

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

SCI 2010 398

IN THE MATTER OF TIMBERCORP SECURITIES LIMITED  
(IN LIQUIDATION)  
ACN 092 311 469

TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)  
ACN 092 311 469 IN ITS CAPACITY AS RESPONSIBLE ENTITY  
OF THE 2005 TIMBERCORP CITRUS PROJECT (ARSN 114 091 299)  
AND ORS  
Plaintiffs

**CERTIFICATE IDENTIFYING EXHIBIT**

Date of document: 8 February 2010  
Filed on behalf of: the Plaintiffs

Prepared by:  
**ARNOLD BLOCH LEIBLER**  
Lawyers and Advisers  
Level 21  
333 Collins Street  
MELBOURNE 3000

Solicitor's Code: 54  
DX 38455 Melbourne  
Tel: 9229 9999  
Fax: 9229 9900  
Ref: 01-1531208  
(Leon Zwier - lzwier@abl.com.au)

This is the exhibit marked "**MAK-8**" now produced and shown to **MARK ANTHONY KORDA**  
at the time of swearing his affidavit on 8 February 2010.

Before me: 

CATHERINE HELEN MACRAE  
Arnold Bloch Leibler  
Level 21, 333 Collins Street  
Melbourne 3000

An Australian Legal Practitioner within the  
meaning of the Legal Profession Act 2004

**Exhibit "MAK-8"**  
**Letter from Arnold Bloch Leibler to Gadens**  
**Lawyers dated 22 December 2009**

# Arnold Bloch Leibler

Lawyers and Advisers

22 December 2009

By E-mail

Simon Theodore and Andrew Croxford  
Gadens Lawyers  
Level 25  
Bourke Place  
600 Bourke Street  
Melbourne VIC 3000

[acroxford@vic.gadens.com.au](mailto:acroxford@vic.gadens.com.au)

Your Ref  
Our Ref BXT LZ  
File No. 011499489

**Contact**  
Bridgette Toy-Cronin  
Direct 61 3 9229 9881  
Facsimile 61 3 9916 9392  
[btoycronin@abl.com.au](mailto:btoycronin@abl.com.au)

**Partner**  
Leon Zwier  
Direct 61 3 9229 9646  
[lwier@abl.com.au](mailto:lwier@abl.com.au)



Level 21  
333 Collins Street  
Melbourne  
Victoria 3000  
Australia  
DX38455 Melbourne  
[www.abl.com.au](http://www.abl.com.au)  
Telephone  
61 3 9229 9999  
Facsimile  
61 3 9229 9900

Dear Mr Theodore

## Timbercorp - Access to Olive and Almond Scheme Records

### Your request

We refer to your letters of 18 December 2009 requesting that the liquidators of Timbercorp Securities Limited (In Liquidation) (TSL) consent to your clients inspecting the books of the seven registered managed investment schemes (MIS) for the cultivation of olives (**Olive Schemes**) and the seven registered MIS for the cultivation of almonds (**Almond Schemes**). You state that your clients are:

- (a) in respect of the Olive Schemes, the TGG Olive Committee Inc (**Olive Committee**) and seven Growers named in your letter; and
- (b) in respect of the Almond Schemes, the TGG Almond Committee Inc (**Almond Committee**) and seven Growers named in your letter.

Your clients wish to convene a meeting of each Olive and Almond Scheme to appoint a new responsible entity (RE) and before doing so, wish to inspect the books and records to ascertain what liabilities a new RE would inherit.

Your letters were sent after close of business on Friday 18 December 2009 and request consent be given by 12:00pm on Monday 21 December 2009. You state that if the liquidators do not consent to your client's request you will make an application pursuant to s 247A of the *Corporations Act 2001 (Cth)* (**the Act**).

### No order available under s 247A

Your clients are not entitled to an order under s 247A. Section 247A(5) states that the Court may only make the order if it is satisfied that your clients are acting in good faith and that the inspection is made for a purpose connected with applying for leave under s 237 or bringing or intervening in proceedings

#### MELBOURNE

##### SYDNEY

**Partners**  
Mark M Leibler AC  
Henry D Lanzer  
Joseph Borensztajn  
Leon Zwier  
Philip Chester  
Ross A Paterson  
Stephen L Sharp  
Kenneth A Gray  
Kevin F Frawley  
Michael N Dodge  
Jane C Sheridan  
Steven Klein  
Leonie R Thompson  
Zaven Mardrossian  
Jonathan M Wenig  
Paul Sokolowski  
Paul Rubenstein  
Peter M Seidel  
Alex King  
John Mitchell  
Nicole Gordon  
Ben Mahoney  
Sam Dollard  
Lily Tell  
Henry Skene  
Andrew Silberberg  
Lisa Merryweather  
Jonathan Milner

**Senior Litigation Counsel**  
Robert J Heathcote

**Special Counsel**  
Danuta Czuchwicki  
Simonne Einfeld

**Senior Associates**  
Kirsten Frew  
Jillian Saint  
Katie Morrison  
John Mengolian  
Melanie Alderton  
Sue Kee  
Jorja Cleeland  
Caroline Goulden  
Matthew Lees  
Genevieve Sexton  
Lucy Kirwan  
Nicholas Clifton  
Lior Harel  
Jeremy Leibler  
Amelia Kelly  
Bridgette Toy-Cronin  
Benjamin Marshall

**Consultants**  
Allan Fels AO  
Steven M Skala

with leave under that section. Section 237 applies to a person bringing proceedings on behalf of a company. That is not your clients' stated intention in inspecting the books of the Almond and Olive Schemes. Furthermore, s 237 does not apply to companies in liquidation: *Chahwan v Euphoric Pty Ltd t/as Clay & Michel* (2008) 245 ALR 780.

### **Olive and Almond Schemes are subject to informal winding up**

TSL's liquidators are disinclined to provide the information your clients are seeking because the Olive and Almond Schemes are the subject of an informal winding up.

Since shortly after the commencement of the voluntary administration of TSL and the Timbercorp Group companies the liquidators developed a strategy for, and then managed, an orderly realisation or recapitalisation of the Almond and Olive Schemes, as well as the 11 registered and one unregistered MIS for the cultivation of eucalyptus trees. The purpose of this process has been to maximise returns to all stakeholders, including the Growers, landlords, employees, secured and unsecured creditors and to circumvent significant loss arising from wastage of the Almond and Olive Schemes in particular. The task has been extremely difficult because the Timbercorp Group is insolvent, its assets are secured in favour of banks, its structure is complex, key assets are leased to external landlords and the Act does not set out a comprehensive regime for the orderly winding up of managed investment schemes.

In June 2009, the liquidators of TSL brought an application to wind up the Almond and Olive Schemes, Supreme Court proceeding 7114 of 2009 (**Winding Up Application**). This was preceded by the liquidators' application for a direction that they were justified in bringing the Winding Up Application.

On 20 July 2009, the Winding Up Application was adjourned by consent as the Growers did not wish the Schemes to be terminated and wanted an opportunity to consider their options at a meeting of Growers.

In July and August 2009, the liquidators convened meetings of the Growers for the Growers to put resolutions forward, particularly to appoint a new RE. No replacement RE who was willing to consent to appointment unconditionally could be found for either the Olive Schemes or Almonds Schemes.

The liquidators returned to Court but did not press their application to wind up the Almond and Olive Schemes. They instead sought a direction that they would be justified in causing TSL to amend the constitutions of the Olive and Almond Schemes to give TSL the explicit power to "assign, terminate, surrender or otherwise deal with any sub-leases, licence or joint venture agreement." The liquidators consequently amended the constitutions.

At the conclusion of three transparent and robust sale processes (one for the assets the subject of the Olive Scheme and two for the assets the subject of the Almond Scheme), the assets were sold to third parties. The three sale transactions were each the subject of a Court proceeding 9408 of 2009, SCI 2009 10382 and SCI 2009 9998 (**Sale Proceedings**).

Following completion of the sales, the net sale proceeds from each of these sales are or will be held in escrow pending the hearing and determination of a proceeding to determine which person or persons have any rights to all or any part of the net proceeds (**Rights Proceedings**). The Rights Proceeding in respect of the Timbercorp Group owned assets for the Almond Schemes have begun in the Supreme Court (SCI 2009 10699) (**Almond Rights Proceeding**).

The process that the liquidators have followed since June 2009 has amounted to a de facto or informal winding up of the Olive and Almond Schemes. As you were not instructed during this process we enclose by way of further background the affidavit of Mark Anthony Korda in proceeding SCI 2009 9998 (without exhibits). This affidavit explains in some detail the history of the proceedings in relation to the Olive and Almond Schemes.

### **Grower involvement in the Court Proceedings**

Throughout the liquidations KordaMentha's website has continually been updated with press releases, documents and court proceedings. ABL's website is continually updated with the court documents relating to all the Timbercorp Court proceedings of which we have carriage. The Growers have had every opportunity to be heard.

The Timbercorp Growers Group, represented by Clarendon Lawyers, has appeared at all the liquidators' applications in relation to the Almond and Olive Schemes.

From 6 October 2009, your client Kerree Anne Bezencon, the chair of the Olive Committee and Almond Committee, and the Olive Committee and Almond Committee, have intervened in the proceedings brought by the liquidators in respect of the Olive and Almond Schemes. This includes in the three Sale Proceedings. The Almond Committee is also seeking to represent the Growers in the Almond Rights Proceeding.

We note that in proceeding two of the Sale Proceedings, your clients appeared in opposition to the sale and were associated with under bidders or late bidders in those sale transactions. In proceeding 9408 of 2009 for the sale of the Timbercorp Group owned almond assets, Ms Bezencon swore two affidavits. She proposed Huntley Management Limited act as temporary RE for the Almond Schemes and put to the Court a new bid of Stephen Blair which she argued was more favourable than the bid the liquidators had accepted. Robson J in his judgment of 8 October 2009 rejected Ms Bezencon's argument and found that "the evidence establishes that the liquidators have conducted a proper sale process .... In my view the liquidators are justified in accepting the Olam Orchards bid" (paragraph 64).

Similarly in the proceeding for the sale of the olive assets, SCI 2009 9998, Ms Bezencon filed an affidavit sworn 11 November 2009 putting forward a last minute alternate bid by EB Capital, to the bid the liquidators had accepted. Stephen Blair, one of the under bidders in the olive sale process is a principal of EB Capital. Croft J, said that the proposal the subject of Ms Bezencon's affidavit was "no more than a possibility, which is subject to all the exigencies of negotiation and agreement of terms and conditions". Another member of the

Olive Committee, Neil Leslie Cox, also filed an affidavit sworn 10 November 2009 in that proceeding, supporting the under bidder Great Land Olives (GLO). GLO put a new bid to the Court. Croft J similarly rejected the submission that the liquidators should consider GLO's new bid calling it "no more than a possibility which is subject to all the difficulties and disappointments often inherent in negotiations".

#### **Role of RE now limited to receiving assets**

TSL's role is now limited to receiving the remaining assets and distributing those assets. The Olive and Almond Schemes are no longer operating as MIS: the Growers are not being invoiced for any further contributions to the Olive and Almond Schemes. There is therefore no role for a RE of an MIS as contemplated by the Act.

The liquidators do not consider that any purpose would be served by a new RE being appointed at this time. It would only add to the expense of the liquidation which would ultimately be borne by the Growers.

#### **Further Court Proceedings**

The liquidators are subject to Court supervision and will continue to seek directions from the Court as any controversial issues arise. While they consider that an informal winding up process is sufficient at this time, the liquidators' application to wind up the Olive and Almond Schemes (7114 of 2009) remains before the Court.

If your clients call meetings of the Olive and Almond Scheme Growers the liquidators will resume the application to formally wind up those schemes and formalise the position. They will do so as they believe that it is in the best interests of the Growers that the Growers do not bear the costs involved in convening meetings or in having a new RE spend what would be significant costs in becoming sufficiently acquainted with the legal and financial matters of TSL and the Olive and Almond Schemes. The liquidators will otherwise leave the informal process to run its course.

Yours sincerely  
**Arnold Bloch Leibler**



**Leon Zwier**  
Partner