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

Not Restricted

LIST B
S CI 2013 01477
S CI 2013 01478

THE TRUST COMPANY (NOMINEES) LIMITED (ACN 000 154 441)

Plaintiff

v

MICHAEL FUNG IN HIS CAPACITY AS RECEIVER AND MANAGER OF ALIGN FUNDS MANAGEMENT LIMITED (RECEIVER AND MANAGER APPOINTED) (ACN 105 684 231) IN ITS CAPACITY AS THE RESPONSIBLE ENTITY OF THE TIMBERCORP ORCHARD TRUST & OTHERS (ACCORDING TO THE SCHEDULE)

Defendants

JUDGE:	Dixon J
WHERE HELD:	Melbourne
DATE OF HEARING:	19 May 2014
DATE OF JUDGMENT:	27 May 2014
CASE MAY BE CITED AS:	In re Timbercorp Securities Ltd (Applications for the approval of compromises) (No 2)
MEDIUM NEUTRAL CITATION:	[2014] VSC 246

PRACTICE AND PROCEDURE – Represented parties – Approval of compromise – Whether for the benefit of the absent persons - *Supreme Court (General Civil Procedure) Rules 2005* r 16.01.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Ms W.A. Harris QC with Dr M.D. Rush of counsel	Allens
For the Second & Third Defendants	Mr G.T. Bigmore QC with Mr S. Hopper of counsel	M + K Lawyers

HIS HONOUR:

Background to the application

1 Before the court on 19 May 2014 were applications to approve terms of a compromise of two proceedings that are commonly referred to as the Bella Vista Rights Proceeding and the Kangara Rights Proceeding. Each proceeding arose out of the collapse of Timbercorp Ltd and related entities. Orders were sought to bind absent parties who were represented in each of the proceedings by a representative party appointed by the court for that purpose. The applications were made under r 16.01(4) of the *Supreme Court (General Civil Procedure) Rules* 2005. I approved the Deeds of Compromise and made orders binding the absent parties. What now follows are my reasons for doing so.

2 In each proceeding, the plaintiff is the trustee for holders of debentures, issued by Align Funds Management Limited (receivers and managers appointed) to raise funds to purchase properties and water rights for various agribusiness managed investment schemes conducted by Timbercorp and its subsidiaries. The debenture holders were secured and the plaintiff alone held all securities. The first defendant, Michael Fung in his capacity as receiver and manager of assets over which the plaintiff held security, was excused from taking any substantive part in the proceedings. The second and third defendants are the Representative Growers for each of four Timbercorp projects - 2004 Table Grape Project, 2005 Table Grape Project, 2004 Citrus Project and 2005 Citrus Project that are the subject of these two proceedings . The Representative Growers were appointed by the court on 19 July 2013 as representatives of all investors in the relevant projects for the purposes of these proceedings. The number of growers who invested in each project are as follows:

(a) 207 growers invested in the 2004 Table Grape Project;

(b) 302 growers invested in the 2005 Table Grape Project;

(c) 80 growers invested in the 2004 Citrus Project; and

(d) 160 growers invested in the 2005 Citrus Project.

3 Two Deeds of Compromise were executed on 14 January 2014 by each of the parties to the proceedings respectively, as well as Align in its capacity as the responsible entity of the Timbercorp Orchard Trust, and Timbercorp Securities Limited (in liquidation) (**TSL**). Each Deed contains two conditions precedent. By 7 March 2014, the holders of the debentures issued by Align must approve the Deed, and that has occurred. By 30 June 2014, this court must approve each Deed of Compromise pursuant to r 16.01(4) of the Rules. The Deeds of Compromise on this application are cross-conditional and neither can take effect until both are approved. Plainly, a global settlement of both proceedings is intended.

4 Similar applications were made to the court in respect of five other proceedings that also arose from the collapse of Timbercorp Ltd and related entities. Those other proceedings were commonly referred to as the Almond Land Rights Proceeding, the Liparoo and Yungera Rights Proceeding, the Solora Rights Proceeding, the BB Olives Rights Proceeding, and the Fenceport Rights Proceeding. Each proceeding concerned like-structured agribusiness managed investment schemes and similar issues about the entitlements of the parties to a fund comprised by asset sales. The court approved each compromise and made orders binding absent parties. In *In re Timbercorp Securities Ltd (Application for the approval of compromises)*[1] (the first approval), Judd J set out background and other matters that I am content to adopt for present purposes without restating such matters in full. It is necessary that that judgment, which is familiar to the parties, be read together with these reasons. I am adopting that course because -

(a) each proceeding arose out of the collapse of the Timbercorp group of companies in 2009;

---

1 [2012] VSC 590 (12 December 2012).

(b) Timbercorp was the parent entity in a group comprising 40 corporate entities involved in the establishment, development, marketing and management of primary industry based managed investment schemes;

(c) on 23 April 2009, voluntary administrators were appointed to each of the companies in the group, and on 29 June 2009 the creditors resolved to wind-up the group. Liquidators were appointed over companies including Timbercorp and TSL;

(d) Court approval was sought and obtained to sell assets the subject of the various projects, with the net sale proceeds to be held on trust pending determination of those who were entitled to the proceeds and the amounts to which they were entitled. In each case, the approval application followed completion of that process;

(e) one proceeding, the Almond Land Rights Proceeding, went to trial in 2011. It was, in effect, a test case to ascertain what rights, if any, various interested parties had to the net sale proceeds (the subject of that proceeding), and the value of those rights. Those proceeds derived from the sale of assets used in various almond-growing schemes operated by Timbercorp (the Almond Projects). The Almond Land Rights Proceeding is equally significant for this application as it was for the first approval. The trial judge, Davies J, concluded that the growers in the relevant projects had either no proprietary interest in the net sale proceeds or, if they had such an interest, it was of no value. I will return to this decision;

(f) the compromises that were the subject of the first approval were on substantially similar terms to the Deeds of Compromise that I must consider, including providing for approximately 5% of the gross sale proceeds of the relevant project assets being held on trust by TSL for distribution to and on behalf of growers in accordance with their entitlement under the respective

deeds;

(g) the first approval was, as are these proceedings, applications under r 16.01(4) of the Rules for approval of the compromises. In each proceeding, growers received notices about the approval process, an information hotline was established, a document answering frequently asked questions was prepared and made available, and grower feedback was obtained and recorded;

(h) the same legal principles are relevant in determining whether, in the current proceedings, the court should approve the Deeds of Compromise. Primarily, those principles are drawn from *Exxonmobil Superannuation Plan Pty Ltd v Esso Australia Pty Ltd*[2]; and

(i) there is a further connection between the Kangara Rights Proceeding and the Solora Rights Proceeding, one of the five compromises approved in the first compromise. Judd J considered, in the context of the compromise of the Solora Rights Proceeding, the viability of the 2005 Timbercorp Citrus Project and whether the compromise concerning that project should be approved. The 2005 Citrus Project was conducted on land the subject of both the Solora Rights Proceeding and the Kangara Rights Proceeding. For the purposes of determining whether to approve the Deed of Compromise in the Kangara Rights Proceeding, the court must consider findings made in the first compromise by Judd J concerning the viability of the 2005 Citrus Project.

Background to the proceeding

5 The Bella Vista Rights Proceeding concerns two table-grape agribusiness schemes, the purpose of which was the cultivation of fresh table grapes for commercial sale. Each project was a managed investment scheme, with TSL the responsible entity, governed by a suite of documents including a constitution, leases, under-leases and licence agreements. The projects were conducted on land in New South Wales

2 (2010) 29 VR 356; [2010] VSC 357 (Habersberger J).

owned by Align in its capacity as the responsible entity of the Timbercorp Orchard Trust. In that capacity, Align also held water access rights under licence and water share arrangements. The property, water licences and other rights were secured to the plaintiff by real property mortgages and a registered charge over the assets of the Timbercorp Orchard Trust.

6 The Kangara Rights Proceeding concerns two citrus-related agribusiness schemes, the purpose of which was the cultivation of citrus fruit (oranges, mandarins, lemons, limes and grapefruit) for commercial sale. Each project was a managed investment scheme, with TSL the responsible entity, governed by a suite of documents including a constitution, head lease, sub-lease and licence agreement. The projects were conducted on land in Murtho, South Australia. The 2004 Citrus Project was conducted on the Kangara property at Murtho and 2005 Citrus Project was conducted on the Kangara property and the Solora property at Murtho. As I have noted, the sale of the Solora land, and the distribution of the proceeds, was approved by Judd J in the first approval. The Kangara Rights Proceeding concerned the proceeds from the sale of the Kangara property and related assets. Align (in its capacity as the responsible entity of the Timbercorp Orchard Trust) owned the Kangara property, which included citrus orchards and wine grape vineyards. Align also held rights to 8,861.5 mega litres of water per annum under a water licence.

7 The purchase by Align of the Kangara Project assets was with funds raised by the same debenture issue as was used to purchase the Bella Vista Property and Water Rights and the plaintiff held security over the Kangara property by real property mortgage and security over the assets of the Timbercorp Orchard Trust by a registered charge.

8 As at 29 June 2009, the combined amount of the secured debt owing to the plaintiff in relation to the 2004 and 2005 Table Grape Projects and the 2004 and 2005 Citrus Projects was $56,773,700 (with interest continuing to accrue from that date).

9 In late 2009, the receivers offered the Bella Vista property and Water Rights for sale. I need not recite the detail of the sale process, which was in evidence before me. On 23 July 2010, the receivers contracted to sell the Bella Vista property and associated assets and on 22 December 2010 the receivers contracted to sell the Bella Vista Water Rights. These contracts were subject to conditions precedent that were satisfied when, on 7 February 2011, Davies J made orders which permitted the sale of the Bella Vista property and Water Rights to proceed, required the net sale proceeds to be held on trust until further order of the court, and expressly preserved the rights of the plaintiff and the growers to assert an interest in those net sale proceeds. Following settlement of those Bella Vista sale contracts, and payment of the receivers' costs and other expenses, the Bella Vista net sale proceeds totalled $5,899,837.70.[3]

10 The receivers engaged in an extensive sale process to realise the Kangara Property and Water Rights. Again, I received evidence of that process but it is unnecessary to now recite the detail of it. On 3 December 2010, the receivers sold the Kangara property and on 4 January 2011, the receivers contracted to sell the Kangara Water Rights. Again, conditions precedent in those contracts were satisfied when on 15 March 2011, Judd J's orders permitted the sale of the Kangara property and Water Rights to proceed, required the net sale proceeds to be held on trust until further order of the court, and expressly preserved the rights of the plaintiff and the growers to assert an interest in those net sale proceeds. After the Kangara Sale Contracts settled, and following payment of the Receivers' costs and other expenses, the Kangara net sale proceeds totalled $20,336,356.45.[4]

11 Each of the Bella Vista Rights proceeding and the Kangara Rights proceeding was commenced by the plaintiff to determine who was entitled, and in what quantum, to the respective net sale proceeds.

---

3 As at 19 March 2014.
4 As at 19 March 2014.

12 I pause to note that the combined proceeds of the asset sales, after expenses, is $26,236,193 and the secured debt owed to the plaintiff is more than $56,773,700 as interest continues to accrue from 29 June 2009, leaving a shortfall on well in excess of $30,000,000.

13 Following negotiations between the parties, the Deeds of Compromise were executed by the parties to the proceedings on 14 January 2014. The Deeds of Compromise are in largely identical terms, to each other and to the compromise deeds approved by Judd J in the first approval. The Deeds provide for the distribution of the net sale proceeds from the assets and land sales I have described and provide that the parties, including growers, will mutually release each other from all claims and entitlements to the sale proceeds.

14 The mechanism for allocation and distribution of the Fund in each proceeding is set out in clause 4 of each Deed. It provides, in substance, that the following payments are to be made from each Fund following court approval:

(a) to the receivers, their unpaid costs;

(b) to TSL, to be held on trust for distribution to, or on behalf of, growers in accordance with their entitlements (as further defined in the Deeds of Compromise):

(i) $385,000 (in the Bella Vista Rights Proceeding); and

(ii) $1,043,321 (in the Kangara Rights Proceeding),

being approximately 5% of the gross sale proceeds of the subject assets in each case, to be apportioned between the growers on a pro-rated basis according to the number of lots held by each grower at the date on which the growers' rights in the Table Grape Projects or the Citrus Projects (as the case may be) were extinguished pursuant to court order; and

(c) to the plaintiff, the balance of the Fund.

15 The amount payable per lot for the Table Grape Projects equates to $93.93.[5] The amount payable per lot for the Citrus Projects equates to $271.98.[6] The difference between the amounts payable reflects matters of difference between the projects that include the sale price obtained for the respective properties and water rights.

16 Rule 16.01(4) of the Rules provides:

> Where a compromise of a proceeding is proposed and some of the persons who are interested in, or who may be affected by, the compromise are not parties (including unborn or unascertained persons) but –
>
> (a) ...
>
> (b) the absent persons are represented by a person appointed under paragraph [16.01](2) and the appointed person so assents –
>
> the Court, if satisfied that the compromise is for the benefit of the absent persons, may approve the compromise and order that it shall be binding on the absent persons, and they shall be bound accordingly except where the order is obtained by fraud or non-disclosure of material facts.

17 In each of the Bella Vista and Kangara Rights Proceedings:

(a) a compromise of the proceedings has been proposed;

(b) there are growers who are interested in, or who may be affected by, the relevant compromises; and

(c) growers who are 'absent', in the sense of not being a party to the proceedings, are represented by Representative Growers appointed under r 16.01(2) of the Rules.

18 For the reasons that follow, I am satisfied that the Deeds of Compromise are, in each case, for the benefit of growers.

19 As I have noted, the relevant principles when determining whether, for the purposes

---

5 Calculated by reference to the gross sale proceeds of $7,696,256.

6 Calculated by reference to the gross sale proceeds of $20,884,620.

of r 16.01(4), a compromise is 'for the benefit' of absent persons, were set out by Habersberger J in *Exxonmobil Superannuation Plan Pty Ltd v Esso Australia Pty Ltd*[7] and applied by Judd J in the first compromise.[8] I am content to adopt the summary of those principles put by counsel for the plaintiff.

(a) In its ordinary meaning, something is 'for the benefit of' a person if it is an advantage or profit for that person, or a gain for that person.[9]

(b) Although it is essential that the court applies the test in r 16.01(4) in the particular circumstances of each case, court approval of proposed settlements of class action provide useful guidance.[10] Relevant considerations identified in such cases include:

(i) the amount offered to each group member;

(ii) the prospects of success in the proceeding;

(iii) the likelihood of the group members obtaining judgment for an amount significantly in excess of the settlement offer;

(iv) the terms of any advice received from counsel and from any independent expert in relation to the issues which arise in the proceeding;

(v) the likely duration and cost of the proceeding if continued to judgment; and

(vi) the attitude of the group members to the settlement.[11]

---

7 (2010) 29 VR 356; [2010] VSC 357.

8 *Re Timbercorp Securities Limited (Applications for the approval of compromises)* [2012] VSC 590.

9 *Exxonmobil Superannuation Plan Pty Ltd v Esso Australia Pty Ltd* (2010) 29 VR 356; [2010] VSC 357 at 368 [52], with references to *The Shorter Oxford English Dictionary on Historical Principles*, p181 and *Butterworths Australian Legal Dictionary*, p121.

10 Ibid, at 369-70 [60]. In Victoria, approval is sought in accordance with the terms of s 33V of the *Supreme Court Act 1986* (Vic).

11 Ibid, at 369-70 [60] quoting from *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459 at 465 [19] per Goldberg J.

(c) The benefit received by absent persons from a settlement, whether it be little or large, has to be weighed against their prospects of success should the matter proceed to trial (or appeal, as the case may be).[12] Thus:

(i) if a settlement is considered to be appropriate or fair and reasonable when weighed against the chances of the absent person obtaining a better outcome at trial and the risks and potential burdens of litigation, then it can safely be concluded that it is "for the benefit of the absent persons" because it is in their best interests to accept what has been offered rather than reject it and run the risk of receiving nothing or substantially less;

(ii) but if the financial gain to the absent persons from a settlement is considered too low when weighed in this balancing exercise then it would not be correct to conclude that it was for their "benefit".[13]

(d) In the case of absent persons who receive nothing from a settlement because they have no chance of succeeding at trial, it can still be concluded that the settlement is for their benefit because it brings to an end litigation which was serving no valid purpose as far as they are concerned and might even be exposing them to a potential liability for costs.[14]

(e) When weighing up the prospects of the parties obtaining a more favourable result at trial, it is important for the court to bear in mind that:

(i) it is difficult for the court to know more about the actual risks of the litigation than the parties' legal advisers; and

---

12 Ibid, at 369 [56].

13 Ibid, at 370 [62].

14 Ibid. Court orders made on 16 December 2011 in the case of the Liparoo and Yungera Rights Proceeding, Solora Rights Proceeding and Fenceport Rights Proceeding, 22 March 2010 for BB Olives Rights Proceeding, and 22 December 2009 for Almond Land Rights Proceeding, provided that Grower Representatives would have their costs paid out of the respective Fund for the trial of each of the those proceedings. This order did not extend to any appeal.

(ii) the court looks to whether the settlement amount falls within a range that may be considered reasonable having regard to the respective strengths and weaknesses of the parties' position in the litigation, rather than deciding for itself whether the settlement provides what the court itself considers to be the most fair and reasonable outcome.[15]

(f) A compromise may be 'for the benefit of' someone who potentially stands to gain a financial benefit from the compromise, even though he or she does not eventually receive that benefit.[16]

(g) Other relevant considerations, evident from the reasons in *Exxonmobil,* are:

(i) Have the court appointed grower representatives received legal and actuarial advice concerning the proposed deeds of compromise?[17]

(ii) Have the representatives formed the view that it was in the best interests of the absent members to agree to the deeds of compromise and the proposed orders sought under them?[18]

(iii) Does the evidence establish that appropriate notification of the compromise and of the applications seeking approval have been provided to absent members?[19]

(iv) Were any queries from absent members arising from the notification satisfactorily dealt with?[20]

20 The principles relevant to class action settlement approvals have been considered by this court in a number of recent cases,[21] some of which cite with approval the

---

15 Ibid, at 370-1 [63], citing *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Limited* (No 2) (2006) 236 ALR 322 at 339 [50] per Jessup J.

16 Ibid, at 374 [80].

17 Ibid, at 367 [49].

18 Ibid.

19 Ibid, at 367 [50].

20 Ibid.

21 *Wheelahan v City of Casey & Ors* [2011] VSC 215 at [59]-[64] Emerton J; *Thomas v Powercor Australia Limited* [2011] VSC 614 at [9]-[16] Beach J; *Perry v Powercor Australia Ltd* [2012] VSC 113 at [9]-[16] Beach J; *Matthews v SPI Electricity Pty Ltd (Ruling No 16)* [2013] VSC 74 at [35]–[36] Dixon J; *Place v*

discussion of principle in *Exxonmobil* and the first compromise.

21 I am satisfied that the Deeds of Compromise are for the benefit of growers and I am so satisfied on all of the material principally by reference to four matters.

(a) The growers' prospects of success in the proceedings are reasonably assessed as poor or minimal, in light of the Almond Land Rights Proceeding and the similarity between the facts of that case and those of the present proceedings.

(b) The Representative Growers have received the advice of senior and junior counsel who analysed the growers' prospects of success in each proceeding, and other relevant matters, and supported settlement on the terms of the Deeds of Compromise. The Representative Growers, having considered that advice and acting in the best interests of growers, support approval of the Deeds.

(c) Growers have received notice with detailed information about the Deeds of Compromise and the approval process, and have been given the opportunity to ask questions and raise any concerns. To date, no growers, other than Ms Bezencon, who has an interest as a grower in one of the four projects and whose concerns are discussed below, have voiced concern or objection to the Deeds of Compromise.

(d) The cost and delay to be borne by all parties if the proceedings were to continue to trial would be substantial and corrosive of a fixed sum fund.

22 The relevant aspects of Davies J's decision in the Almond Land Rights Proceeding[22] were analysed by Judd J in the first compromise[23] and I need not repeat that analysis.[24] In summary, in rejecting the interpretation advanced for the growers of

---

Powercor Australia Ltd [2013] VSC 6 at [10] Beach J; *Campbell v Hazell Bros (Vic) Pty Ltd* [2014] VSC 54 at [16] Emerton J.

22 *BOSI Security Services Ltd v Australia and New Zealand Banking Group Ltd* (2011) 84 ACSR 341.

23 *Re Timbercorp Securities Ltd (Applications for the approval of compromises)* [2012] VSC 590 at [19]-[27].

24 The Growers' appeal of the decision of Davies J settled before the appeal was heard.

Robson J's growers' rights extinguishment orders that permitted the sales to proceed, Davies J held that the relevant question was the proper characterisation of the growers' pre-extinguishment rights and, in particular, whether they were of a proprietary nature. In the case of two of the Almond projects (the 2002 Private Offer Scheme and 2002 Almond Scheme), growers' rights under the project documents were contractual in nature conferred by a licence not a sub-lease, and no proprietary interest was created.[25] The project documentation for other Almond projects were different, but as I will shortly explain, I need not concern myself with those other projects. Next Davies J turned to the issue of whether the growers' rights held any value before extinguishment, but that question too is not relevant on these applications, save that the plaintiff puts a supplementary submission that even if growers' rights in the present projects are not contractual but proprietary, those rights are of no value.

23 That conclusion was reached because Davies J held that the Almond Projects could not continue under their existing structures as they were at risk of 'imminent and inevitable' termination.[26] Her Honour found that there was no possibility, other than a theoretical possibility, that the project could have continued if the growers' rights had not been extinguished.[27] On the hearing of the approval applications I was taken by counsel through the project documents for the four projects.

24 I am satisfied that the 2004 and 2005 Table Grape Projects were licence-based schemes, and that the growers' rights in relation to those schemes were of a contractual nature only, rather than of proprietary character. Applying the reasoning of Davies J in the Almond Land Rights Proceeding in relation to the contractual Almond projects to the Bella Vista Rights Proceeding, the growers in the Table Grape Projects would have no entitlement to share in the net proceeds obtained from the

---

25 *BOSI Security Services Ltd v Australia and New Zealand Banking Group Ltd* (2011) 84 ACSR 341 at 356-7 [48], [52].

26 Ibid, at 364 [83].

27 Ibid, at 379 [137].

sale of the Bella Vista Land and related assets and the Bella Vista Water Rights. Further, even if it were found that the growers had some right of a character entitling them to a prima facie interest in the net sale proceeds, on the available evidence there is no realistic prospect of the growers in the Table Grape Projects establishing that the schemes were viable under either the existing structure or under any restructure. Thus, any such rights as they may have had were worthless.

25 Unless there be reason not to apply the key findings in the Almond Land Rights Proceeding consistently in the Bella Vista Rights Proceeding, it is probable that the growers would be found to have no entitlement to the net proceeds from the sale of the Bella Vista Property and Water Rights. No criticism is advanced, or is otherwise apparent, of Davies J's reasoning, and no factual basis to distinguish the application of her Honour's findings to the projects that I am considering has been identified.

26 I am also satisfied that the growers' rights in relation to the 2004 and 2005 Citrus Projects, as licence-based schemes, were of a contractual nature only and that there was no realistic prospect of the growers in the Citrus Projects establishing that the schemes were viable under either the existing structure or under any restructure. It is probable that the growers would be found to have no entitlement to the net proceeds from the sale of the Kangara Land and related assets and the Kangara Water Rights. I should add that Judd J considered the viability of the 2005 Citrus Project in the first compromise and reached the same conclusion.[28] As similar contentions against that proposition appear to have been raised by Ms Bezencon in this proceeding and in the proceeding before Judd J, it is significant that his Honour considered these contentions in the analysis.

27 I find particular remarks of Judd J in the first approval to be apposite and worth restating.[29]

> It is always difficult for a court to make an assessment of litigants prospects

---

28 *Re Timbercorp Securities Ltd (Applications for the approval of compromises)* [2012] VSC 590, at [52] and [96].

29 Ibid, at [102].

> without the benefit of hearing all of the evidence and detailed submissions. But, as the secured creditors and representative growers submitted, this case had the unique feature of a decision of a judge at first instance in one proceeding that provided a readily applicable basis upon which a prediction may be made in the other proceedings. Perhaps more important is the very practical matter of the dependency of the schemes, and thus value for growers, on the solvency of the responsible entity and Timbercorp group as a whole. In the absence of a suitable replacement responsible entity, with additional and substantial new funding, the schemes would fail, and the value of any investment made by the participating growers would be substantially lost. Viewed from that perspective, it is my firm view that the offer accepted by the representative growers in each of the deeds of compromise exceeds all reasonable prospects of a better outcome if any of the proceedings were to be litigated.

28 I am satisfied that the certain payment to be received by each grower under the respective Deeds, albeit modest, is, when compared with the unlikely prospect of any payment being received consequent on judgments in the proceedings, an advantage or profit for a grower and that the compromise is 'for the benefit of a person' in terms of r 16.01(4). It is in the growers' best interests to accept what has been offered, although it is a modest sum, rather than reject the compromise offered and run the risk of receiving nothing, which risk I assess to be likely to eventuate.

29 Next, I turn to the consideration of advice to growers in connection with the Deeds of Compromise. The Representative Growers were represented in negotiations by Macpherson + Kelley solicitors. Prior to entering into the Deeds of Compromise, the Representative Growers in each proceeding received formal written advice from counsel. Conferences were then arranged between the Representative Growers, their instructing solicitors and counsel, during which counsel provided oral advice and answered any questions of the Representative Growers. In each case the Representative Growers each formed the view that the terms of the relevant Deed of Compromise were in the best interests of all growers they represent.

30 Copies of counsels' written advices have been made available to any grower in the relevant proceeding, and filed as confidential exhibits. I have read them. As

Finkelstein J said in *P Dawson Nominees Pty Ltd v Brookfield Multiplex Limited (No. 4)*[30], in approving settlements of class actions the court assumes responsibility for protecting the interests of the class members. In that task, the court necessarily places considerable reliance on the parties' lawyers. As a settlement proposal is in reality a proposal put by both sides it is not just the applicants' lawyers that carry the burden of ensuring that the court is given sufficient information to assess whether the proposed settlement is to be approved. The respondents' lawyers also bear some responsibility for ensuring that the court has all the information that objectively describes the merits of the case and should bring to the court's attention the obstacles to recovery and the benefits to be derived from the proposed settlement.

31 In their advices, counsel acknowledge that the advice may be provided to represented growers and to the court on any application for approval of the proposed settlement. I am satisfied that counsel have contemplated, and do, address an audience beyond their immediate clients and that frank advice has been given in the context of the duties that counsel owe to the court and to represented growers. The advices address the right questions and the appropriate evidence. I am satisfied that counsel were properly instructed for the purposes of their advices and that those instructions were revisited as circumstances warranted. Counsel gave supplementary advice in the Kangara Rights Proceeding dealing with two particular issues that had arisen. One of those issues was the relevance of a recent decision of the High Court of Australia, and the other was a memorandum from Ms Bezencon that commented on the initial advice. The supplementary advice acknowledged that Ms Bezencon was a grower with a long history of advocacy for growers in these and other Timbercorp schemes. The material discloses that some of the matters raised by Ms Bezencon were investigated by the solicitors before counsel gave further advice based on those investigations. Counsel responded to all matters that she raised.[31] The solicitors sent a copy of the supplementary advice to Ms Bezencon. Further, counsel

30 [2010] FCA 1029, at [4].
31 K4:1393 at [21]-[22].

then conferred with the Representative Growers in the Kangara Rights Proceeding who each confirmed that they did not wish to alter their decision to enter into the Deed of Compromise.

32 The next matter to consider is the information and assistance that was given to all growers. The material on the application before me established that on 4 March 2014 a letter and email was sent to the last known email address of all growers informing them that a compromise in each of the Proceedings had been reached, and that an information notice (known as the First Notice to Growers) had been uploaded onto specified websites. Letters were also posted to all growers and letter returns and email 'bounce-backs' were monitored. Follow up communications ensured that all growers received a copy of the First Notice to Growers. An advertisement was placed in *The Australian* newspaper the same day, and copies of the Deeds, and a 'frequently asked questions' document for each proceeding, were put on the specified websites.

33 Growers in each proceeding were informed of, among other things, how much money per lot under the relevant compromise was proposed to be set aside for growers, when growers would receive their entitlement under the compromise (if approved), and how this was to occur. Growers were also told why the Representative Growers agreed to the Deeds of Compromise, that copies of the advice provided by counsel could be obtained, and that any objections or queries could be directed to the Representative Growers by, in the first instance, contacting TSL on their behalf, or could be raised with the court as part of the compromise proceedings. TSL has arranged for a telephone hotline and email facility to be maintained to enable growers to, among other things, ask questions, make comments, and update personal information. An agreed protocol governed those communications with growers through the telephone hotline and email facilities.

34 The responses to this information process were monitored and collated. In the Bella

Vista Rights Proceeding there were no objections lodged by any grower, although there were a number of other forms of assistance provided to growers through this process. In the Kangara Rights Proceeding only Ms Kerree Bezencon lodged an objection.

35 I now turn to Ms Bezencon's objection, but first some background. Ms Bezencon unsuccessfully contested the application to appoint the representative grower for the 2005 Citrus Project. Judd J gave her leave to appear on behalf of the TGG Citrus Committee Inc in the Kangara Rights Proceeding and ordered that any document served in the proceeding also be served on the TGG Citrus Committee. I accept that Ms Bezencon has been served with materials and information in relation to the approval process. On 15 April 2014, Ms Bezencon wrote to the parties seeking consent to her costs of engaging a firm of solicitors to represent the TGG Citrus Committee in relation to the approval of the Deeds of Compromise being paid out of the fund in order to assist her in a role as 'contradictor'. The plaintiff responded noting that any payment out of the fund for additional legal costs would need court approval and foreshadowing, on stated grounds, opposition to any such application.

36 The solicitors for the Grower Representatives have put before the court their communications with Ms Bezencon. Those solicitors stated their intention to put any matters raised by Ms Bezencon or documents provided by her to them before the court and they have done so. They reminded her that she had the opportunity to appear before the court on the hearing of the application. She did not do so. Ms Bezencon's extensive email of 1 April 2014 was considered by the solicitors and counsel, as I have already noted. A further email, described as a statement, and dated 16 May 2014 was also put before me. I have read, and considered the matters raised in, each of these communications. Overwhelmingly, Ms Bezencon's objections to the approval of the Deeds of Compromise concern procedural matters and, in so far as I understand what she is contending from these communications, I am not persuaded that the substance of the points she raises have not been properly

answered by the plaintiff on this application, or by the legal representatives of the Representative Growers in submissions to me and in the confidential memoranda of advice they have provided as discussed above. It appears, unsurprisingly, that no other Representative Grower or Kangara Rights Proceeding absent member has been persuaded by Ms Bezencon's arguments.

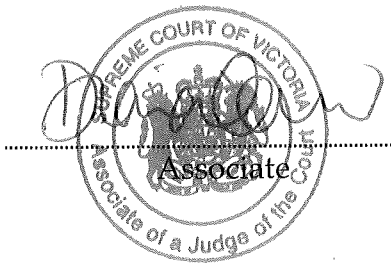
37 Finally, the other matter on which I will comment is that of delay and expense that will be incurred by the parties if the compromise is not approved. In this respect, the Almond Land Rights Proceeding provides a useful guide. If the Bella Vista and Kangara Rights Proceedings proceeded to trial, it is likely that significant time and cost will be involved in the preparation of evidence and submissions, and in the hearing itself as occurred in the Almond Land Rights case. I would expect, because the appeal in that case was settled, that all issues decided by Davies J would again be contested. Moreover, the Representative Growers would face a likely prospect of the additional cost and delay of an appeal in this case. Further litigation will reduce the balance of the Funds available for distribution to all parties.

38 Default interest continues to accrue on the secured debt. Should the matter proceed, the plaintiff would receive substantially less than the sum owed to it under the proposed compromise, and would be kept out of funds for a further period of time while the trial and any appeal is heard and determined. By contrast, if each of the Deeds of Compromise is approved, disbursement of the funds to the growers and the plaintiff can be effected immediately on the terms set out in the Deeds. Plainly, the commercial sense of the compromises is apparent to all except Ms Bezencon.

CERTIFICATE

I certify that this and the 19 preceding pages are a true copy of the reasons for Judgment of the Honourable Justice Dixon of the Supreme Court of Victoria delivered on 27 May 2014.

DATED this twenty seventh day of May 2014.



.....
Associate

SCHEDULE OF PARTIES

LIST B
S CI 2013 01477

BETWEEN:

THE TRUST COMPANY (NOMINEES) LIMITED (ACN 000 154 441)	Plaintiff
and	
MICHAEL FUNG IN HIS CAPACITY AS RECEIVER AND MANAGER OF ALIGN FUNDS MANAGEMENT LIMITED (RECEIVER AND MANAGER APPOINTED) (ACN 105 684 231) IN ITS CAPACITY AS THE RESPONSIBLE ENTITY OF THE TIMBERCORP ORCHARD TRUST	First Defendant
ANTHONY WILLIAM CORMICK (IN HIS CAPACITY AS REPRESENTATIVE OF THE GROWERS IN THE 2004 TIMBERCORP TABLE GRAPE PROJECT (ARSN 108 648 086))	Second Defendant
JEYARASA RASIAH AND ANNE RASIAH (IN THEIR CAPACITY AS REPRESENTATIVES OF THE GROWERS IN THE 2005 TIMBERCORP TABLE GRAPE PROJECT (ARSN 113 512 226))	Third Defendant

LIST B
S CI 2013 01478

BETWEEN:

THE TRUST COMPANY (NOMINEES) LIMITED (ACN 000 154 441)	Plaintiff
and	
MICHAEL FUNG IN HIS CAPACITY AS RECEIVER AND MANAGER OF ALIGN FUNDS MANAGEMENT LIMITED (RECEIVER AND MANAGER APPOINTED) (ACN 105 684 231) IN ITS CAPACITY AS THE RESPONSIBLE ENTITY OF THE TIMBERCORP ORCHARD TRUST	First Defendant
GREGORY WESTAWAY IN HIS CAPACITY AS REPRESENTATIVE OF THE GROWERS IN THE 2004 TIMBERCORP CITRUS PROJECT (ARSN 108 887 538)	Second Defendant
ROBERT AND ELIZABETH BUGDEN IN THEIR CAPACITY AS REPRESENTATIVES OF THE GROWERS IN THE 2005 TIMBERCORP CITRUS PROJECT (ARSN 114 091 299)	Third Defendant