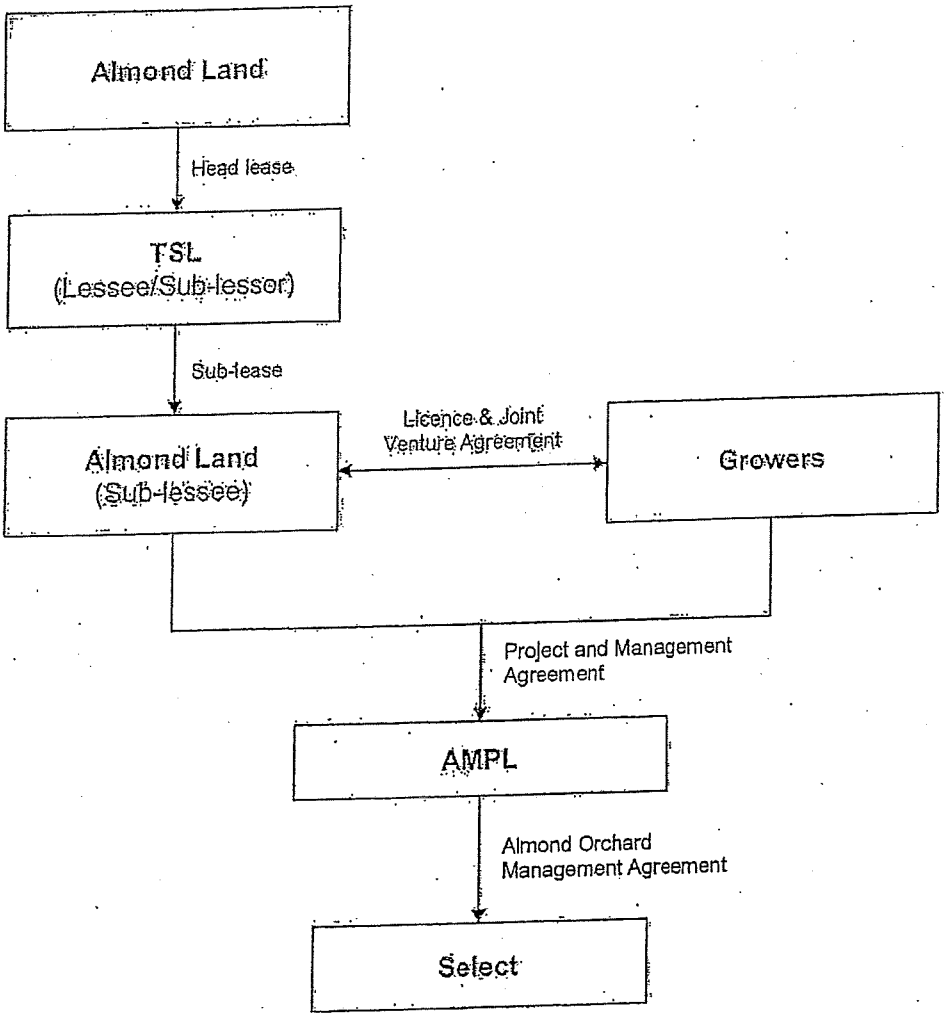
S CI 2009 10699

BETWEEN:

BOSI SECURITY SERVICES LIMITED (ACN 009 413 852) AS TRUSTEE FOR AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522) AND BOS INTERNATIONAL (AUSTRALIA) LIMITED (ACN 066 601 250) AND WESTPAC BANKING CORPORATION LIMITED (ACN 007 457 141)	Plaintiff
- and -	
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522)	First Defendant
ALMOND LAND PTY LTD (IN LIQUIDATION) (ACN 091 460 392)	Second Defendant
MARK ANTHONY KORDA (IN HIS CAPACITY AS LIQUIDATOR OF ALMOND LAND PTY LTD (IN LIQUIDATION))	Third Defendant
LEANNE KYLIE CHESSER (IN HER CAPACITY AS LIQUIDATOR OF ALMOND LAND PTY LTD (IN LIQUIDATION))	Fourth Defendant
GRAHAM GOLDENBERG (IN HIS CAPACITY AS REPRESENTATIVE OF THE GROWERS IN THE 2002 ALMOND PROJECT)	Fifth Defendant
CHRISTOPHER MARK LITTLEY (IN HIS CAPACITY AS REPRESENTATIVE OF THE GROWERS IN THE 2005 ALMOND PROJECT)	Sixth Defendant
CONSTANTINE MOSHOPOULOS (IN HER CAPACITY AS REPRESENTATIVE OF THE GROWERS IN THE 2006 ALMOND PROJECT)	Seventh Defendant
DAVID BUTTERFIELD (IN HIS CAPACITY AS REPRESENTATIVE OF THE GROWERS IN THE 2007 ALMOND PROJECT AND AS A REPRESENTATIVE OF THE GROWERS IN THE 2002 PRIVATE OFFER SCHEME)	Eighth Defendant

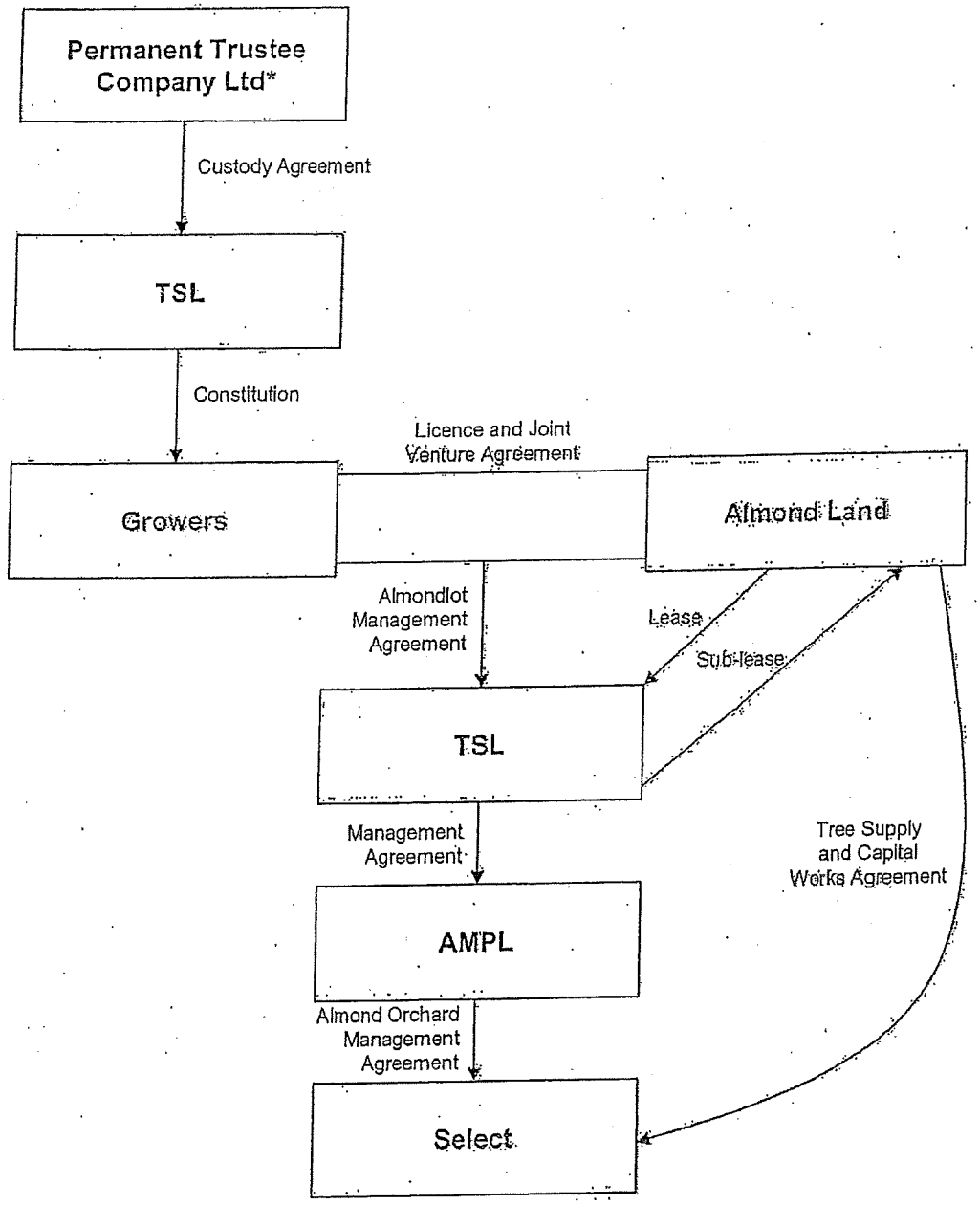
SCHEDULE A

Schedule A
2002 private offer project



SCHEDULE B

Schedule B
2002 Almond Project



*now known as Trust Company Fiduciary Services Ltd

Schedule C
2005, 2006 and 2007 Almond Projects