

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

Not Restricted

IN THE MATTER OF TIMBERCORP SECURITIES LTD (in Liquidation) (Applications for  
the approval of compromises)

S CI 2010 01354

BOSI SECURITY SERVICES LIMITED AS  
TRUSTEE FOR AUSTRALIA AND NEW  
ZEALAND BANKING GROUP LIMITED  
AND BOS INTERNATIONAL  
(AUSTRALIA) LIMITED AND WESTPAC  
BANKING CORPORATION

Plaintiff

V

B.B. OLIVES PTY LTD (IN LIQUIDATION)  
and OTHERS (according to Schedule A  
attached)

Defendants

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Mr P. E. Anastassiou of  
Senior Counsel with Mr R.  
G. Craig of Counsel

Ashurst

For the First to Sixth  
Defendants

Dr O. Bigos of Counsel

Arnold Bloch Liebler

For the Seventh to Ninth  
Defendants

Mr G. T. Bigmore, one of Her  
Majesty's Counsel, and Mr S.  
Hopper of Counsel

Clarendon Lawyers

Kerree Anne Bezencon in  
person with leave of the  
court

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S CI 2011 06604

AUSTRALIA AND NEW ZEALAND  
BANKING GROUP LIMITED  
(ACN 005 357 522)

Plaintiff

V

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OIM#2 PTY LTD (RECEIVERS AND  
MANAGERS APPOINTED) (ACN 112 691  
997) AS TRUSTEE FOR TIMBERCORP  
ORCHARD TRUST #3  
and OTHERS (according to Schedule B  
attached)

Defendants

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Ms W. A. Harris of Senior  
Counsel with Mr M. D. Rush  
of Counsel

Allens

For the First and Second  
Defendants

Mr M. N. C. Harvey of  
Counsel

Maddocks

For the Fifth to Tenth  
Defendants

Mr G. T. Bigmore, one of Her  
Majesty's Counsel, and Mr S.  
Hopper of Counsel

Clarendon Lawyers

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S CI 2011 06606

AUSTRALIA AND NEW ZEALAND  
BANKING GROUP LIMITED (ACN 005 357  
522)

Plaintiff

v

OIM#2 PTY LTD (RECEIVERS AND  
MANAGERS APPOINTED) (ACN 112 691  
997) AS TRUSTEE FOR TIMBERCORP  
ORCHARD TRUST #2 and OTHERS  
(according to Schedule C attached)

Defendants

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Ms W. A. Harris of Senior  
Counsel with Mr M. D. Rush  
of Counsel

Allens

For the First Defendant

Mr M. N. C. Harvey of  
Counsel

Maddocks

For the Fourth Defendant

Mr G. T. Bigmore, one of Her  
Majesty's Counsel, and Mr S.  
Hopper of Counsel

Clarendon Lawyers

Kerree Anne Bezencon in  
person with leave of the  
court

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S CI 2011 06777

FENCEPORT PROPRIETARY LIMITED  
(ACN 139 604 121)  
and OTHERS (according to Schedule D  
attached)

Plaintiffs

V

CON MOSHOPOLOUS  
(IN HIS CAPACITY AS A GROWER IN THE  
2000 TIMBERCORP OLIVE PROJECT  
(PRIVATE OFFER) (UNREGISTERED))  
and OTHERS (according to Schedule D  
attached)

Defendants

APPEARANCES:

Counsel

Solicitors

For the Plaintiffs

Dr O. Bigos of Counsel

Arnold Bloch Liebler

For the Defendants

Mr G. T. Bigmore, one of Her  
Majesty's Counsel, and Mr S.  
Hopper of Counsel

Clarendon Lawyers

Kerree Anne Bezencon in  
person with leave of the  
court

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S APCI 2011 103

GRAHAM GOLDENBERG  
(IN HIS CAPACITY AS REPRESENTATIVE  
OF THE MEMBERS IN THE 2002 ALMOND  
PROJECT)  
and OTHERS (according to Schedule E  
attached)

Appellants

V

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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 (ACN 007 457 141)  
and OTHERS (according to Schedule E attached)

Respondents

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Appellants	Mr G. T. Bigmore, one of Her Majesty's Counsel, and Mr S. Hopper of Counsel	Clarendon Lawyers
For the First Respondent	Mr P. E. Anastassiou of Senior Counsel with Mr R. G. Craig of Counsel	Ashurst
For the Second Respondent	Ms W. A. Harris of Senior Counsel with Mr M. D. Rush of Counsel	Allens
For the Third to Fifth Respondents	Dr O. Bigos of Counsel	Arnold Bloch Liebler
For the Appellants' litigation funder	Mr M. J. Hoyne of Counsel	MGA Lawyers

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<u>JUDGE:</u>	JUDD J
<u>WHERE HELD:</u>	Melbourne
<u>DATES OF HEARING:</u>	3 and 4 October 2012
<u>DATE OF JUDGMENT:</u>	12 December 2012
<u>CASE MAY BE CITED AS:</u>	In re Timbercorp Securities Ltd (Applications for the approval of compromises)
<u>MEDIUM NEUTRAL CITATION:</u>	[2012] VSC 590

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**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.

**PRACTICE AND PROCEDURE** – Costs – Circumstances supporting indemnification of representative parties appointed pursuant to *Supreme Court (General Civil Procedure) Rules 2005* r 16.01 from property subject to trust – Entry into litigation funding agreement –

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Premium of 25% - Representative parties acting in good faith - Proper party to bring application for indemnification.

HIS HONOUR:

- 1 Before the court are applications to approve terms of a compromise agreed in five proceedings that arose out of the collapse of Timbercorp Ltd and related entities; and for orders binding absent parties who were represented in each of the proceedings by a representative party appointed by the court for that purpose. The applications are made under r 16.01(4) of the *Supreme Court (General Civil Procedure) Rules 2005*.
- 2 There are five Deeds of Compromise, each executed by all parties, including the representative parties, and dated 25 July 2012. They are interdependent, in the sense that they will only take effect upon approval by the court of each compromise before 31 December 2012.
- 3 The compromised proceedings were commenced to resolve competing claims by secured and unsecured creditors and participating growers to funds derived from the liquidation of assets deployed in managed investment schemes conducted by the Timbercorp group in and between 2000 and 2008. Each fund is held on trust by the vendor of the assets, or the receivers appointed by a bank, pending resolution of the competing claims. The participating growers represented in each proceeding had invested in almond, olive and citrus schemes.
- 4 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. The group had promoted and managed such schemes since around 1992, attracting approximately 18,500 investors who contributed more than \$2 billion. Timbercorp Securities was the responsible entity for 33 registered schemes. Not all such schemes have participating growers represented in the compromised proceedings. There were also forestry schemes in which growers invested. These growers investing in the forestry schemes have no interest in the compromise proceeding, unless they also happen to be an investor in one of the almond, olive or citrus schemes.
- 5 There were also unregistered schemes. There are participating growers in two such schemes who claim an interest in a fund the subject of these proceedings. Olivecorp

Management Ltd managed the 2000 Olive Private Offer Project, and Almond Management Pty Ltd managed the 2002 Almond Private Offer Project.

- 6 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. Mark Anthony Korda and Leanne Kylie Chesser were appointed liquidators of Timbercorp, Timbercorp Securities, Almond Land Pty Ltd and Almond Management. Mr Korda, Ms Chesser and Mark Francis Xavier Mentha were appointed liquidators of BB Olives Pty Ltd; and Messrs Korda and Mentha were appointed liquidators of Olivecorp Land Pty Ltd.
- 7 On 16 September 2009, one of the group bankers, Australia and New Zealand Banking Group Ltd, appointed David McEvoy and Paul Quirk as joint and several receivers and managers of charged assets. ANZ had advanced \$45 million to the Timbercorp group for the purpose of funding almond operations. In addition, it was part of a syndicate of banks, which included Westpac Banking Corporation Ltd and BOS International Australia Ltd, represented by the trustee, BOSI Security Services Ltd, that had advanced \$200 million to the Timbercorp group. The Commonwealth Bank of Australia Ltd also provided funding. Insofar as the compromised proceedings involved claims by secured creditors, they were the ANZ, the BOSI Syndicate, which of course included the ANZ, and Fenceport Pty Ltd, whose role is explained below.
- 8 Following their appointment, Mr Korda and Ms Chesser undertook an extensive investigation of the financial position of the Timbercorp group. Their preliminary investigation indicated that the group had combined liabilities of \$661 million owing to secured creditors, \$250 million owing in other loans and debts, \$14 million owing to unsecured creditors and \$5 million owing in respect of employee entitlements. On 4 June 2009 the liquidators sought approval from the court that they were justified in winding up the almond and olive projects on the basis that the responsible entity, Timbercorp Securities, was hopelessly insolvent and did not have the funds required to continue to maintain the schemes.

- 9      At the time of the application Timbercorp Securities had no funds in its own capacity, and to the extent it did have funds in its capacity as responsible entity, they were insufficient to enable it to perform those functions. It had no significant assets, employees or infrastructure. The harvest prospects for the schemes were uncertain, payments were due under leases, or would shortly become due and could not be paid, and growers were unable to obtain loans from within Timbercorp group to facilitate payments. The liquidators concluded that the management and harvest of the 2010 almond crop would require an investment of \$247 million, and for the olive crops, around \$62 million. The anticipated proceeds from the sale of harvested almonds and olives would not meet those costs, even if the funds could have been raised to undertake the harvest. There was no ability to raise the necessary funds.
- 10     The liquidators concluded that the schemes were insolvent. Notwithstanding the fact that schemes are not legal entities, the solvency or otherwise of managed investment schemes is now analysed and assessed, and schemes may be wound up, as if they were entities.
- 11     On 17 June 2009, Robson J authorised the liquidators to procure Timbercorp Securities to apply to wind up the almond and olive projects. By 18 August 2009, when that application was listed for hearing, there was no one willing to assume responsibility as replacement responsible entity. When the liquidators pressed their application that Timbercorp Securities be authorised to wind up the almond projects, the application was opposed by a Timbercorp Growers Group. As an alternative, the liquidators sought directions that they were justified in amending the scheme constitutions to confer on the responsible entity the express power to terminate growers' rights so as to facilitate a sale or recapitalisation. They were of the opinion that the best prospects for sale of the land was to remove the encumbrance of grower rights.
- 12     On 21 August 2009, Robson J authorised the liquidators to amend the constitutions of the almond projects so as to provide the responsible entity with express power to 'assign, terminate, surrender or otherwise deal with any Sublease/Licence and Joint



Venture Agreement'. Similar orders were eventually made in relation to the olive projects.

- 13 In relation to the citrus project conducted on land known as Solora, the liquidators had commenced an 'informal winding up' process after concluding that the scheme arrangements had broken down following the insolvency of Timbercorp Securities and other companies within the group. The group was unable to fund the continued operations of the scheme. The liquidators procured Timbercorp Securities to amend the constitution of the citrus project to give the responsible entity the power to terminate grower rights. When they sought approval to exercise that power, their application was challenged. The challenge was made by the Timbercorp Growers Group Citrus Committee Inc, and by a grower, Siger Super Services Pty Ltd, as trustee for the Kereg Trust. To facilitate the challenge they were joined as parties to the application for approval brought by the liquidator. Kerree Anne Bezencon is the chairperson of the TGG Citrus Committee Inc and controls Siger Super Services Pty Ltd.
- 14 Orders were made by Davies J on 26 February 2010 authorising the termination or surrender each of the grower licences involved in the citrus project to facilitate a sale of the land deployed in the scheme. Davies J found on the evidence before her that the insolvency of Timbercorp Securities meant that it could no longer fund the operations of the scheme and that the assets were at risk of wasting. The risk of wastage had also been a matter of great concern to the liquidators of the entities involved in the almond and the olive projects.
- 15 The liquidators of the Timbercorp group, and the receivers appointed by the banks, were of the opinion that they had to move quickly to realise assets. There were no offers to recapitalise the schemes. That would involve the replacement of the responsible entity. There were no viable proposals for introduction of a replacement responsible entity. Accordingly, on 18 September 2009 the liquidators entered into a Conditional Sale and Purchase Deed with Olam Orchards Australia Pty Ltd for the sale of assets deployed in the 2002 Almond Private Offer Project, the 2002 Almond

Project, the 2005 Almond Project, the 2006 Almond Project and the 2007 Almond Project, for the price of \$128 million. On 12 October 2009 the liquidators entered into a Conditional Sale and Purchase Deed with Boundary Bend Ltd to sell olive assets deployed in the 2006 Olive Project, the 2007 Olive Project and the 2008 Olive Project for a price of \$2,036,000. Water rights deployed in the olive projects were sold for \$21,464,000. Olive assets, deployed in the 2000 Private Offer Project, the 2001 Olive Project, the 2002 Olive Project, the 2003 Olive Project and the 2004 Olive Project were also sold to Boundary Bend for \$6,665,900. Water rights deployed in the those schemes were sold for a cumulative price of \$29,334,100.

- 16 On 16 November 2009, almond project land known as ‘Liparoo’ and ‘Yungera’ was sold to Olam Orchards Australia Pty Ltd and Olam International Ltd, resulting in combined net sale proceeds of \$147,529,984. The land had been deployed in the 2001, 2002, 2003, 2004 and 2005 Almond Projects, and the 2002 Almond Private Offer Project.
- 17 On 18 December 2009 the land known as Solora, deployed in the 2005 Citrus Project, was sold to Agriproperty Pty Ltd, resulting in net sale proceeds of \$13,327,604.51.
- 18 There were competing claims to the funds derived from these sales. Five proceedings were commenced in which the claims were to be decided. They are:
  - (a) *BOSI Security Services Ltd and others v Australia and New Zealand Banking Group Ltd* No. 10699 of 2009 (the Almond Land Rights Proceeding)
  - (b) *Australia and New Zealand Banking Group Ltd v OIM#2 Pty Ltd (Receivers and Managers Appointed) as trustee for Timbercorp Orchard Trust #3 and others* No. 6604 of 2011 (Liparoo and Yungera Rights Proceeding)
  - (c) *Australia and New Zealand Banking Group Ltd v OIM#2 Pty Ltd (Receivers and Managers Appointed) as trustee for the Timbercorp Orchard Trust #2 and others* No. 6606 of 2011 (Solora Rights Proceeding)
  - (d) *BOSI Security Services Ltd v BB Olives Pty Ltd (in liquidation) and other* No. 1354 of 2010 (BB Olives Rights Proceeding)

**Almond Land Rights Proceeding**

- 19 The Almond Land Rights Proceeding arose out of the competing claims to the proceeds of the sale of assets that were deployed in the 2002 Almond Project, the 2002 Private Offer Project and the 2005, 2006 and 2007 Almond Projects. The liquidators of the vendor, Almond Land, sold real estate, water rights, almond orchards and the benefit of certain contracts under terms of sale approved by Robson J on 8 October 2009.
- 20 Shortly after Almond Land had contracted to sell its assets, BOSI and the ANZ made a conditional offer to Almond Land, that they would contribute \$6 million, less costs, for distribution to the participating growers in the schemes conducted on the land, in full and final settlement of all claims by them to the proceeds of the sale of the almond assets. The liquidators accepted the offer, subject to a direction of the court that they were justified in doing so. Their decision was informed by legal advice they had received as well as their own assessment of the commercial value of the growers' interests in the almond projects. The court declined to approve the offer, instead directing that the proceeds of sale be held on trust by Almond Land pending resolution of competing claims. The offer is significant only because it was for approximately the same amount as that more recently accepted by the representative growers in the Almond Land Deed of Compromise.
- 21 On 2 December 2009, the sale of the almond assets was completed, and the growers' rights were extinguished. The Almond Land Rights Proceeding was commenced on 15 December 2009. On 22 December 2009, Davies J made an order pursuant to r 16.01(2) that the following persons be appointed as representative defendants in the proceeding:
- (i) Graham Goldenberg as representative of the growers in the 2002 Almond Project;
  - (ii) Christopher Mark Littlely as representative of the growers in the 2005 Almond Project;

- (iii) Constantine Moshopoulos as representative of the growers in the 2006 Almond Project;
- (iv) David Butterfield as representative of the growers in the 2007 Almond Project; and
- (v) David Butterfield as representative of the growers in the unregistered managed investment scheme known as the 2002 Timbercorp Almond Project (Private Offer No. 1).

22 In her judgment, delivered on 15 June 2011, Davies J set out the primary issues for determination in the following terms<sup>1</sup>

- (a) the intent and effect of the orders of Robson J in *Re Timbercorp Securities Ltd (In liq)*(No. 3). 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
- (d) if so, the value to be ascribed to those rights.

23 Her Honour rejected a contention that Robson J had decided that the growers had a valuable right traceable into the proceeds of sale. Her Honour concluded that the growers in the 2002 Almond Project and the 2002 Private Offer Project had rights that were contractual only with no entitlement to share in the net proceeds; that growers had no rights in relation to the water licences; but that for the 2005, 2006 and 2007 Almond Projects, the growers' interest in land, capital works and trees were proprietary, entitling them to at least make a claim to the proceeds of sale, referable to those assets, to be assessed by assessing the value of those rights prior to extinguishment.

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<sup>1</sup> *BOSI Security Services Limited v Australia and New Zealand Banking Group Limited* [2011] VSC 255 [9].

24 On valuing the rights, Davies J considered the viability of the projects under the existing structures, the prospects for restructure, and whether they would be viable if restructured. Her Honour concluded that under the existing structures, immediately prior to termination, the growers' rights were at risk of 'imminent and inevitable' termination. Her reasons for so concluding were as follows:<sup>2</sup>

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.

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

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.

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.

25 In relation to the viability of the schemes, if restructured, Davies J held,<sup>3</sup>

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. 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. Thus the growers' case required some evidentiary basis from which the Court could evaluate the likelihood of the restructure counterfactual eventuating had the growers' rights not been extinguished.

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<sup>2</sup> *BOSI Security Services Limited v Australia and New Zealand Banking Group Limited & Ors* [2011] VSC 255, [84]-[87] per Davies J.

<sup>3</sup> *Ibid*, [95], footnotes omitted.

26 Her Honour concluded that there was no real possibility that the almond projects could be restructured and continue as viable projects. A new responsible entity would need to be appointed. The only party that had expressed an interest in undertaking that role, Huntly Management Ltd, was unlikely to be in a position to assume the role. Her Honour held,<sup>4</sup>

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 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.

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.

27 When reaching her conclusions concerning the absence of future viability, her Honour assessed the prospect that the orchards being sold to a new entity prepared to purchase the land subject to the growers' rights; the likelihood that some other entity or manager could be found to replace the existing responsible entity; the risk of deterioration of the orchards; the availability of any real proposal for restructure; the conditions imposed by Huntly Management under which it might have been prepared to assume the role of responsible entity; and the fact that investor sentiment may be adversely influenced by tax consequences flowing from a restructure. Davies J concluded that the growers' rights had no value. She said,<sup>5</sup>

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

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<sup>4</sup> Ibid, [116], [117].

<sup>5</sup> Ibid, [137].

the growers' rights had not been extinguished. Accordingly, in my view no value can or should be attributed to the rights given up.

- 28 By a notice of appeal dated 11 July 2011, the representative growers appealed against the judgment and orders made by Davies J. In summary, they challenged her Honour's findings in relation to the nature of the rights that growers had in the 2002 Almond Project and the 2002 Private Offer Project; the requirement that the growers must establish a proprietary interest in order to have any entitlement to the proceeds of sale; and the conclusion that the growers' interests were at risk of immediate and inevitable termination immediately prior to termination by the responsible entity.
- 29 On 24 February 2012 a settlement proposal was made by the ANZ to representative growers in the Liparoo and Yungera Rights Proceeding and in the Solara Rights Proceeding. Similar offers were then made by the secured creditors in the other proceedings. Negotiations between the parties extended over many months. The grower representatives had engaged Clarendon Lawyers to act on their behalf, and that firm was eventually engaged by the representative parties appointed in each proceeding. Ultimately, agreement was reached, and the five Deeds of Compromise executed.
- 30 The terms of each Deed of Compromise have common features. They address the respective entitlement of the claimants to what is defined as a 'Fund', made up of the proceeds from the sale of assets secured in favour of the plaintiffs. The Deeds of Compromise are interconnected in that performance under one is conditional upon the approval of all other Deeds, and an order binding absent parties. This approach reflects the intended global settlement to finally resolve all claims under the five apportionment proceedings.
- 31 Each Deed required notice to be given to participating growers in the schemes for which the assets had been deployed, informing them of various matters including the background to the relevant proceeding. The notices were also to inform growers of the substance of the relevant provisions of the operative Deed, including the mechanism for payment, the approval process and grower options in relation to the

approval process. The notices were to be published on various websites, with a short letter sent to each grower informing them of the existence of the notices. Advertisements were to be placed in a national newspaper.

- 32 Timbercorp Securities assumed responsibility to perform a range of administrative roles in connection with the approval application, such as distributing the notices to growers, establishing a telephone hotline and email information service, and recording and providing to the representative growers, details of comments, questions, answers and objections made given or raised by growers.
- 33 The mechanisms for allocation and distribution of the 'Fund' mentioned in each Deed were broadly consistent, although there were some minor variations reflecting circumstances particular to the proceeding.
- 34 As at 13 September 2012, the amount owed to the syndicate banks represented by BOSI was \$183,627,796.80. As at 14 January 2011 the ANZ was owed \$56,244,445.57. The advances made by the ANZ and BOSI had been secured by fixed and floating charges and mortgages over land.
- 35 The Almond Rights Deed of Compromise provides, in substance, that BOSI will pay \$3,819,000 and the ANZ \$2,181,000, to Timbercorp Securities to be held on trust for distribution to and on behalf of growers in accordance with their entitlements under the Deed. The amount is approximately 5% of the gross sale proceeds. The total sum of \$6 million is to be apportioned between growers according to the number of almond lots held by each grower on 2 December 2009, which was the date on which their rights were extinguished. Subject to payment out of the fund of costs and expenses to which the representative may be entitled, and the impact of any loan obligations on the amount for distribution to any individual participating grower, they will each receive \$186.57 per lot.

### **BB Olive Rights Proceeding**

- 36 The BB Olive Rights Proceeding was commenced to resolve the competing claims to the proceeds of the sale of assets that were deployed in three olive projects. The assets



were sold to Boundary Bend. The net proceeds from the sale of the olive assets were \$2,036,000; and from the sale of water rights, \$21,464,000. Following the sale, the funds were held on trust by BB Olives pending resolution of the competing claims. The claimants included the secured creditor, BOSI and the participating growers in the 2006, 2007 and 2008 Olive Projects. BB Olives had guaranteed to BOSI repayment of the syndicated loan. That obligation was secured by mortgages over land, a registered water mortgage and other assets charged under a fixed and floating charge.

37 On 22 March 2010, Davies J made an order pursuant to r 16.01(2) that the following persons be appointed as representative defendants in the proceeding:

- (i) Michael Charles Vicary as representative of the growers in the 2006 Olive Project;
- (ii) Pamela Jan Dry as representative of the growers in the 2007 Olive Project; and
- (iii) David Butterfield as representative of the growers in the 2008 Olive Project.

38 The rights conferred on the growers in the 2006 Olive Project and the 2007 Olive Project were, in all material respects, the same as those conferred upon the growers in the 2005, 2006 and 2007 Almond Projects. The participating growers in the 2008 Olive Project invested under a structure, and pursuant to terms, that were in material respects similar rights to those conferred on growers in the 2002 Almond Project. Thus, applying the reasoning of Davies J in the Almond Land Right's Proceeding, their rights would be construed as contractual rather than proprietary.

39 Many of the same factors that were taken into account by Davies J to declare the rights of growers in the almond projects as having no value, applied equally to the 2006, 2007 and 2008 Olive Projects. They could not continue under their existing structures. Termination was inevitable. The groves were at risk of wastage and impairment unless substantial expenditure was undertaken. The purpose of the schemes could not be accomplished. The Timbercorp group had no capacity to fund required capital expenditure. The schemes required significant cash contributions beyond the fee obligations of the growers in order to meet operating costs. Harvest of the 2010 crop

could not be funded. The olive projects were insolvent with no reasonable prospect of restructure.

40 By the time the amendments were made to the relevant scheme constitutions, authorising the responsible entity to terminate growers' rights, no party had come forward to assume the role of a replacement responsible entity on an unconditional and binding basis. When the assets were offered for sale there were only four bids received, none of which involved a recapitalisation of the schemes.

41 Under the BB Olive Deed of Compromise \$1,185,000, or approximately 5% of the gross proceeds of sale of the BB Olive assets, is allocated to participating growers in the 2006, 2007 and 2008 Olive Projects. That sum is to be apportioned according to the number of grove lots held by participating growers on 11 January 2010, being the date upon which their rights were extinguished. That equates to \$92.43 per lot. The balance of the fund is to be paid to BOSI.

### **Liparoo and Yungera Rights Proceeding**

42 The Liparoo and Yungera Rights Proceeding was commenced to resolve the competing claims to the proceeds of the sale of assets, over which the ANZ held security, that were deployed in six almond projects. The relevant projects were the 2001, 2002, 2003, 2004 and 2005 Almond Projects and the 2002 Almond Private Offer Project. The plaintiff in the proceeding is the ANZ, which advanced \$27.6 million to OIM#2 Pty Ltd as trustee for the Timbercorp Orchard Trust #3 in September 2005; and \$72.9 million to OIM#5 Pty Ltd, as trustee for the Timbercorp Orchard Trust #5. By 31 August 2012 the total amount owed to the ANZ under these facilities exceeded \$125 million. The security given to the ANZ was in the form of real property mortgages over Liparoo Land owned by OIM#2, and the Yungera Land owned by OIM#5. There were also fixed and floating charges.

43 The land on which the schemes were undertaken, and associated assets, were sold to Olam Orchards Australia Pty Ltd. The net proceeds of sale were \$147,529,984. Pursuant to an order of Davies J made on 15 December 2009, the receivers and

managers appointed by the ANZ hold the proceeds on trust pending the outcome of the proceeding.

44 On 16 December 2011, Davies J ordered that, pursuant to r 16.01(2), the following persons be appointed as representative defendants in the proceeding:

- (i) Graham Dace as representative of the growers in the 2001 Almond Project;
- (ii) Graham Goldenberg as representative of the growers in the 2002 Almond Project;
- (iii) Goran Runje as representative of the growers in the 2003 Almond Project;
- (iv) Graeme Philip Cole as representative of the growers in the 2004 Almond Project;
- (v) Christopher Mark Littlely as representative of the growers in the 2005 Almond Project; and
- (vi) David Butterfield as representative of the growers in the unregistered managed investment scheme known as the 2002 Almond Project (Private Offer No. 1).

45 The grower rights in relation to the 2002 Almond Project, the 2002 Almond Private Offer Project and the 2005 Almond Project were, insofar as those schemes had been conducted on the land owned by Almond Land, determined by Davies J in the Almond Land Rights Proceeding. The 2001 Almond Project, conducted on the Liparoo land, had been structured in such a way that, by application of the reasoning of Davies J in the Almond Land Rights Proceeding, the rights of the participating growers would be construed as contractual rather than proprietary. On that basis the growers would have no entitlement to any share in the net proceeds of sale. The 2003 Almond Project, conducted on the Yungera property, would also have conferred on growers rights of a contractual nature. On the other hand, applying the reasoning of Davies J to the 2004 Almond Project, the rights of the participating growers would be characterised as proprietary. The evidence was to the effect that there was no viable alternative structure under which any of these projects were capable of continuing.

The reasons of Davies J in the Almond Land Rights Proceeding in relation to the value of the grower rights at termination would, if applied to these schemes, lead to the conclusion that any interest growers might have had was worthless.

46 Clause 4 of the Liparoo and Yungara Deed of Compromise provides for the following payments:

- (a) To the extent approved by the court, unpaid costs of the receivers;
- (b) To Timbercorp Securities, on trust for distribution to or on behalf of the participant growers:
  - (i) \$8 million or approximately 5% of the gross sale proceeds of the assets, with \$2,094,096.18 of that sum to be applied for growers in the Liparoo based projects and \$5,905,903.82 to growers in the Yungara based projects. These amounts are to be apportioned according to the number of almond lots held by each grower in those projects on 10 February 2010, being the date upon which their rights were extinguished;
  - (ii) \$1,796,000 for growers in the 2001 Almond Project, to be apportioned according to the number of almond lots held by each participant grower on 10 February 2010.
- (c) To the ANZ, in respect of amounts outstanding under the TOT#3 facility and the TOT#5 facility, and any shortfall owing to the ANZ under the TOT#2 facility, following payment to the ANZ in respect of that facility under the Solora Deed of Compromise discussed below; and
- (d) Any balance remaining to be paid to OIM#3 and OIM#5.

47 The amount to be paid to participant growers with projects conducted on the Liparoo and Yungara land is \$521.31 per lot. An additional amount of \$2,000 is allocated to participant growers in the 2001 Almond Project. That additional payment is

explained by their entitlement, under project documents, to a minimum payment of \$2,000 per lot for their trees when sold.

### **Solara Rights Proceeding**

- 48 The Solara Rights Proceeding relates to the proceeds of the sale of assets that were deployed in the 2005 Citrus Project. The land was mortgaged to the ANZ Bank which had advanced \$9.398 million to OIM#2 on 30 September 2005. That advance was later increased to \$11.4 million on 18 April 2007. In addition to the mortgage over the Solara land, the advance was secured by a fixed and floating charge over the assets of OIM#2, insofar as they related to the Timbercorp Orchards Trust #2. As at 31 August 2012 the amount due to the ANZ under the facility was \$13,360,280.51.
- 49 The land on which the scheme was undertaken, and associated assets, were sold to Agriproperty Pty Ltd. The proceeds of sale were \$13,327,604.51. Pursuant to an order of Davies J made on 26 February 2010, receivers and managers appointed by the ANZ hold the proceeds on trust pending resolution of the competing claims.
- 50 On 16 December 2011, Davies J made an order pursuant to r 16.01(2) appointing Robert and Elizabeth Bugden as representatives of the growers in the 2005 Citrus Project.
- 51 The scheme documents conferred on participating growers rights that resembled the contractual rights found by Davies J to exist in relation to the 2002 Almond Private Offer Project and the 2002 Almond Project.
- 52 The financial predicament of the Citrus Project, following the collapse of the Timbercorp group, was not unlike the other schemes. The responsible entity was unable to perform its obligations. It was hopelessly insolvent. There were proposals for the restructure and continuation of the project. Food and Beverage Australia Ltd, an entity associated with Ms Bezencon, advanced proposals for the appointment of a replacement responsible entity. Those proposals were not sustainable and would not have resulted in a viable restructure. When the receivers offered the Solara Land and associated assets for sale, either encumbered by the scheme or unencumbered, they

received only three bids. All bids were conditional on assets free of encumbrance by grower rights.

- 53 Under the Solara Deed of Compromise, the participant growers will receive a distribution of \$650,000, which is approximately 5% of the gross sale proceeds of the assets. That sum is to be apportioned between the participant growers according to the number of citrus lots held by each grower on 9 April 2010, being the date upon which their rights were extinguished. That equates to \$316.80 per citrus lot. After the ANZ is paid the amount outstanding under the facility, any remaining funds are to be paid to OIM#2.

### **Fenceport Rights Proceeding**

- 54 The Fenceport Rights Proceeding was commenced on 13 December 2011 and relates to the proceeds of sale of assets that were deployed in five olive projects – the 2002 Olive Private Offer Project and the 2001, 2002, 2003 and 2004 Olive Projects, all of which were undertaken on land near Boort in Victoria.
- 55 Prior to the application by the liquidators for approval of the sale of the olive assets, deployed in the olive projects at Boort, they had entered into a Sale and Purchase Deed for the sale of forestry assets owned by companies within the group. The Commonwealth Bank held securities over both the forestry and olive assets. Before the CBA would release the security it held over the forestry assets, to facilitate settlement of that transition, it required repayment of all advances. That required some additional funding to pay out the debt secured by the olive assets. Fenceport provided that funding. Upon release by the CBA of the olive assets as security, they were charged in favour of Fenceport. Thus, Fenceport became a secured creditor, having advanced \$26 million to the vendors, Olivecorp Land Pty Ltd and Olivecorp Processing Facility Pty Ltd.
- 56 The plaintiffs in the proceeding are Fenceport and Olivecorp Land. The olive assets and water rights were sold to Boundary Bend. The net proceeds from the sale of the olive assets were \$6,665,900; and the water rights, \$29,334,100. Pursuant to an order

of Croft J made on 12 September 2009, Olivecorp Land holds the proceeds of sale on trust pending a determination of the competing claims to the fund.

57 On 16 December 2011, Davies J made an order pursuant to r 16.01(2), that the following persons be appointed as representative defendants in the proceeding:

- (i) Con Moshopolous as representative of the growers in the 2000 Olive Project (Private Offer);
- (ii) Pauline Emma Hammer as representative of the growers in the 2001 Olive Project;
- (iii) David Sydney Butterfield as representative of the growers in the 2002 Olive Project;
- (iv) Graham Goldenberg as representative of the growers in the 2003 Olive Project; and
- (v) Shun King Li as representative of the growers in the 2004 Olive Project.

58 The Fenceport Deed of Compromise provides for an amount to be set aside for the benefit of the participating growers in the sum of \$1,815,000, which is approximately 5% of the sale proceeds. On a per lot basis, that amount equates to \$163.81 per lot.

59 Set out below is a summary of participating growers respective entitlements under the deeds of compromise

<b>Timbercorp Almond Project</b>	<b>Almond Land Compromise Grower Entitlement per lot</b>	<b>Liparoo &amp; Yungera Compromise Entitlement per lot</b>	<b>Tree purchase per lot</b>	<b>Total Grower entitlement Per lot</b>
2001 Almond	-	\$521.31	\$2,000	\$2,521.31
2002 Almond (private offer no 1)	\$53.46	\$371.93	-	\$425.39
2002 Almond	\$54.89	\$367.93	-	\$422.82
2003 Almond	-	\$521.31	-	\$521.31
2004 Almond	-	\$521.31	-	\$521.31
2005 Almond	\$121.24	\$182.54	-	\$303.78
2006 Almond	\$186.57	-	-	\$186.57
2007 Almond	\$186.57	-	-	\$186.57

<b>Timbercorp Olive Project</b>	<b>Fenceport Compromise entitlement per lot</b>	<b>BB Olives Compromise entitlement per lot</b>	<b>Total entitlement per lot</b>
2002 Almond (private offer no 1)	\$163.81	-	\$163.81
2001 Olive	\$163.81	-	\$163.81
2002 Olive	\$163.81	-	\$163.81
2003 Olive	\$163.81	-	\$163.81
2004 Olive	\$163.81	-	\$163.81
2006 Olive	-	\$92.43	\$92.43
2007 Olive	-	\$92.43	\$92.43
2008 Olive	-	\$92.43	\$92.43

<b>Timbercorp Citrus Project</b>	<b>Solora Compromise entitlement per lot</b>	<b>Total entitlement per lot</b>
2005 Citrus	\$316.80	\$316.80

60 The variation in dollar amount from project to project is a reflection of the differing amount of sales proceeds. Subject to the special circumstances of the growers under



the 2001 Almond Project, there is symmetry in the proportion and apportionment of the proceeds of sale in favour of participating growers in any one scheme.

- 61 The jurisdictional facts necessary to engage the court's power under r 16.01(4) are present in each of the proceedings. There has been a compromise reached between the parties. There are growers who are interested in the outcome, but who are absent. They are represented by the representative growers appointed under the rules. The remaining question is whether the court can be satisfied that in each case the compromise is for the benefit of the absent growers. In the event that the Court approves a compromise it is to 'order that it shall be binding on the absent persons'.

### **Applicable principles**

- 62 In *Exxonmobil Superannuation Plan Pty Ltd v Esso Australia Pty Ltd*,<sup>6</sup> Habersberger J set out the principles relevant to determining whether a compromise is for 'the benefit' of absent persons as required by r 16.01(4). According to its ordinary meaning, a compromise will be 'for the benefit of' a person if it represents an advantage, profit or gain for that person.<sup>7</sup> While the court in that proceeding recognised that a benefit may be derived by an absent person simply because litigation has been brought to a conclusion,<sup>8</sup> Habersberger J considered that the proper test required that 'the benefit received by the 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.'<sup>9</sup>

- 63 Habersberger J considered that the balancing process requires that:<sup>10</sup>

If a settlement is considered to be appropriate or fair and reasonable when weighed against the chances of the absent members 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. But if the financial gain to the absent members 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'.

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<sup>6</sup> [2010] VSC 357 ('*Exxon*').

<sup>7</sup> *Exxon* [2010] VSC 357 [52].

<sup>8</sup> *Exxon* [2010] VSC 357 [53]-[56]

<sup>9</sup> *Exxon* [2010] VSC 357 [56]

<sup>10</sup> *Exxon* [2010] VSC 357 [62]

64 In *Exxon*, Habersberger J made reference to the following two judicial statements setting out matters that were taken into account in determining whether to approve a settlement under the group proceeding provisions of the *Supreme Court Act 1986* (Vic) and the corresponding provisions of the *Federal Court of Australia Act 1976* (Cth). Notwithstanding some material differences between the regime under Part 4A and r 16, I accept that Part 4A authorities provide useful guidance in the approach to be taken by this court when asked to approve a compromise under r 16.

65 The first case was *Williams v FAI Home Security Pty Ltd (No. 4)*, in which Goldberg J said that the court should have regard to:<sup>11</sup>

the amount offered to each group member, the prospects of success in the proceeding, the likelihood of the group members obtaining judgment for an amount significantly in excess of the settlement offer, the terms of any advice received from counsel and from any independent expert in relation to the issues which arise in the proceeding, the likely duration and cost of the proceeding if continued to judgment, and the attitude of the group members to the settlement.

66 The approach adopted by Goldberg J was derived from a nine-factor test adopted by the United States Court of Appeals for the Third Circuit.<sup>12</sup> The second case to which Habersberger made reference was *Harrison v Kerrili Pty Ltd*,<sup>13</sup> in which Gillard J drew upon many years of decisions concerning the approval of compromises and said that:

The paramount consideration on an application such as the present is whether the proposed settlement is in the best interest of the claimants. In the majority of disputed proceedings in litigation, there is a risk that a claimant may fail, or receive substantially less, than what is sought. Hence, it is a question of balancing the risks which, as I have stated, are inherent in all litigation, and seeking to determine whether, if the matter was to go to trial, the complaint may recover a less favourable outcome than that proposed in the settlement.

Hence, the main concern in an application such as the present is to identify the risks involved in the litigation, to weigh them, and to seek to determine the likely outcome of the proceeding, and compare it with the settlement.

67 Subsequent decisions of this court (when approving a compromise in a group proceeding) have applied the factors set out by Goldberg J, but have warned against any formulaic application. In *Wheelahan v City of Casey*, Emerton J had said that:

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<sup>11</sup> (2000) 180 ALR 459 [19]

<sup>12</sup> (2000) 180 ALR 459 [19].

<sup>13</sup> [2007] VSC 277 [44]-[45].

Jessup J, in *Darwalla Milling Co Pty Ltd v Hoffman-La Roche Ltd*, observed that his review of subsequent judgments of the Court under s 33V *did not disclose any pattern of systematic consideration of these matters* in the way, for example, of a checklist, and that the case before him involved specific problems and issues which no predetermined list could ever hope to anticipate. He also commented that those factors threw little light on the proper resolution of the rather difficult inter se issues that arose in the proceeding before him.

68 When endorsing the approach of Jessup J in *Darwalla Milling Co Pty Ltd v Hoffman-La Roche Ltd (No2)*<sup>14</sup> Emerton J said '[i]t is true that in practice every case must be dealt with on its own merits, and by reference to specific factors which might raise serious doubts as to fairness and the like.' Beach J agreed with this approach in both *Perry v Powercor Australia Ltd*<sup>15</sup> and in *Thomas v Powercor Australia Ltd*.<sup>16</sup> Similarly, in *Mercieca v SPI Electricity Pty Ltd*,<sup>17</sup> Emerton J warned that while such factors may provide a 'useful framework for considering the fairness and reasonableness of the proposed settlement' they should not be applied mechanically.

69 The secured parties submitted that the decision in *Exxon* disclosed four additional considerations that were regarded by Habersberger J as relevant to the approval of the compromise:<sup>18</sup>

- (1) representatives appointed pursuant to r 16.02(2) had received legal and actuarial advice concerning the proposed deeds of compromise;
- (2) the representatives had formed the view that it was in the best interests of the absent members who they represented to agree to the deeds of compromise and the proposed orders sought under them;
- (3) the evidence established that appropriate notification of the compromise and of the applications seeking approval had been provided to absent members; and
- (4) any absent members' queries arising from the notification had been satisfactorily dealt with.

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<sup>14</sup> (2006) 236 ALR 322.

<sup>15</sup> [2011] VSC 614 [13].

<sup>16</sup> [2012] VSC 11 [13].

<sup>17</sup> [2012] VSC 204 [32].

<sup>18</sup> *Exxon* [2010] VSC 357 [49].

There is an obvious overlap between these factors and the matters regarded as important in the Part 4A proceedings. Some factors are merely a subset of another.

70 Finally, Habersberger J acknowledged, consistently with the judgment of Jessup J in *Darwalla Milling Co Pty Ltd v F Hoffman-La Roche Limited*<sup>19</sup>, that the role of the court is necessarily limited in assessing the prospects of success in litigation.<sup>20</sup> There must be an element of reliance upon the views of counsel in recommending acceptance of a proposed compromise, as ‘it is difficult for the Court to know more about the actual risks of the litigation than the parties’ legal advisers’.<sup>21</sup> Therefore,

the Court looks to whether the 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.<sup>22</sup>

### **Benefit of growers**

71 Clarendon Lawyers acted on behalf of the representative growers in each proceeding and instructed senior and junior counsel. Shortly after execution of the Deeds of Compromise, that firm sent a letter and email to the last known address of each grower in each of the schemes affected by the compromise, informing them agreement that had been reached, and that an information notice had been uploaded onto their website, and the websites maintained by Korda Mentha and Arnold Bloch Leibler. The growers were told that the notice contained an explanation of the apportionment proceeding in which they had an interest, the terms of the compromise and the proposed application for court approval. Information was also provided as to how growers might comment upon, object to, or obtain more information about the compromise and approval process. On 14 August 2012 an advertisement was placed in ‘The Australian’ newspapers to the same effect.

72 The websites also included a list of frequently asked questions with answers. Growers were informed of the amount to which they would become entitled, when

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<sup>19</sup> (2006) 236 ALR 322 [50].

<sup>20</sup> *Exxon* [2010] VSC 357 [63].

<sup>21</sup> *Exxon* [2010] VSC 357 [63].

<sup>22</sup> *Exxon* [2010] VSC 357 [63].

their entitlements would be received and how this was to occur. They were told of the circumstances in which the representative growers came to agree to the compromises, of advice from counsel that was available for perusal, and how that might be obtained.

73 A total of 20,338 letters and a 11,528 emails were sent to growers. In relation to the Liparoo and Yungara Rights Proceeding, there were 4,646 letters, of which two-hundred and six were returned; and 2,855 emails of which three-hundred and forty-five 'bounced back'. In relation to the Solara Rights Proceeding, there were three-hundred and twelve letters, of which thirteen were returned; and one-hundred and seventy-seven emails of which eighteen 'bounced back'. In relation to the Almond Land Rights Appeal Proceeding, there were 9,487 letters of which four-hundred and eighteen were returned; and 5,157 emails of which six-hundred and one bounced back. In relation to the BB Olives Rights Proceeding, there were 3,163 letters, of which one-hundred and twenty-eight were returned; and 1,635 emails of which one-hundred and eighty-nine bounced back. In relation to the Fenceport Rights Proceeding, there were 2,730 letters, of which one-hundred and seventeen were returned; and 1,704 emails, of which two-hundred and fifty-eight bounced back. The communication 'strike rate' with conventional mail and by email is, in my view, remarkable.

74 Timbercorp Securities maintained a telephone hotline service in addition to an email facility to enable growers to ask questions, make comments and update personal information. A protocol was developed for those communicating with growers through the telephone hotline and email facility. The terms of the protocol were agreed between the parties, including the representative growers.

75 There was a significant, but not overwhelming response from the growers following the letters, emails and advertisements. One thousand and eighty-one growers made comments, asked questions or expressed some form of objection. The objections were very few. Three hundred and eighty three growers requested a copy of the letter, the notice posted on the internet, the frequently asked questions document, the bank

account nomination form or a direction to pay form. One hundred and eighty-three growers requested information in relation to the particulars of their investments, such as the number of lots or the identity of the scheme. One hundred and fifty-three growers requested financial information, such as their entitlement under the compromise or the extent of their indebtedness to a Timbercorp entity. Four hundred and twenty growers returned bank account nomination forms or directions to pay. Sixty-seven growers requested more information about a relevant deed of compromise. Sixty-six growers provided change of address details, and fifty-four growers made queries or comments which required a response from Clarendon Lawyers on behalf of the representative growers.<sup>23</sup>

76 As might be expected, the grower responses continued after the initial material in support of this application had been filed with the court. By 2 October 2012<sup>24</sup> there were additional responses. It is difficult to generalise about the grower responses, in which they expressed a view about the compromise and their entitlements. There were some expressions of disappointment, and even anger at the outcome. In only a few cases did a grower object to the compromise on the basis that a better outcome would be achieved if the proceeding was litigated.

77 The most consistent objection was made by and through Ms Bezencon, advanced on behalf of Syger Super Services and in her capacity as chairperson of the TGG Citrus Committee Inc and the TGG Olive Committee Inc. These incorporated committees were not parties to any of the compromised proceedings, although the TGG Citrus Committee Inc was made a party to a related proceeding (2010/398) in which the liquidators of Timbercorp Securities sought directions approving the termination of growers' rights under the 2005 Citrus Project. Nevertheless, having regard to the nature of the power to be exercised under r 16.01(4), leave was granted to Ms Bezencon to make submissions at the hearing and to file material in addition to that previously filed by her

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<sup>23</sup> The foregoing statistics were as at 19 September 2012 – the date upon which the third affidavit of Celia Jane Armstrong was sworn.

<sup>24</sup> fourth affidavit of Celia Jane Armstrong sworn 2 October 2012.

78 A further reason for inviting Ms Bezencon to make submissions, and granting leave to file further material, was the fact that she was the only voice in opposition to the applications to approve the compromises. In substance, she argued that the olive and citrus projects, whose members are represented in the BB Olive Rights Proceeding, the Solora Rights Proceeding and the Fenceport Rights Proceeding, ought to be permitted to fully litigate their claims in court. Ms Bezencon sought to differentiate those schemes from the almond projects, contending that the olive and citrus schemes were viable when grower rights were terminated, and thus valuable. She argued that the court in the Almond Land Rights Proceeding had approached its task incorrectly, by first ascertaining the nature of the rights, if any, enjoyed by the growers and only then examining the value of any such rights.

79 Other objections articulated by Ms Bezencon may be summarised as follows:

- (a) Some of the representative growers did not represent the sentiments of all growers they purport to represent.
- (b) There has been difficulty in obtaining information about the compromise.
- (c) It was inappropriate to make a like allocation of approximately 5% of the proceeds of sale in each case.
- (d) There was no urgency in the determination of the Fenceport rights proceeding, the Solora rights proceeding and the BB Olives rights proceeding.

80 Underlying Ms Bezencon's submission was the premise that notwithstanding the characterisation of the rights, as contractual or proprietary, they had value that ought to be recognised; and that the value to growers exceeded the amount available to growers under each relevant compromise. She submitted that the growers' rights were recognised within scheme documents, by the banks when taking security over scheme land, and by the very fact that it was necessary to extinguish rights in order to sell the land in the winding up. Ms Bezencon submitted that growers' rights had, from time to time, been successfully auctioned during the currency of schemes. She also submitted that the value of the rights was reflected in the willingness of parties to assume obligations as a replacement responsible entity. Ms Bezencon also said that

there were around six alternative responsible entities willing to assume the obligation for the citrus and olive projects. Those contentions were not supported by any evidence. Insofar as there was material before the court in relation to such proposals, by the time offers were accepted to sell the assets, such proposals as had been advanced had either evaporated or were impracticable.

81 Ms Bezencon argued, however, that the role of the responsible entity, and its significance to viability, had been misunderstood and overstated. She argued that it was unnecessary to consider the replacement of a responsible entity when members could give directions to the existing entity and amend the constitution to enable the schemes to continue. It was not clear how such an objective might have been achieved, even if such directions were authorised, in the absence of a substantial injection of funds or forbearance by secured and unsecured creditors, and landlords.

82 Ms Bezencon also submitted that a majority of growers had been willing to continue funding the projects. She did not adduce evidence to support the contention. I take her to contend that such evidence might be available at the trial of the proceedings, although the absence of any evidence to support her contention diminished its force.

83 Ms Bezencon challenged the findings of Davies J in the Almond Land Rights Proceeding, in which her Honour considered the potential for the restructure of the schemes. She also challenged the model employed by the liquidators to assess the viability of the schemes. She argued that assets, such as water rights, could have been sold to assist in the funding a restructure.

84 Ms Bezencon submitted that there was no urgency for a determination of citrus and olive grower rights and entitlements. She said that her committees had not been consulted over the terms of the relevant compromises, and that the solicitors acting on behalf of the grower representatives were unduly influenced by Messrs Garnaut and Lennie who, while purporting to represent growers, could not be said to represent the interests of all growers. She asserted that, on the other hand, her committees represented the interests of all growers.



- 85 Ms Bezencon further submitted that the grower representatives were unaware of information in her possession that might, had it become known to their counsel, changed their advice. The information concerned the viability of the schemes. Ms Bezencon withheld material in her possession concerning scheme viability until after the close of submissions. She was then permitted to introduce that material through an affidavit to be filed by Ms Armstrong. The cash flows and other material introduced by her to support viability was unsupported, unexplained and largely incomprehensible.
- 86 Ms Bezencon produced what she described as grower objections to the compromises. She had emailed growers with a notice encouraging them to object to the compromises by returning an email to 'lodge your objection' to the compromises, as unjust. She complained that the offer had not been satisfactorily explained and did not reflect 'the intrinsic value of the plantations, orchards and groves which the growers paid to have planted and nurtured'.
- 87 There were approximately 75 responses to her 'lodge your objection' emails, representing around 80 growers. Insofar as the responses included grower complaints, they were variously directed at the liquidators, the banks, the court, Timbercorp management, ASIC, the amount of the settlement offer, lack of grower participation in the process, the unfairness of outstanding Timbercorp loans and the general injustice of the whole matter. There was some overlap between those who responded to Ms Bezencon's invitation, and those who responded to formal invitations about which Ms Armstrong gave extensive evidence.

## Prospects of success

- 88 One relevant consideration for the court on an application of this kind is to make some assessment of the participating growers prospects of success in each proceeding so as to form a view about the likelihood of their obtaining a judgment for an amount significantly in excess of the settlement offer. Another consideration is the advice the growers had received from their legal representatives.
- 89 A lengthy memorandum of advice was prepared by senior and junior counsel on instructions from the solicitors for the representative growers. The principal ‘updated’ advice is dated 16 August 2012. There was a short supplementary advice dated 29 August 2012 which, in substance, dealt with the effect of the decision of the court of appeal in *Re Wilmot Forests Ltd; Wilmot Forests Ltd v Wilmot Growers Group Inc.*<sup>25</sup> There had been earlier advice to growers, given to them prior to their execution of the Deeds of Compromise on 25 July 2012. That was the advice updated in the memorandum dated 16 August 2012.
- 90 The growers do not waive privilege in relation to the advice and it has remained confidential. Copies of the updated advice and the supplementary memorandum were made available to any grower or their solicitor. A copy of the advice has been provided to the court in support of these applications, and remains a confidential exhibit. Accordingly, it is not appropriate to recite the advice or disclose any part of its content save insofar as is absolutely essential for the purpose of these reasons. Given the course of events, including the fact of written advice provided to the representative growers prior to executing the Deeds, their subsequent meeting with counsel, their execution of the deeds of compromise, and the submissions of counsel representing the representative growers in support the application for approval, it may readily be supposed that the advice of counsel supported the decision of the representative growers to accept the offers and execute the deeds of compromise.
- 91 In addition to relying upon their confidential advice to support the applications for approval, (and I decline to comment on the effect of such reliance as a waiver of the

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<sup>25</sup> [2012] VSCA 202.

privilege), counsel for the representative growers emphasised the process that had been undertaken to inform them, and the absent growers, about the prospects of success in each proceeding. While I found the written advice to the representative growers difficult to follow, I accept that it was designed to address particular concerns the grower representatives might have had in making the decision they were called upon to make in each proceeding. I have taken into account the content of that advice and consider that the representative growers were entitled to accept and act upon it when making their decisions. Most representative growers filed an affidavit in support of the applications.

- 92 These applications have, as was submitted by the secured parties, the unique feature that there is a decision by a judge of this court, in the Almond Land Rights Proceeding, who made findings in relation to the rights of the participating growers which may be readily translated and applied to the facts in each other proceedings. The hearing before Davies J occupied 12 days, with numerous lay and expert witnesses. Judgment was delivered on 15 June 2011. The outcome of that proceeding is summarised above. There are common issues of fact and law between that and the other proceedings in which deeds of compromise have been executed. While it is true that the representative growers appealed against the decision, the appeal was compromised by their agreement in the Almond Land Rights Deed of Compromise.
- 93 Had the decision of Davies J in the Almond Land Rights Proceeding been strictly applied, the participating growers would not have enjoyed any part of the proceeds of settlement. As mentioned above, the critical issues in the Liparoo and the Yungara Rights Proceeding are closely aligned with the issues that were determined in the Almond Land Rights Proceeding. Three of the almond projects involved in the Liparoo and Yungara Rights Proceeding were also involved in the Almond Land Rights Proceeding. These were the 2002 Almond Project, the 2005 Almond Project and the 2002 Private Offer Project. The constituent documents for the almond projects considered in the Almond Land Rights Proceeding were similar in content and form to the corresponding documents that were the subject of the Liparoo and Yungara

Rights Proceeding. Accordingly, subject to the outcome of any appeal, a court at first instance in the Liparoo and Yungara Rights Proceeding would have been required to give careful consideration to the reasons of Davies J when determining the issues in that proceeding.

- 94 If the judgment in the Almond Land Rights Proceeding were to be applied to the relevant facts in the Liparoo and Yungara Rights Proceeding, the participating growers in the 2001 Almond Project, the 2002 Almond Project, the 2002 Private Offer Project and the 2003 Almond Project acquired only contractual rights, with no entitlement to share in the net proceeds derived from the asset sales. While the participating growers in the 2004 Almond Project and the 2005 Almond Project had, consistently with the decision of Davies J, rights of a proprietary nature, valuation of those rights immediately prior to termination would not have resulted in any apportionment in their favour. There was no practical means by which the schemes might have continued. They required a replacement responsible entity and funding. Termination was inevitable.
- 95 In relation to the Solara Rights Proceeding, the constituent documents for the almond projects involved in the Almond Land Rights Proceeding were broadly similar in content and form to the corresponding documents in the citrus project the subject of the Solara Rights Proceeding. The rights acquired by the participating growers in their citrus lots were under licence agreements rather than leases. Accordingly, consistent with the decision of Davies J in the Almond Land Rights Proceeding, their contractual rights gave them no entitlement to any share in the sale proceeds of the assets.
- 96 The available evidence in relation to the viability of the citrus project disclosed a scheme that required substantial funding to continue. Funding was not available. There was no replacement responsible entity willing to accept its statutory obligations. There was no viable restructuring proposal and accordingly, whatever may have been the nature of the rights enjoyed by the participating growers,

termination was inevitable. On the approach adopted by Davies J, the growers' rights were valueless immediately prior to their extinguishment.

97 While it is impossible to predict, with any certainty, the likely outcome of the Almond Land Rights Appeal, the scheme structures and underlying business models were highly prejudicial to growers in the event of the insolvency of the responsible entity and manager. The marketing, financing and management layers within the Timbercorp group, which absorbed a substantial component of grower fees and contributions, meant that following the insolvency of the responsible entity and management group, failure of the schemes and consequential termination, by one means or another, was almost inevitable.

98 Even if a replacement entity had come forward, willing to accept the statutory obligations, the grower fees and other contributions would not have been sufficient. The scheme structures were inherently fragile and highly susceptible to the insolvency of the Timbercorp group.

99 Applying the reasoning of Davies J, the participating growers in the 2006 and 2007 Olive Projects had proprietary rights because of the grower leasehold interest in the land, capital works and trees. But in relation to the 2008 Olive Project, the rights resembled the contractual rights of the growers in the 2002 Almond Project and the 2002 Private Offer Project. Translated into the Fenceport Rights Proceedings, it would only be the participating growers in the 2003 Olive Project and the 2004 Olive Project that enjoyed a proprietary interest because of their leasehold interests in relation to the land, capital works and olive trees. The other growers acquired rights of a contractual nature only. But in any event, the nature of the rights acquired became insignificant having regard to the impact of the insolvency of the Timbercorp group value of any rights the growers might have had.

100 Whatever might have been decided by the Court of Appeal, about the nature of the growers' rights, any rights they had were, at the time those rights were terminated, of little, or no value. The expert evidence was to the effect that they had no value. On

the same basis, the rights of the participating growers in the 2006, 2007 and 2008 Olive Projects, the subject of the BB Olive Rights Proceeding, had no value.

- 101 In their report dated July 2012, the Corporations and Markets Advisory Committee of the Australian Government identified some of the problems of such common enterprise schemes. The following extracts highlight some relevant features of the Timbercorp schemes that were prejudicial to the interests of the growers.<sup>26</sup>

Recent experience with the collapse of some agribusiness common enterprise schemes points to the possibility of confusion arising in attempting to untangle these arrangements, with a range of involved parties, including scheme members, each seeking to assert what they perceive to be their proprietary and other rights and attempting to determine the way forward, often in an environment of conflict and resort to litigation.

...

More recent experience suggests that many of the problems encountered in attempting to deal with schemes in financial stress, including how best to respond to the various proprietary and other claims of scheme members, may have been avoided if the types of permissible schemes had been limited to pooled schemes. Entrepreneurial activities in which investors sought a greater personal proprietary or other involvement could have adopted a corporate based structure, although it is recognised that a corporate entity is not as effective from a taxation perspective as a collective investment vehicle in attracting a wide range of investors with different tax profiles.

...

A further problem that became apparent during the course of the review was the potential for complexity where schemes were run by multi-function REs. For instance, the task of administering an insolvent multi-function RE can be made more difficult by having to disentangle its own dealings in its personal capacity from its dealings as operator of a number of schemes, and then determine which dealings as scheme operator go with which schemes. This process can be further complicated by disputation amongst a range of affected parties about the nature of their rights and remedies where the RE fails.

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

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<sup>26</sup> Corporations and Markets Advisory Committee, *Managed Investments Schemes Report* (July 2012) 10-11.

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.

103 The payment structure under each deed of compromise by which approximately 5% of the sale proceeds are set aside for the participating growers, to be allocated according to the number of agricultural lots acquired by a grower in each project, is practical, reasonable and fair. While the amounts differ from scheme to scheme, depending upon the proceeds realised from the sale of assets, the principle is uniform, logical and just.

104 To carve out of the compromise the citrus and olive growers rights, or such of them as Ms Bezencon would have determined at a trial, would have the effect of undermining what is, in my opinion, a very beneficial resolution for the growers in all of the schemes.

105 Further, I am persuaded that a trial of the Fenceport, BB Olives and Solora rights proceedings, in which olive and citrus scheme growers' rights stand to be determined, would not result in a more beneficial outcome for the participating growers than they are destined to receive under the compromises. Putting to one side the contest between contractual and proprietary rights, any real prospect of a restructure that might have enabled growers to participate in the completion of their projects was so remote as to be worthless. The hurdles were insuperable.

106 The applicants also relied on a recent decision of the Court of Appeal<sup>27</sup> to contend that a liquidator was entitled, on behalf of the company which had leased land to another,

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<sup>27</sup> *Re Wilmot Forests Ltd* [2012] VSCA 202.

to disclaim the lessee's interest in the property under s 568(1) of the *Corporations Act 2001*. While such a right was not adverted to, and is subject to an application for leave to appeal to the High Court, the secured creditors, liquidators and the growers contend this provides another basis upon which the rights of the growers were, at a relevant time, susceptible to termination.

107 There are other important considerations that I take into account. There is the litigation risks confronting the representative growers in each proceeding at first instance and in the Almond Land Rights Appeal. There is also a time factor. Each of the proceedings, apart from the Appeal, would involve a substantial and costly hearing, with delay in finalising any entitlement, assuming some degree of success. Having regard to the events surrounding the funding of the appeal, there is no guarantee that the other cases would proceed. The compromises provide certainty of a distribution under each deed. There is advice from senior and junior counsel supporting the decision of the representative growers to execute the deeds of compromise; and there is the decision of the representatives to accept that advice, mindful of the outcome in the Almond Land Rights Proceeding and, in particular, the evidence concerning the viability of their schemes following the failure of the Timbercorp group. I propose to approve each compromise and bind absent parties, because it is in their best interests that I do so.

#### **Claim by litigation funders**

108 Following the decision of Davies J in the Almond Land Rights Proceeding, a notice of appeal, dated 11 July 2011 was filed on behalf of the representative growers. The growers' costs in relation to the trial before Davies J were apparently paid from the funds held in trust. That arrangement did not extend to any appeal, and a grower advisor, Mr Garnaut, paid the costs in relation to the preparation and filing of the notice of appeal.

109 The representative growers again sought access to the funds held in trust for their costs of the appeal. They filed and served a summons and supporting affidavit, in which they sought to make the fund liable for their costs of the appeal. The



application was opposed and not pursued. Costs were awarded against them for that failed application.

110 Attempts by the representative growers to negotiate a funding agreement with a commercial litigation funder were unsuccessful. In the end, Mr Garnaut approached some of his clients to fund the appeal, and on 22 October 2011, MRB Equities Pty Ltd, Ferrari Investments Holdings Pty Ltd and Redvil Pty Ltd entered into a funding agreement with the representative growers.

111 Under the agreement the funders agreed to pay the litigation expenses of the representative growers and any adverse costs order. In return, the grower representatives agreed that they would pay out of any judgment sum or amount recovered in a settlement the costs and expenses incurred by the funders and a premium. The premium varied. It was 35% of the amount of any judgment on the appeal, or \$5 million whichever was the lesser; or if a settlement was reached and approved by the court, a premium of 17½% or 35% depending upon whether there was a global settlement in resolution of all Timbercorp horticultural schemes without allocating the amount between schemes, or whether a settlement was made in which there was a particular allocation for the participating growers in that proceeding.

112 The funding agreement was amended on two occasions. On 18 December 2011, the premiums were reduced from 17.5% to 15.5% and from 35% to 25% respectively. I was told that the purpose of the reduction was to make the premiums more palatable to a court.

113 The funding agreement was again amended on 24 July 2012 to include an acknowledgement by the funders that the representative growers had complied with their obligation to use their best endeavours to have the Almond Land Rights Deed of Compromise provide for a payment directly to the funders.

114 The funders have incurred costs and disbursements in the sum of \$253,443.25. Based upon the amended premium of 25%, they are entitled to \$1,500,000 according to the terms of the funding agreement. Thus, their total claim is for \$1,753,443.25.

- 115 The funders applied for a declaration that they are entitled to indemnity out of the fund held on trust for the participating growers under the Almond Rights Deed of Compromise for their costs, expenses and the premium, and to an equitable lien over the fund to the extent of their claim. Alternatively, they sought to preserve so much of the fund as was necessary to cover their claim before distribution to participating growers, pending the commencement of a proceeding to recover their costs, expenses and the premium. It was not entirely clear against whom it was proposed that such proceedings would be commenced, although the funders were plainly seeking to assert an equity in the fund, and for payment to them directly out of the fund.
- 116 The application by the funders for declarations, excited a spectrum of responses. At one end, the grower representatives said little on the subject. They may be taken to support the application, perhaps explained by their contractual liability. Counsel for BOSI was anxious to prevent the application interfering with the timely resolution of the principal application for approval. Counsel for Fenceport may be taken to have opposed the application in its present form. He contended that there was a question concerning the power of the court to make the declarations sought, and that the representative growers had been appointed before any issue of litigation funding was contemplated. Fenceport contended that the appropriate course was to require a separate proceeding to be brought in which all participating grower interests could be properly protected.
- 117 The appointment of the grower representatives under r 16.01(2) is to facilitate the resolution of litigation through the participation of representative parties, where the conditions for their appointment are satisfied. The procedure is conceptually and practically different to a group proceeding under Part 4A of the *Supreme Court Act* 1986 and the *Federal Court of Australia Act* 1974. Under r 16, there is no 'opt in' or 'opt out' provision. A judgment or order made by a court in a proceeding, where representative parties have been appointed under r 16, 'shall bind the person or class represented as if the person or class were parties'. It is only in the case of a

compromise that court approval is required before the absent persons are bound by the outcome.

- 118 The role of a representative was considered by Austin J in *Arakella Pty Ltd v Paton* <sup>28</sup> in which his Honour said,

In my opinion a representative appointed under Pt 8, r 14 is not required to oppose the orders sought by the other party. The representative's responsibility, acting honestly and fairly, is to represent what he or she considers to be the interests of the represented group. If the representative forms the view that it is in the interests of the represented group that some or all of the orders sought by the other party should be made, then his or her responsibility is to inform the Court accordingly, providing reasons in support of that view in order to assist the Court to reach its decision. Indeed, for the representative to do otherwise would be inconsistent with his or her role as representing the interests of the represented group.

- 119 A representative party will usually make an agreement with solicitors or a litigation funder in respect of costs, and must address the risk of adverse costs orders. These are matters reasonably incidental to the function. Thus, if the question before the court were to be simply framed in terms of the ability of the representatives to recover, out of an award of damages or a settlement sum, their reasonable costs and expenses properly incurred in advancing the case, or the amount of an adverse costs order, an order of the court facilitating such recovery would seem unexceptional.<sup>29</sup> Were it otherwise, a purpose of the rule would be impaired by the imposition of unfair financial burden and risk on representative parties. Individuals would be reluctant to assume such a burden and risk.

- 120 The issues that arise on this part of the case are, however, quite different in two respects. The first is that the applicant for relief is the funder, not the representative party. The second, is that the court is being asked to approve the 25% premium out of the proceeds available for distribution to participating growers under the Almond Land Rights Deed of Compromise, most of whom know nothing of the funding arrangements.

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<sup>28</sup> (2004) NSWLR 334.

<sup>29</sup> See generally *Murray v Kirkpatrick* (1940) 57 WN (NSW) 162; *Farrell v Royal Kings Park Tennis Club* [2007] WASCA 173; *NSW Insurance Ministerial Corporation v Aboualfoul* [1991] FCA 433.

- 121 The funders developed two elaborate arguments to support their overall claim for indemnity out of the fund and for the premium. First, they relied upon *agency of necessity*; secondly, they contended that under the principle enunciated in *Re Universal Distributing*,<sup>30</sup> they were entitled to an equitable lien over the fund to secure their claim. In my opinion their claim is misconceived.
- 122 As the funders point out, most of the cases concerning *agency of necessity* involve maritime salvage, although quite plainly, the categories in which those principles may be applied are not closed. There are three basic requirements.<sup>31</sup> There must be something in the nature of a commercial necessity or emergency requiring action by someone to preserve a wasting asset; it must not have been reasonably possible for the 'agent' to seek and obtain instructions from all principals; and the steps taken by the agent must have been reasonable in the circumstances.
- 123 While there is an obvious overlap between the requirements for an *agency of necessity* and for the appointment of a representative party under r 16, there seems no logical basis for considering the doctrine after a representative order has been made. If, as I find to be the case, a representative party is authorised to enter into agreements in relation to the payment of reasonable costs and expenses there is no need to have resort to *agency of necessity*, or for that matter the *Universal Distributing* doctrine, in order to support an entitlement to costs, subject to the general supervision of the court in such matters.
- 124 The litigation funders have a *prima facie* right in contract against the representative growers. Nothing has been advanced to impugn those rights. Presumably, if the representative growers do not honour their obligations, the funders might commence a proceeding to recover their expenses and the premium. Thus, the more practical question is whether the representative growers may seek indemnification for the costs and premium under the agreement. In other words, is it appropriate that an order be

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<sup>30</sup> (1933) 40 CLR 171.

<sup>31</sup> See generally, *Burns Philp & Company Ltd v Gillespie Bros Pty Ltd* (1947) 74 CLR 148.

made that imposes on the absent parties the liability to pay the costs and premium contracted by the representative growers?

125 Unfortunately, I was not assisted by submissions on this point, due in part to the fact that it was the funders who made the application for indemnity, and the representative growers stood mute. But having regard to the nature and content of the power the court is asked to exercise under r 16.01(4), to approve a compromise and bind the absent parties, and the general supervisory jurisdiction exercised by the court over costs, I am of the opinion, unassisted by any authority brought to my attention, that the question for the court is whether the liability which the representative parties might seek to shift onto the fund, and thus the absent parties, is a liability that was incurred for the benefit of the absent growers and is fair and reasonable. These requirements may overlap.

126 A requirement that the agreement is for the benefit of the absent growers corresponds with a precondition for approval under r 16.01(4). But there seems to be no reason in principle why it should not also be a requirement in a case where there has been an award of damages on a judgment. In my view, where a costs agreement, whether made with a solicitor or funder, only goes so far as to make the representative party liable for the reasonable costs and expenses properly incurred in conducting the litigation, it is unlikely that any issue will arise concerning the requirement of 'benefit' of the agreement to the absent parties. But an obligation to pay a premium will require scrutiny.

127 In the absence of an opportunity to bring such a matter (an obligation to pay a premium) to the attention of the court for approval at the time the representative orders are made, it is for the representative party seeking indemnity for that premium to satisfy the court of both requirements. The requirement that the premium is for the benefit of the absent growers may, in my view, be satisfied if the court were to be persuaded that in the absence of such an obligation, funding would not have been available. That would, of course, be subject to the requirement that the amount is fair and reasonable.

- 128 Some assistance on the question of what is fair and reasonable may be derived from the decided cases in which litigation funding agreements have been approved, although great care must be taken to avoid generalisations, and to acknowledge the legislative regimes under which such approvals were sought. It must be remembered that this was not a proceeding under Part 4A of the *Supreme Court Act* or the *Federal Court of Australia Act*.<sup>32</sup> Those regimes contain particular provisions in relation to the award of costs, and others which impact upon approval of a compromise. In the present case there was no opportunity for growers to ‘opt in’ or ‘opt out’, as in the case of a group proceeding under Part 4A. Thus, the absence of any specific notification to growers in advance of the proceeding, to that effect that there was a litigation funding agreement, would have been of little consequence. On the other hand, had the court been informed of the existence of such an agreement, or a contemplated agreement, at the time of making the representative orders, steps might have been taken to notify the growers, by similar means to those employed in notification to growers of the fact and terms of the deeds of compromise, enabling them to object to the terms upon which funding was to be provided. But that is to speculate. As against that, it might be argued that the making of a representative order presupposes an inability to obtain instructions from the wider group or class.
- 129 The legislative regime under Part 4A of the *Federal Court of Australia Act* was invoked by *Merkel J Johnson Tiles Pty Ltd v Esso Australia Ltd*<sup>33</sup> where his Honour declined to approve the fees payable under a funding agreement, that included an ‘uplift fee’ of 25%, because notice had not been given to the group members so as to enable them to make an informed decision as to whether to ‘opt out’ of the proceeding.
- 130 The litigation funders’ reliance on *IMF (Australia) Ltd v Meadow Springs Fairway Resort Ltd*<sup>34</sup> was misplaced. That case concerned a challenge made to a liquidator’s right to rely upon the *Universal Distributing* principle to authorise payment of a premium of 35% to the litigation funder. There was no challenge to a finding by the trial judge

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<sup>32</sup> [132].

<sup>33</sup> (1999) 94 FCR 167.

<sup>34</sup> [2009] FCA FC 9; 253 ALR 240.

that it was reasonable for the liquidator to have entered into the funding agreement. The secured creditor, who challenged the payment, knew that the liquidator had entered into the agreement prior to the relevant litigation, but had taken no steps to challenge the decision. The Full Federal Court did, however, helpfully conclude that the obligation 'was an expense reasonably incurred by the liquidator in order to preserve the Colliers cause of action and to realise the asset of *Meadow Springs*'.<sup>35</sup>

131 The relevant facts, which in my view inform the requirements of 'benefit to the growers' and what is 'fair and reasonable' in the circumstances of these cases include the following:

- (a) The right of appeal, which is subject to requirements that steps be taken within prescribed times, may be characterised as a wasting asset.
- (b) Having lost at first instance, the representative growers required funding to proceed with an appeal. In the absence of a satisfactory funding arrangement they would not have prosecuted the appeal.
- (c) Alternate funding options had been considered and pursued but to no avail. Conventional litigation funding entities would not support the appeal. In the circumstances, an ad hoc group was assembled through the solicitors to enable the representative members to secure funding.
- (d) It would be wrong to treat the appeal, in the overall context of the settlement, as lacking utility merely because the offer that was accepted was similar (although not identical) to an offer that had been made much earlier. The fact remains that the growers lost their case at first instance, but then succeeded in achieving a meaningful settlement in their favour.

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<sup>35</sup> Ibid, [80].

- (e) I accept that the 'premium' of 25%, in terms of litigation funding agreements, is in the range of that which has been approved in the past. Indeed it may be regarded as toward the lower end of the range.
- (f) Litigation funding agreements may be the only means by which such proceedings can be prosecuted by claimants such as the growers.
- (g) To impose on the representative growers the burden of the premium, by denying to them the opportunity for indemnification out of the fund, would impact adversely on the willingness of persons to accept responsibility as a representative party in such litigation.

132 Had this application been made by the representative growers for indemnification in respect of their liability under the funding agreement, the court would have been assisted by the submissions made on their behalf. Nevertheless, I am satisfied that the representative growers acted in the best interests of all growers when entering into the funding agreement and contracting to pay the costs and premium. Having regard to the usual terms of such agreements, I am satisfied that the terms of this agreement are, in all of the circumstances, fair and reasonable. It was only by contracting with the litigation funder that the representative growers were in a position to prosecute their appeal. Moreover, I am satisfied that the prosecution of the appeal made a real and substantial contribution to achieving the settlements.

133 While I propose to dismiss the litigation funders' application, should the representative growers make application for indemnity out of the fund I would grant that application.

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## SCHEDULE A

S CI 2010 01354

Plaintiff

BOSI SECURITY SERVICES LIMITED AS  
TRUSTEE FOR AUSTRALIA AND NEW  
ZEALAND BANKING GROUP LIMITED  
AND BOS INTERNATIONAL  
(AUSTRALIA) LIMITED AND WESTPAC  
BANKING CORPORATION

V

B.B. OLIVES PTY LTD (IN LIQUIDATION)

First Defendant

ALMOND LAND PTY LTD (IN  
LIQUIDATION)

Second Defendant

TIMBERCORP LIMITED (IN  
LIQUIDATION)

Third Defendant

MARK ANTHONY KORDA (IN HIS  
CAPACITY AS LIQUIDATOR OF ALMOND  
LAND PTY LTD (IN LIQUIDATION) AND  
OF B.B. OLIVES PTY LTD (IN  
LIQUIDATION))

Fourth Defendant

LEANNE KYLIE CHESSER (IN HER  
CAPACITY AS LIQUIDATOR OF ALMOND  
LAND PTY LTD (IN LIQUIDATION))

Fifth Defendant

MARK FRANCIS XAVIER MENTHA (IN  
HIS CAPACITY AS LIQUIDATOR OF B.B.  
OLIVES PTY LTD (IN LIQUIDATION))

Sixth Defendant

MICHAEL CHARLES VICARY (AS THE  
REPRESENTATIVE OF THE GROWERS IN  
THE 2006 TIMBERCORP OLIVE PROJECT  
(ARSN 119 182 179))

Seventh Defendant

PAMELA JAN DRY AS THE  
REPRESENTATIVE OF THE GROWERS IN  
THE 2007 TIMBERCORP OLIVE PROJECT  
(ARSN 123 155 715)

Eighth Defendant

DAVID BUTTERFIELD AS THE  
REPRESENTATIVE OF THE GROWERS IN  
THE 2008 TIMBERCORP OLIVE PORJECT  
(ARSN 129 307 722)

Ninth Defendant

SCHEDULE B

S CI 2011 06604

AUSTRALIA AND NEW ZEALAND  
BANKING GROUP LIMITED  
(ACN 005 357 522)

Plaintiff

V

OIM#2 PTY LTD (RECEIVERS AND  
MANAGERS APPOINTED) (ACN 112 691  
997) AS TRUSTEE FOR TIMBERCORP  
ORCHARD TRUST #3

First Defendant

OIM#5 PTY LTD (RECEIVERS AND  
MANAGERS APPOINTED) (ACN 118 204  
701) AS TRUSTEE FOR TIMBERCORP  
ORCHARD TRUST #5

Second Defendant

MICHAEL FUNG IN HIS CAPACITY AS  
RECEIVER AND MANAGER OF OIM#2  
PTY LTD (RECEIVERS AND MANAGERS  
APPOINTED) (ACN 112 691 997) IN ITS  
CAPACITY AS TRUSTEE FOR  
TIMBERCORP ORCHARD TRUST #3 AND  
RECEIVER AND MANAGER OF OIM#5 IN  
ITS CAPACITY AS TRUSTEE FOR  
TIMBERCORP ORCHARD TRUST #5

Third Defendant

PAUL WILLIAM KIRK IN HIS CAPACITY  
AS RECEIVER AND MANAGER OF OIM#2  
PTY LTD (RECEIVERS AND MANAGERS  
APPOINTED) (ACN 112 691 997) IN ITS  
CAPACITY AS TRUSTEE FOR  
TIMBERCORP ORCHARD TRUST #3 AND  
RECEIVER AND MANAGER OF OIM#5 IN  
ITS CAPACITY AS TRUSTEE FOR  
TIMBERCORP ORCHARD TRUST #5

Fourth Defendant

GRAHAM DACE AS THE  
REPRESENTATIVE OF THE GROWERS IN  
THE 2001 TIMBERCORP ALMOND  
PROJECT (ARSN 095 649 746)

Fifth Defendant

GRAHAM GOLDENBERG AS THE  
REPRESENTATIVE OF THE GROWERS IN  
THE 2002 TIMBERCORP ALMOND  
PROJECT (ARSN 099 611 935)

Sixth Defendant

GORAN RUNJE AS THE  
REPRESENTATIVE OF THE GROWERS IN  
THE 2003 TIMBERCORP ALMOND  
PROJECT (ARSN 103 197 299)

Seventh Defendant

GRAEME PHILIP COLE AS THE  
REPRESENTATIVE OF THE GROWERS IN  
THE 2004 TIMBERCORP ALMOND  
PROJECT (ARSN 108 336 670)

Eighth Defendant

CHRISTOPHER MARK LITTLEY AS THE  
REPRESENTATIVE OF THE GROWERS IN  
THE 2005 TIMBERCORP ALMOND  
PROJECT (ARSN 112 935 092)

Ninth Defendant

DAVID SYDNEY BUTTERFIELD AS THE  
REPRESENTATIVE OF THE GROWERS IN  
THE UNREGISTERED MANAGED  
INVESTMENT SCHEME KNOWN AS THE  
2002 TIMBERCORP ALMOND PROJECT  
(PRIVATE OFFER NO. 1)

Tenth Defendant

SCHEDULE C

S CI 2011 06606

AUSTRALIA AND NEW ZEALAND  
BANKING GROUP LIMITED (ACN 005 357  
522)

Plaintiff

v

OIM#2 PTY LTD (RECEIVERS AND  
MANAGERS APPOINTED) (ACN 112 691  
997) AS TRUSTEE FOR TIMBERCORP  
ORCHARD TRUST #2

First Defendant

MICHAEL FUNG IN HIS CAPACITY AS  
RECEIVER AND MANAGER OF OIM#2  
PTY LTD (RECEIVERS AND MANAGERS  
APPOINTED) (ACN 112 691 997) IN ITS  
CAPACITY AS TRUSTEE FOR  
TIMBERCORP ORCHARD TRUST

Second Defendant

PAUL WILLIAM KIRK IN HIS CAPACITY  
AS RECEIVER AND MANAGER OF OIM#2  
PTY LTD (RECEIVERS AND MANAGERS  
APPOINTED) (ACN 112 691 997) IN ITS  
CAPACITY AS TRUSTEE FOR  
TIMBERCORP ORCHARD TRUST #2

Third Defendant

ROBERT BUGDEN AND ELIZABETH  
BUGDEN (AS THE REPRESENTATIVES OF  
THE GROWERS IN THE 2005 TIMBERCORP  
CITRUS PROJECT (ARSN 114 091 299))

Fourth Defendant

## SCHEDULE D

S CI 2011 06777

FENCEPORT PROPRIETARY LIMITED  
(ACN 139 604 121)

First Plaintiff

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

Second Plaintiff

MARK ANTHONY KORDA  
(IN HIS CAPACITY AS LIQUIDATOR OF  
OLIVECORP LAND PTY LTD (IN  
LIQUIDATION))

Third Plaintiff

MARK FRANCIS XAVIER MENTHA  
(IN HIS CAPACITY AS LIQUIDATOR OF  
OLIVECORP LAND PTY LTD (IN  
LIQUIDATION))

Fourth Plaintiff

V

CON MOSHOPOLOUS  
(IN HIS CAPACITY AS A GROWER IN THE  
2000 TIMBERCORP OLIVE PROJECT  
(PRIVATE OFFER) (UNREGISTERED))

First Defendant

PAULINE EMMA HAMMER  
(IN HER CAPACITY AS A GROWER IN  
THE 2001 TIMBERCORP OLIVE PROJECT  
(ARSN 094 382 082))

Second Defendant

DAVID SYDNEY BUTTERFIELD  
(IN HIS CAPACITY AS A GROWER IN THE  
2002 TIMBERCORP OLIVE PROJECT (ARSN  
098 233 455))

Third Defendant

GRAHAM GOLDENBERG  
(IN HIS CAPACITY AS A GROWER IN THE  
2003 TIMBERCORP OLIVE PROJECT (ARSN  
104 648 473))

Fourth Defendant

SHUN KING LI  
(IN HIS CAPACITY AS A GROWER IN THE  
2004 TIMBERCORP OLIVE PROJECT (ARSN  
108 744 378))

Fifth Defendant

## SCHEDULE E

S APCI 2011 103

GRAHAM GOLDENBERG  
(IN HIS CAPACITY AS REPRESENTATIVE  
OF THE MEMBERS IN THE 2002 ALMOND  
PROJECT)

First Appellant

CHRISTOPHER MARK LITTLE  
(IN HIS CAPACITY AS REPRESENTATIVE  
OF THE PARTICIPANT MEMBERS IN THE  
2005 ALMOND PROJECT)

Second Appellant

CONSTANTINE MOSHOPOULOS  
(IN HIS CAPACITY AS REPRESENTATIVE  
OF THE PARTICIPANT MEMBERS IN THE  
2006 ALMOND PROJECT)

Third Appellant

DAVID BUTTERFIELD  
(IN HIS CAPACITY AS REPRESENTATIVE  
OF THE PARTICIPANT MEMBERS IN THE  
2007 ALMOND PROJECT AND AS  
REPRESENTATIVE OF THE MEMBERS IN  
THE 2002 PRIVATE OFFER SCHEME)

Fourth Appellant

V

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 (ACN 007 457  
141)

First Respondent

AUSTRALIA AND NEW ZEALAND  
BANKING GROUP LIMITED  
(ACN 005 357 522)

Second Respondent

ALMOND LAND PTY LTD (IN  
LIQUIDATION) (ACN 091 460 392)

Third Respondent

MARK ANTHONY KORDA  
(IN HIS CAPACITY AS LIQUIDATOR OF  
ALMOND LAND PTY LTD (IN  
LIQUIDATION))

Fourth Respondent

LEANNE KYLIE CHESSER  
(IN HER CAPACITY AS LIQUIDATOR OF  
ALMOND LAND PTY LTD (IN  
LIQUIDATION))

Fifth Respondent