

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

S CI 2010

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 2004 TIMBERCORP TABLE
GRAPE PROJECT (ARSN 108 648 086) AND THE 2005 TIMBERCORP TABLE GRAPE
PROJECT (ARSN 113 512 236) AND ORS ACCORDING TO THE SCHEDULE
Plaintiffs

CERTIFICATE IDENTIFYING EXHIBIT

Date of document: 23 December 2010
Filed on behalf of: the Plaintiffs

Prepared by:

ARNOLD BLOCH LEIBLER

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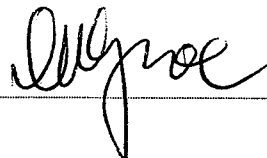
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(Leon Zwier - lzwier@abl.com.au)

This is the exhibit marked "MAK-2" now produced and shown to **MARK ANTHONY KORDA**
at the time of swearing his affidavit on 23 December 2010.

Before me: 

MEAGAN LOUISE GROSE

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-2"
Affidavit of Mark Anthony Korda
sworn 10 November 2009

" MAK - 2 "

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

LIST E

No of 2009

**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
MANAGED INVESTMENTS SCHEMES LISTED IN SCHEDULE 1
AND ORS ACCORDING TO THE SCHEDULE**

Plaintiffs

AFFIDAVIT OF MARK ANTHONY KORDA

Date of document: 10 November 2009
Filed on behalf of: the Plaintiffs

Prepared by:
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I, **MARK ANTHONY KORDA**, of Level 24, 333 Collins Street, Melbourne, in the state of Victoria, Chartered Accountant, SAY ON OATH that:

- 1 I am, with Leanne Kylie Chessier, the liquidator of the First Plaintiff, Timbercorp Securities Limited (in liquidation) (**TSL**), and the sixth plaintiff Timbercorp Limited (in liquidation) (**TL**). I am, with the fifth plaintiff, Mark Francis Xavier Menthia, the liquidator of the second plaintiff Olivecorp Management Limited (in liquidation) (**OML**), and the seventh plaintiff Olivecorp Land Pty Ltd (in liquidation) (**OLPL**).

MK
PD

- 2 Except where I otherwise indicate, I make this affidavit from my own knowledge. Where I depose to matters from information or belief, I believe those matters to be true. I am authorised by Ms Chesser and Mr Mentha to make this affidavit on their behalf. References in this affidavit to "we", "us", "our" or "ourselves" are references to Ms Chesser and me when referring to TL or TSL or Mr Mentha and me when referring to OLPL or OML.

Personal background and experience

- 3 I am a chartered accountant and a partner of the firm KordaMentha Pty Ltd (ACN 100 169 391) (**KordaMentha**). I am a Registered Liquidator and an Official Liquidator of the Court. I am a member of the Insolvency Practitioners Association of Australia and a member of the Institute of Chartered Accountants. Before founding KordaMentha in 2002, I had a 24-year career with the firm Arthur Andersen, during which I held the positions of Director of Corporate Finance, Managing Partner Asia Pacific Corporate Recovery Services Practice and Managing Partner Australia Accounting and Audit Practice. I was also a Member of the Australian Executive Committee and Board of Partners. I have been practising in the area of corporate insolvency and financial reconstructions for 20 years.
- 4 Paras 5-19 of this affidavit set out general background to explain the purpose of the application. I will explain these events in more detail below.

Voluntary Administration of Timbercorp Group

- 5 On 23 April 2009, we were appointed as voluntary administrators of TL, TSL, OLPL and OML. Also on 23 April 2009, we, and two other KordaMentha partners, namely Craig Peter Shepard and Clifford Stuart Rocke, were appointed as voluntary administrators of the 37 other Timbercorp group companies (together **Timbercorp Group**). All of the appointments were made by those companies pursuant to section 436A of the *Corporations Act 2001 (Cth)* (**the Act**).

Liquidation

- 6 On 29 June 2009, at the second meeting of the creditors of the Timbercorp Group and a separate meeting of the creditors of TSL, the creditors resolved to wind up the Timbercorp Group, and TSL respectively. From 29 June 2009 we have been the liquidators of TSL, TL, OLPL and OML.



Timbercorp Olive Schemes

- 7 TSL is currently the responsible entity (**RE**) of 7 olive schemes which are registered managed investment schemes (**MIS**) under Part 5C of the Act. In addition, there is one olive scheme managed by OML which is not registered, and because it was only offered to sophisticated or professional investors, it was not required to be registered under Part 5C of the Act. I refer to these together as the "**Olive Schemes**". In this affidavit I refer to each of the Olive Schemes individually by their year, for example, "2001 Olive Scheme". The only exception is the 2000 unregistered Olive Scheme which I refer to as the "**2000 Private Offer Scheme**".
- 8 TSL is hopelessly insolvent and is unable to continue managing the registered Olive Schemes and OML is hopelessly insolvent and OML is unable to continue managing the 2000 Private Offer Scheme.
- 9 The Olive Schemes are governed by a complex suite of documents. The members of the Olive Schemes are referred to in the documents as "**Growers**" and I adopt that terminology here. There are 3,265 Growers in the registered Olive Schemes and 42 in the 2000 Private Offer Scheme. The purpose of the Olive Schemes is the cultivation of olives for the production of olive oil for commercial sale.
- 10 The land on which the Olive Schemes are operated is owned by either a Timbercorp Group company or an external landlord (**Land**). In the 2001 and 2002 Olive Schemes, the landowner leases the Land to TSL. TSL then leases the Land to OLPL and OLPL associates itself with the Growers in a licence and joint venture agreement (**LJVA**). In the 2000 Private Offer Scheme OML leases the land and subleases it to OLPL. OLPL then associates itself with the Growers in an LJVA. In the 2003, 2004, 2006, 2007 and 2008 Olive Schemes, TSL subleases the Land to the Growers. The parcels of land sub-leased or licensed to the Growers are referred to in the Olive Scheme documents as "**Grovelots**".
- 11 The 2000 Private Offer Scheme and the 2001-2004 Olive Schemes are operated on Land in Boort and are known as the "**Boort Schemes**". OLPL owns the land on which the Boort Schemes are operated. The 2006-2008 Olive Schemes are operated on land at Boundary Bend in the Murray Valley and are known as the "**Boundary Bend Schemes**". The landowners in the Boundary Bend Schemes are the Timbercorp Group companies B.B. Olives Pty Ltd (In Liquidation) (**BBO**) and Almond Land Pty Ltd (In Liquidation) (ACN 091 460 392) (**Almond Land**), and the arms

length companies Boundary Bend Estate Management Pty Ltd (ACN 080 184 925) (**BBEM**), Boundary Bend Nominees (No. One) Pty Ltd (ACN 115 765 583), Boundary Bend Nominees (No. Two) Pty Ltd (ACN 115 765 387) and Boundary Bend Nominees (No. Three) Pty Ltd (ACN 115 765 538).

- 12 BBEM is the farm manager of all the Boundary Bend Schemes and Boundary Bend Management (Boort) Pty Ltd (ACN 110 670 285) (**BBMB**) is the farm manager of the Boort Schemes. Boundary Bend Limited (ACN 115 131 667) (**BBL**) is the parent company of BBEM and BBMB.

Nature of Growers' payments and tax deductibility

- 13 An important feature of the Olive Schemes is the tax deductibility available to Growers in respect of their contributions, for example the payment of rent and management fees. The basis for the tax deductibility is that Growers' contributions to the Olive Schemes constitute a loss or outgoing that is incurred in gaining or producing assessable income from primary production. The Growers' contributions to the Olive Schemes have never been akin to a payment made for an acquisition of an asset. A loss or outgoing cannot be deducted to the extent that it is capital, or of a capital nature. The Olive Scheme documents are consistent with the tax driven nature of MIS. They provide that the Growers have the right to occupy and use the land and that the olive crop vests directly in the Growers but the documents also expressly provide that the rights of the Growers do not extend to an ownership interest in any land, water rights or other infrastructure and the Growers expressly acknowledge that those assets are owned by the landowner.

Orderly realisation or recapitalisation of Timbercorp assets

- 14 Since shortly after the commencement of the voluntary administration of TSL and the Timbercorp Group Companies we developed a strategy for, and then managed, an orderly realisation or recapitalisation of the Olive Schemes, as well as the 11 registered and one unregistered MIS for the cultivation of eucalyptus trees (**Forestry Schemes**) and the seven registered and one unregistered MIS for the cultivation of almonds (**Almond Schemes**). 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 Timbercorp horticultural 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.

BBL transaction

- 15 As a result of the matters set out in detail below we have procured TSL and the other Timbercorp Group vendor companies to enter into four conditional sale and purchase deeds (**SPDs**). There are two SPDs with BBL to sell olive land, trees, cropping rights, and plant and equipment, one for the Boort Schemes (**Boort SPD**) and one for the Boundary Bend Schemes (**Boundary Bend SPD**). The two further SPDs are with BBL to sell the permanent water rights at Boort (**Boort Water SPD**) and Boundary Bend (**Boundary Bend Water SPD**). It is a condition precedent of the Boort SPD that BBL and the water mortgagee, which will be Fenceport Pty Ltd (as trustee for the Timbercorp Forestry Assets Sale Trust) (**Fenceport**), enter into a mortgagee contract for the sale of water shares prior to the end date (**Boort Mortgagee Water Sale**). The total sale price for all these assets is \$59.5m.
- 16 Importantly, the SPDs are not conditional on finance or an equity raising by BBL. Equally importantly, the SPDs provide that BBL will extend the crop sale agreements that have been in place during the liquidation of TSL and OML to ensure the Grovelots will be maintained prior to completion.
- 17 The SPD does have two conditions relevant to this application: the sale is conditional on the release of securities and obtaining a direction from the Court that we are justified in causing TSL and OML to enter into and perform the SPD and extinguish all the Growers rights over the Olive Schemes. The conditions precedent must be satisfied by 12 November 2009 (see below at paragraph 84) but they will not be given effect until or nearer to completion on or before January 2010.
- 18 The SPDs contain provisions which endure beyond three months and we do not have power to enter into such an agreement without approval of the Court or the Committee of Inspection of each Timbercorp Group vendor company.

Olive Asset security granted in favour of Banks

- 19 Some of the olive assets subject to the SPDs are secured in favour of BOSI Security Services Limited as security trustee for a syndicate of banks comprised of Australia and New Zealand Banking Group Ltd (**ANZ**), Westpac Banking Corporation

(Westpac) and BOS International Australia Limited (BOSI) (Syndicate Banks). Some of the olive assets subject to the SPD were previously secured in favour of the Commonwealth Bank of Australia (CBA). As set out further from paragraph 97-106 below, the CBA Securities have now been replaced by securities in favour of Fenceport. Fenceport and the Syndicate Banks are referred to below as the "Secured Creditors". The amount of secured debt owed to the Secured Creditors is approximately \$228m. BBL will not settle without clear title to the Olive Assets. The Secured Creditors will not be paid in full from the proceeds of sale to BBL. The Syndicate Banks will therefore not be obliged to release their securities. Fenceport will, however, be required to release its securities upon settlement of the sale to BBL (discussed further below at paragraphs 97 - 106).

Purpose of the application

20 The purpose of this application is to seek:

- (a) The Court's approval pursuant to s 477(2B) of the Act that we can as liquidators of TSL, TL, OLPL and OML, enter into the SPDs and any associated agreement;
- (b) Directions pursuant to section 511 of the Act that we are justified in procuring TSL and OML to enter into and perform the SPDs, and terminate Growers interests in the Olive Schemes; and
- (c) Leave and directions regarding disclaiming the Project and Management Agreement (PMA) in respect of the 2000 Private Offer Scheme to also achieve a termination of those Grower interests in the 2000 Private Offer Scheme.

Court Proceedings - Almonds & Olives - Direction Justified to Apply to Wind Up

21 The administration and liquidation of TSL has been both commercially and legally complex. We owe duties to the Timbercorp Group that own properties and we owe duties as liquidators of TSL as the responsible entity of the Schemes (and as liquidators of OML as the manager of the 2000 Private Offer Scheme), which at times conflict with one another. Accordingly we have continually sought guidance from the Court throughout the winding up process by making a series of applications for directions.

- 22 On 4 June 2009, we filed an originating process seeking a direction that we were justified in applying to wind up the Almond and Olive Schemes. We did so because we apprehended Growers would criticise us for seeking to wind up their Almond and Olive Schemes, and we sought protection from the Court. We explained to the Court in that application that TSL, the responsible entity, was hopelessly insolvent and we did not have the money required to continue maintaining the Almond and Olive Schemes.
- 23 On 4 June 2009, at the first directions hearing of this originating process, Clarendon Lawyers (**Clarendons**) appeared for a Grower, Chris Garnaut to oppose the direction.
- 24 On 10 June 2009 and 14 June 2009, when the matter was further heard, Counsel appeared on behalf of the then newly formed unincorporated association of Timbercorp Growers established by Chris Garnaut, named the Timbercorp Growers Group (**TGG**). Chris Garnaut is the chairman of the TGG.
- 25 The originating process was posted on our website at www.kordamentha.com.au and Arnold Bloch Leibler's (**ABL**) website at www.abl.com.au (together "**Websites**").
- 26 On 17 June 2009 Justice Robson made the direction that we were justified in procuring TSL to apply to wind up the Almond and Olive Schemes.

Administration open and transparent

- 27 Throughout the liquidations of the Timbercorp Group our staff have continually updated the KordaMentha website 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 they have carriage. We have also kept the TGG regularly informed of all developments and so too the Committees of Inspection.

Court Proceedings - Almonds & Olives - Direction Justified to Apply to Wind Up

- 28 After the Court directed that we were justified in applying to wind up the Almond and Olive Schemes, we sought that relief in relation to the Almond and Olive Schemes. We were opposed by the TGG.
- 29 The hearing of these winding up applications was held from 15 July 2009 to 20 July 2009. The TGG also issued an interlocutory application seeking the appointment of a

temporary replacement responsible entity (**Temporary RE**), both for the Almond and Olive Schemes. In relation to the Olive Schemes, the proposed Temporary REs were Primary Securities Ltd (ACN 089 812 635) (**Primary Securities**), Redisland Australia Limited (ACN 105 576 707) (**Redisland**) and Mediterranean Olives Estate Limited (ACN 091 024 396) (**MOE**).

- 30 The TGG also submitted that the Growers did not wish the Schemes to be terminated and should be given an opportunity to consider their options at a meeting of Growers. We submitted that the winding up order would not have that immediate effect. We also submitted that because the RE was hopelessly insolvent and the Schemes required an injection of immediate cash that we did not have, and could not realistically raise from Growers, the Schemes should be wound up.
- 31 On 20 July 2009 the winding up applications were adjourned by consent with Orders by Justice Robson that we cause TSL to call separate meetings of the Almond and Olive Schemes to put Grower resolutions before the Growers.

Meetings of Growers - Almonds

- 32 On 31 July 2009 we caused TSL to hold concurrent meetings of the Growers in the Almond Schemes (**Almond Meetings**) independently chaired by Matthew Walsh of Gadens Lawyers.
- 33 On 31 July 2009 the Growers passed special resolutions to amend the constitutions of the 2001-2007 Almond Schemes. The special resolutions purported to give the RE the power to use the proceeds of the 2009 crop for the purposes of working capital in the production of the 2010 crop and for the purposes of a long term restructure of the schemes. We briefed Mr Scerri QC to advise whether each resolution (if passed) would be legally effective to amend the Almond Scheme Constitutions or otherwise to alter the legal rights or obligations of the Growers, or the legal rights, powers and obligations of TSL as the RE of the Almond Schemes. He advised that they would not be. We caused Mr Scerri QC's opinion to be posted on the websites prior to the meeting. Now produced and shown to me marked **MAK-1** is the opinion of Mr Scerri QC (**Opinion**) and the resolutions put forward at the Almond Meetings.

Meetings of Growers - Olives

- 34 Meetings of the Olive Scheme Growers (with the exception of the 2000 Private Offer Scheme which was not subject to the Court proceeding and subsequent meetings)

were convened on 17 August 2009, also chaired by Matthew Walsh (**Olive Meetings**). In preparation for the Olive Meetings we prepared a notice of meeting, which included the resolutions, and a proxy form for each meeting. Now produced and shown to me marked **MAK-2** is the notice of meeting with an example of the proxy form (for the 2001 Olive Scheme Meeting).

35 The Olive Meetings were held in the Victory Room at Etihad Stadium. Approximately 80 Growers and interested parties attended in person. The structure of the Meeting was:

- (a) Introduction by the Chairman;
- (b) Update by the liquidators, which I presented;
- (c) Timbercorp Growers Group (TGG) presentation including comments from:
 - (i) Stephen Lynch, an agribusiness and horticulture consultant;
 - (ii) The Timbercorp Olives Committee (a committee of the TGG);
 - (iii) BBL;
 - (iv) Great Land Olives (a consortium of Growers and their financial advisers); and
 - (v) Primary Securities;
- (d) Questions;
- (e) Resolutions; and
- (f) Voting.

36 Now produced and shown to me marked **MAK-3** are the Powerpoint slides of the presentations at the Olive Meetings.

37 The resolutions put forward by the TGG were similar to those put forward at the Almond Meetings, including a special resolution to allow the RE to use the proceeds of the 2009 crop for the purposes of working capital in the production of the 2010 crop and for the purposes of a long term restructure of the scheme (**Special Resolution**). The Growers passed the Special Resolution for each of the registered Olive Schemes

and adjourned the other resolutions to a meeting on a date yet to be fixed. Now produced and shown to me marked **MAK-4** are the results of the voting at the Olive Meetings.

2009 Crop proceeds held on trust for Growers

38 For some time prior to the meeting the Growers asked me to consider whether we could use the 2009 crop proceeds to fund a recapitalisation of the Almond and Olive Schemes. We told them that we could not do so. We explained that the proceeds of last year's crop sales are the property of the Growers which cannot be used without the consent of each of those Growers and, where relevant, their secured creditors. In any event, we sold the 2009 olive crop on the tree to BBEM and the proceeds from that sale will not begin to be received until 2010. The sale of the olive crop to BBEM was to fund ongoing maintenance of the olive groves to ensure that the asset did not devalue.

39 However, the purpose of the special resolution, for both Almond and Olives, was to "allow the responsible entity to use the proceeds of the 2009 crop for the purposes of working capital in the production of the 2010 crop and for the purposes of a long term restructure of the scheme (whether alone or together with other schemes)" (Opinion, paragraph 9, quoting the TGG's explanatory statement). Mr Scerri QC opined (in relation to the special resolution for the Almond Schemes) that TSL is obliged to hold the 2009 crop proceeds on trust and that it would be a breach of trust to deal with the monies in a way that was inconsistent with the accrued rights of the Growers. He said that the constitution could not be amended to take away the accrued rights of the Growers (Opinion, paragraph 9). I understand that this Opinion applies equally to Olive Schemes. The TGG continued to press for the amendments to the Constitutions. The TGG's lawyer Michael Fernon pressed me for an assurance that I would lodge the amendments with ASIC if they were passed by Growers.

Growers' amendments lodged with ASIC

40 If the constitution of an MIS has been modified by a special resolution of the members of the scheme, I am told by Jane Sheridan of ABL that section 601GC of the Act requires the RE to lodge with Australian Securities and Investments Commission (**ASIC**) a copy of the modification. On 11 August 2009 and 28 August 2009 I caused the amendments made at the Almond Meetings and Olive Meetings respectively to be lodged with ASIC even though I did not believe that the special

resolutions were effective to modify the Constitutions. Now produced and shown to me marked **MAK-5** are the deeds recording the special resolutions that were passed at the Olive Meetings to amend the Constitutions.

Court Proceedings - Almonds - Continuing Winding Up Application

- 41 Between 31 July 2009 and 17 August 2009 no party made an unconditional and binding offer to take the role of replacement RE of the Almond Schemes despite all the publicity surrounding the Timbercorp collapse.
- 42 On 18 August 2009 we pressed our application to wind up the Almond Schemes. We did not press the application to wind up the Olive Schemes at this time as the Olive Meetings were held on 18 August 2009 and we wanted to allow time for the Olive Meetings to take place and for any replacement RE to come forward.
- 43 It was necessary to press the application in relation to the Almond Schemes as the RE remained hopelessly insolvent and the Almond Schemes each had a cashflow deficiency. We were also concerned about the risk of severe wastage of the almond orchards if the almond assets were not sold or Almond Schemes recapitalised in the near term. We also considered that in order to achieve the best outcome for the stakeholders, we would need to demonstrate to a potential bidder that it could buy the almond assets with title clear from Secured Creditors claims and Growers claims. If the potential bidders were not so satisfied, we expected that any bids for the almond assets would be made at a large discount to the price which could be achieved if the almond assets were offered for sale with clear title. (Prior to the voluntary administration the Timbercorp Group attempted to sell some of the assets subject to Forestry Schemes, but the process failed in part because of the complexity of the MIS structure and the inability to give clear title). The TGG maintained its opposition to winding up the Almond Schemes.

Court Proceedings - Forestry Schemes - Power to Extinguish Growers' Rights

- 44 The problems with Forestry Schemes were easier in two respects for us to deal with than the Timbercorp horticultural schemes. First, the Forestry Schemes did not require the immediate injection of cash to maintain them (although they had other problems arising from leased properties). Second, unlike the Almond and Olive Schemes, the Forestry Scheme documentation provides that the Growers own the eucalyptus trees the subject of the Forestry Schemes (**Trees**). Accordingly we

developed a strategy in relation to the Forestry Schemes, in conjunction with the TGG, for an orderly sale or recapitalisation of the Forestry Schemes. Because we did not have an express power to terminate the Growers rights should that process culminate in a sale, rather than seeking to wind up the Forestry Schemes, which Growers found repugnant, we agreed to seek a direction from the Court that we could use the powers granted to the RE by Growers to amend the Constitution to empower the RE to terminate Growers rights.

45 On 18 August 2009, we applied to the Federal Court in relation to the Forestry Schemes for a direction regarding TSL's power to sell the Trees. Now produced and shown to me marked **MAK- 6** is the amended originating process and my supporting affidavits (without the exhibits) for that application, Federal Court Proceeding VID 595 of 2009.

46 On 18 August 2009 Justice Finkelstein ordered that we were justified in procuring TSL as responsible entity to amend the constitutions of the Forestry Schemes pursuant to section 601GC(1)(b) of the Act granting the RE an express power to terminate Growers' rights. Now produced and shown to me marked exhibit **MAK- 7** is the order of Justice Finkelstein of 18 August 2009.

Court Proceedings - Almond Schemes - Power to Extinguish Grower Rights

47 As with the Olive Schemes, and similarly to the Forestry Schemes, each of the Almond Schemes is governed by a complex suite of documents including a constitution and licence and joint venture agreements or sub-leases.

48 As an alternative to immediately winding up the Almond Schemes, which the TGG objected to, we instead sought directions from this Court that we were justified in amending the Constitutions of the Almond Schemes to give the RE an express power to terminate Growers' rights so that we could engage in an orderly sale or recapitalisation process.

49 On 21 August 2009 Justice Robson made a direction that we were justified in causing TSL to amend the constitutions of the 2001-2007 Almond Schemes to give TSL the explicit power to "assign, terminate, surrender or otherwise deal with any Sub-lease/Licence and Joint Venture Agreement". Now produced and shown to me marked exhibit **MAK- 8** is the order of Robson J dated 21 August 2009.

Court Proceedings - Olive Schemes - Power to Extinguish Grower Rights

- 50 Between the adjournment of the winding up application on 20 July 2009 and 28 August 2009 no party offered to take the role of replacement RE, on an unconditional and binding basis. On 28 August 2009 we therefore had the application to wind up the Olive Schemes listed for mention before Justice Robson. As with the Almond Schemes we considered it necessary to have proceeding mentioned as TSL is hopelessly insolvent and we were concerned about wastage to the olive crop. As with the Forestry and Almond Schemes we also considered that to maximise the value to all stakeholders it was necessary to be able to offer the assets with title clear from Secured Creditors and Growers claims.
- 51 Having already obtained directions that we were justified in amending the Forestry and Almond Scheme constitutions to give the RE the express power to terminate the sub-leases and where relevant the LJVAs, we did not wish to waste judicial time or spend more on legal fees to argue for the same direction in respect of the Olive Schemes. We proposed therefore simply to make the same amendments in respect of the Almond Schemes as we had been directed that we were justified in making in respect of the Almond Schemes.
- 52 The TGG (represented by Mr Galvin and Clarendons) and ASIC (represented by Mr Hibble) were present at the mention. Mr Hibble said that ASIC did not have any concerns and Mr Galvin confirmed that he did not see any problem with this course of action. Now produced and shown to me marked exhibit **MAK-9** is the transcript from the mention on 28 August 2009.

Power to terminate Growers' rights

- 53 On 28 August 2009, I caused the amendments to the Olive Scheme constitutions to be lodged with the ASIC. TSL now has the necessary power to surrender the Grower LJVAs and sub-leases. Now produced and shown to me marked exhibit **MAK-10** are the deeds amending the Olive Scheme constitutions.

Growers' proprietary claims v Secured Creditors' rights

- 54 From the outset of the TSL insolvency there have been ongoing differences of opinion between the TGG and the Secured Creditors of the olive asset owning companies of the Timbercorp Group over a number of issues including:

- (a) The value of the olive assets;
- (b) The extent to which Growers have a proprietary interest in any, and if so which, of the olive assets;
- (c) If so, the value of the Growers' proprietary interests in the olive assets;
- (d) How proceeds of sale of olive assets may be apportioned between the Secured Creditors of the owner of the olive assets and TSL as RE of the Olive Schemes for the benefit of Growers.

55 The same dispute arose between the TGG and Secured Creditors in respect of the almond assets. We made it clear to TGG and the Secured Creditors that it was unlikely that the offers from prospective bidders would exceed the amount owed to the Secured Creditors and the amounts contributed by Growers to the Olive Schemes. We told both the TGG and Secured Creditors that they should seek to amicably resolve their different points of view about apportionment of any sale proceeds between them before it became time critical for them to do so. We also highlighted that we had conflicts of duty as the liquidators of the landowning entities and TSL. As liquidators of the land owning entities we seek to maximise the value of its assets and would be obliged to disclaim any onerous contracts which diminish the value of its assets. As liquidators of TSL we seek to maximise the returns by the maintenance of any beneficial contracts to TSL over the assets of the land owning entities.

Directions in the Sale of the Almond Assets

56 On 5 October 2009 we issued an originating process in the Supreme Court (proceeding 9408 of 2009) for directions regarding the sale of the almond assets. The Growers and Secured Creditors had not reached agreement in that sale process but the Secured Creditors had offered \$6m to settle the Growers' claims (**Bank Offer**). Now produced and shown to me marked exhibit **MAK-11** are the originating process and my affidavits (without the exhibits) and draft orders.

57 On 9 October 2009, Justice Robson made most of the proposed orders but instead of ordering that we were justified in accepting the Bank Offer, he ordered that the net proceeds of sale be held on trust pending the hearing and determination of a court proceeding to determine which person or persons have any rights to the net proceeds. Justice Robson released the transcript of his judgment and made orders.

Now produced and shown to me marked exhibit **MAK-12** are the transcript containing the judgment and the orders.

Additional Grower Representatives

- 58 Up until we sought directions in respect of the almond asset sale there had only been one Grower group for the Almond and Olive Schemes, the unincorporated TGG represented by Clarendons.
- 59 On 6 October 2009, the day after we filed the originating process for directions, Kerree Anne Bezencon filed and served an affidavit which at paragraph 4 states she is the Chair of the TGG Almond Committee Inc (**TGGAC**) incorporated on 31 August 2009. This was the first time I had heard there was a separate group called the TGGAC or that it was chaired by Kerree Bezencon rather than Chris Garnaut.
- 60 On 14 October 2009, my solicitors received a letter from Maurice Blackburn Lawyers (**Maurice Blackburn**) who act for Kerree Bezencon. That letter states there is also a TGG Olive Committee Inc, also chaired by Kerree Bezencon.

Communication with the Growers

- 61 During the mention of the amendments to the Olive Scheme constitutions before Justice Robson on 28 August 2009 our lawyer said in open court that we would meet with the executive of the TGG (as it was then) (Christopher Garnaut, David Haintz, Kerree Bezencon, Neil White and Darren Steinhart) to provide updates regarding the sale or recapitalisation of Olive Schemes and to consult with the TGG after the receipt of all bids under the sale process and before entering into a sale of the olive assets.
- 62 We held Olive Scheme related meetings with the TGG on:
- (a) 3 September 2009 at 11:00 am; and
 - (b) 8 October 2009 at 2 pm.
- 63 Throughout the sale or recapitalisation process of the olive assets, we have communicated with the Growers' representatives and Secured Creditors and continued to update the Websites about that process. We and our staff at KordaMentha and our solicitors ABL, have engaged in numerous telephone

discussions, in person discussions and e-mail correspondence with the TGG and Clarendons and more recently Maurice Blackburn.

Sale or Recapitalisation Process

- 64 On 13 August 2009, we published an advertisement in the *Australian Financial Review* in which we sought expressions of interest for the possible purchase of the olive assets or the re-capitalisation of the Olive Schemes. Now produced and shown to me marked **MAK- 13** is a copy of the advertisement that appeared in the *Australian Financial Review* on 13 August 2009. This advertisement was published again in the *Australian Financial Review* on 18 August 2009.
- 65 Andrew Malarkey, a partner of KordaMentha, has had responsibility for coordinating the expressions of interest. Mr Malarkey has informed me of the matters which I depose to below.
- 66 A number of parties contacted KordaMentha, and some executed a Confidentiality Agreement (**the Interested Parties**). Now produced and shown to me is a **confidential exhibit marked MAK- 14**, a list of Interested Parties.
- 67 Upon execution, each of the Interested Parties were provided with a copy of a Confidential Information Memorandum prepared by KordaMentha (**IM**). Now produced and shown to me is a **confidential exhibit marked MAK- 15** is the IM.
- 68 Each of the Interested Parties was also granted access to an on-line data room which contains confidential information about the Olive Schemes. How often the Interested Parties entered the data room and the number of documents they accessed is also recorded in **confidential exhibit MAK- 14**.
- 69 The assets that we offered for sale are described in the IM as follows:
- (a) 6,532 ha of high-yielding premium quality Olive Groves in various stages of growth, including:
- (i) 2,777 ha of freehold planted groves in the Boort district, in the shire of Loddon, 120 km northwest of Bendigo in northern Victoria – one of the largest single site olive groves in the Southern Hemisphere;
- (ii) 3,235ha of freehold planted groves and leasehold rights to 520 ha of land in the Sunraysia region of northwest Victoria;

- (b) 29,716 ML per annum of permanent water rights (**PWR**) linked to the Olive Groves including:
 - (i) 26,171 ML of PWR owned;
 - (ii) 3,545 ML of PWR leased;
- (c) Olive processing facility located on the Boort Olive Grove, with the capacity to process the needs of the Boort Olive Grove, estimated at approximately 39,000t pa of olives;
- (d) 20 ha of premium wine grape vines located in Boort;
- (e) 500 ha of vacant freehold land located in Boort;
- (f) A 19.4% equity interest in Boundary Bend Limited; and
- (g) Various plant and equipment utilised for the benefit of operations of the Boort Olive Grove.

(together "**Olive Assets**")

Bids for Olive Assets

- 70 The Information Memorandum set out a clear timetable for the sale or recapitalisation process and stipulated that the closing date for first and final binding offers was 5.00pm on Friday, 11 September 2009. This timetable was communicated to the TGG.
- 71 The final binding offer had to include a completed price allocation schedule which required each bidder to ascribe a dollar value to the water rights, land, plant and equipment, trees and cultivation and harvesting rights (**cropping rights**) in each of the Olive Schemes. This was included to assist us in determining apportionment of sale proceeds between the various assets and various creditor groups. The issue was also discussed between counsel and Justice Finkelstein in Federal Court Proceedings VID 595 of 2009 and between counsel and Justice Robson in Supreme Court Proceeding 7114 of 2009. Now produced and shown to me marked exhibit **MAK- 16** are the extracts of the transcripts from those discussions between Court and counsel.

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- 72 We received four bids for the Olive Assets. The main terms of the bids, including allocation of price between the Olive Assets and important conditions are summarised in the schedule of bids now produced and shown to me marked **confidential exhibit MAK-17**. It is information that has been kept confidential to KordaMentha and its advisers. I consider that the exhibit should remain confidential as if bidders or the market are able to see the bids other parties have made it may prejudice any future realisations.
- 73 While bidders were requested to apportion the purchase price between several categories, including cropping rights, the bidders only apportioned between PWR and other assets.

BBL's Bid

- 74 On 9 October 2009 BBL was selected as the preferred purchaser as the terms and conditions that BBL offered were the most favourable. The BBL offer was superior to all other offers received on price, ability to fund the assets prior to completion and completion risk. The BBL bid is fully funded through committed capital resources and is not subject to finance.
- 75 The BBL offer also includes a term that, within three months after completion, BBL will offer the olive Growers a priority allocation to subscribe for shares in BBL. Through this, olive Growers who wish to have an ongoing investment in Australian olive groves will have an opportunity to do so.
- 76 The Boort SPD is made between:
- (a) TL;
 - (b) TSL (in its capacity as responsible entity of the Olive Schemes and in its personal capacity);
 - (c) OLPL;
 - (d) Olivecorp Processing Facility Pty Ltd (In Liquidation) (ACN 098 581 081) (**Olivecorp Processing**);
 - (e) Boort Estate Pty Ltd (In Liquidation) (ACN 101 679 716);

- (f) OML (in its capacity as manager of the 2000 Timbercorp Olive Project (Private Offer) Scheme and in its personal capacity);
- (g) Ms Chesser, Mr Mentha and me; and
- (h) BBL.

77 The Boort Water SPD is made between:

- (a) OLPL;
- (b) BBL; and
- (c) Mr Mentha and me.

78 The Boundary Bend SPD is made between:

- (a) TL;
- (b) TSL (in its capacity as responsible entity of the Olive Schemes and in its personal capacity);
- (c) Almond Land;
- (d) BBO;
- (e) Ms Chesser, Mr Mentha and me; and
- (f) BBL.

79 The Boundary Bend Water SPD is made between:

- (a) BBO;
- (b) BBL;
- (c) Mr Mentha and me.

80 On 12 October 2009 the parties signed the SPDs. Now produced and shown to me marked **confidential exhibit MAK-18** are the Boort SPD and Boort Water SPD. The form of the Boort Mortgagee Water Sale is annexure D to the Boort SPD. Now produced and shown to me marked **confidential exhibit MAK-19** are the Boundary Bend SPD and Boundary Bend Water SPD. I consider that the SPDs should remain

confidential as if bidders or the market are able to see the bids other parties have made, and the agreement with BBL does not reach completion, it may prejudice any subsequent realisation. I have set out in this affidavit the key provisions of the SPDs so that the interested parties are informed of all terms and conditions relevant to their interest.

- 81 BBL's bid offers a total purchase price of approximately \$59.5m allocated as:

	Boort Schemes	Boundary Bend Schemes	Total
PWR	29.2	20.4	49.6
Land, Tree & Other	6.7	3.1	9.8
Low reliability water shares	0.1	N/A	0.1
	36.0	23.5	59.5

- 82 Completion (as defined) will occur 5 days after the conditions precedent have been fulfilled. It is expected by 10 January 2010 but may be sooner.

Conditions Precedent

- 83 The conditions precedent of the Boort and Boundary Bend SPD are set out in clause 3.1 of the Boort and Boundary Bend SPD.
- 84 The deadline for the satisfaction of certain conditions precedent, including obtaining a direction from the Court that the liquidators are justified in entering into the Boort and Boundary Bend SPDs and extinguishing Growers' rights, was 2 November 2009, however the parties have extended this date, by agreement, to 12 November 2009 (**Immediate Conditions Precedent**). (If the Court directs that we are justified in doing so, we will not extinguish the Growers' rights until immediately before Completion.)

Release of Securities over Olive Assets

- 85 Another of the conditions precedent of the Olive Asset sale (clause 3.1(c) of the Boort and Boundary Bend SPDs) is that the Secured Creditors (CBA (now Fenceport) and the Syndicate Banks) or any assignees or the holder of a Replacement Charge or Replacement Mortgage (as defined in the Boort and Boundary Bend SPDs) provide at completion (or having agreed in writing to provide) to the Liquidators executed:

- (a) releases of their charges releasing any of the Boort or Boundary Bend Olive Assets (as defined in the Boort and Boundary Bend SPDs) encumbered by the Lenders' Charges; and
- (b) discharges of the mortgages over the Properties (as defined in the Boort and Boundary Bend SPDs).

86 I am informed by John Stragalinos of Corrs Chambers Westgarth of the matters to which I depose to in paragraphs 87 to 91 below regarding the securities.

87 There are a range of securities over the relevant vendor entities involved in the Boort and the Boundary Bend olive sales.

88 In relation to the assets which fall within the Boort olive sale, the securities over the relevant vendor entities include:

(a) TL:

- (i) Featherweight Fixed and Floating Charge (ASIC No 1410090) in favour of BOSI Security Services Limited registered 29 January 2007.

(b) OLPL:

- (i) Fixed and Floating Charge (ASIC No 1142932) in favour of the CBA registered 23 March 2005;
- (ii) Registered Land Mortgage (No: AD627415B) dated 8 March 2005 in favour of the CBA;
- (iii) Registered Land Mortgage (over water share) (No: AD627415B) dated 8 March 2005 in favour of the CBA.

(c) Olivecorp Processing:

- (i) Fixed and Floating Charge (ASIC No 1142933) in favour of the CBA registered 23 March 2005;
- (ii) Registered Land Mortgage (No: AD627438N) dated 8 March 2005 in favour of the CBA.

(d) OML:

- (i) Fixed and Floating Charge (ASIC No 1142934) in favour of the CBA registered 23 March 2005.

89 In relation to the assets which fall within the Boundary Bend SPD, the securities over the relevant vendor entities included:

(a) TL:

- (i) Featherweight Fixed and Floating Charge (ASIC No 1410090) in favour of BOSI Security Services Limited registered 29 January 2007.

(b) OML:

- (i) Fixed and Floating Charge (ASIC No 1142934) in favour of the Commonwealth Bank of Australia registered 23 March 2005.

(c) BBO:

- (i) Registered Land Mortgage (No: AG323075S) dated 30 December 2008 in favour of BOSI Security Services Limited;
- (ii) Water Mortgage No MOR001534 dated 30 December 2008 to BOSI Security Services Limited.

90 These securities relate to the following principal facilities:

- (a) CBA Olive Facility for \$50,000,000 to OLPL and Olivecorp Processing dated 8 March 2004 as amended and restated on 12 May 2008 (**CBA Olive Facility**). OML is a guarantor to the CBA Olive Facility.
- (b) Syndicated Loan Agreement to TL dated 15 December 2006 (as amended) for \$200,000,000 (**Syndicate Facility**). BOSI Security Services Limited (formerly named BWA Custodians Limited) is the Security Trustee for the Syndicate Banks. The guarantors to the Syndicate Facility include OLPL, BBO, Olivecorp Processing, OML and Almond Land.

91 There are also a range of ancillary documents to these facilities and securities which include:

- (a) Fixed charge - Mortgage of Contractual Rights (ASIC No 1142936) granted by TSL in favour of the CBA registered 23 March 2005;
 - (b) Fixed charge - Mortgage of Contractual Rights (ASIC No 1142935) granted by TSL in favour of the CBA registered 23 March 2005;
 - (c) Deed of covenant dated 8 March 2005 between the CBA, each of the growers, TSL, OML, OLPL and Olivecorp Processing.
- 92 Those securities registered in favour of CBA as described in paragraphs 88-90 and 91 above have been released and discharged and replaced by securities in favour of Fenceport (discussed further below from paragraph 97).
- 93 I understand that the outstanding sum in relation to the CBA Olive Facility on 2 November 2009 was \$54 million.
- 94 As at the time of swearing this affidavit, I understand that the outstanding sum in relation to the Syndicate Banks Facility is \$202 million plus interest and costs.
- 95 Some of the securities were created within six months from the commencement of the Timbercorp Group's winding up. We have not investigated the circumstances surrounding their creation or the financial position of each of the Timbercorp vendor companies at that time. However, if the court grants the relief sought, settlement with the Secured Creditors is proposed to take place on a reservation of rights basis regarding the validity of the securities. This is the only practical way in which we can complete the transaction and procure the releases of the securities from the Secured Creditors.

CBA/Fenceport and the Forestry Asset Sale

- 96 Almond Land is also a vendor entity in the Boundary Bend olive sale in relation to a parcel of land in Victoria (Certificate of Title Volume 11062 Folio 245). This land is unencumbered.
- 97 On 30 September 2009 the liquidators of certain Timbercorp entities entered into a sale and purchase deed under which the forestry assets of certain companies within the Timbercorp Group (**Forestry Assets**) were sold (**Forestry Sale**).
- 98 The CBA held securities over both the Olive and Forestry Assets (**CBA Securities**). It was a condition precedent of the Forestry Sale agreement that the securities over

the Forestry Assets be released. The CBA would not release its securities unless the CBA Olive Facility and the relevant CBA forestry facility were repaid. On the date of the settlement of the Forestry Sale, OLPL and Olivecorp Processing (**Olive Borrowers**) were indebted to the CBA for an amount of approximately \$54m (**CBA Olive Indebtedness**).

- 99 On 29 September 2009, we filed an application for directions in respect of the Forestry Sale agreement (Supreme Court Proceeding 9299 of 2009) supported by my affidavit explaining the CBA's requirement that the Olive and Forestry facilities be repaid before it would release its securities and the apportionment of the sale proceeds. Now produced and shown to me marked **MAK-20** are the originating process and my affidavit. The purchaser allocated \$124m net of costs to the realisation of the CBA securities. This left a shortfall of approximately \$26m.
- 100 On 6 October 2009, Pagone J gave a direction allowing us to procure TSL to pay the CBA from the sale proceeds. This meant we could apply funds allocated by the purchaser to the purchase of the Trees (an asset of the Growers) to release the CBA securities. Now produced and shown to me marked **MAK-21** are the orders of Pagone J and the transcript of the hearing.
- 101 To effect this the funds that would have been payable to Growers went to Fenceport to be held on trust on behalf of TSL as RE of the Forestry Schemes pending agreement or, if no agreement is reached, determination as to the apportionment between the Growers in the various Forestry Schemes. Now produced and shown to me and marked **MAK-22** is a copy of the Fenceport trust deed (**Trust Deed**).
- 102 Fenceport then advanced \$26m to the Olive Borrowers (**Advance**) to enable the full repayment of the CBA Olive Indebtedness and the discharge of all CBA Securities. The Advance was made pursuant to a loan agreement between the Olive Borrowers, TSL, OML and Fenceport (**Loan Agreement**). Now produced and shown to me and marked **MAK-23** is a copy of the Loan Agreement.
- 103 In consideration of Fenceport providing the Advance to the Olive Borrowers, each of the Olive Borrowers, OML and TSL agreed to grant to Fenceport certain securities over the same property that was secured by the CBA securities in relation to the relevant Olive Assets (**New Securities**).
- 104 More particularly, these New Securities include:

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- (a) a fixed and floating charge given by OLPL in favour of Fenceport over substantially the same property as charge no 1142932;
- (b) a fixed and floating charge given by Olivecorp Processing in favour of Fenceport over substantially the same property as charge no 1142933;
- (c) a fixed charge given by OML in favour of Fenceport over substantially the same property as charge no 1142934;
- (d) a fixed charge given by TSL in favour of Fenceport over substantially the same property as charge no 1142935 and charge no 1142936;
- (e) a mortgage of land given by OLPL in favour of Fenceport over substantially the same land as mortgage no AD627415B; and
- (f) a mortgage of land given by Olivecorp Processing in favour of Fenceport over substantially the same land as mortgage no AD627438N.

In addition, it is intended that Fenceport will take a mortgage over certain water rights

- 105 The New Securities secure the Advance made under the Loan Agreement. The final repayment date under this Loan Agreement is the date on which the Olive Companies receive the amount of money from the sale of the Olive Assets that the Supreme Court of Victoria or any other competent Court orders or approves for distribution to the Olive Companies for application towards the repayment of the Advance.
- 106 To the extent that the sale price for the whole of the relevant Olive Assets is less than the Advance, Fenceport has agreed to release the relevant Olive Assets from the New Securities after receiving a declaration from each Olive Borrower stating that the settlement amount was the best price reasonably obtainable for the relevant Olive Assets in the circumstances.

2000 Private Offer Scheme

- 107 The 42 Growers in the 2000 Private Offer Scheme entered into a LJVA with OLPL, similar to the LJVA used in the 2001-2003 Olive Schemes. Growers appointed OML to act as project manager (**Project Manager**) for them pursuant to a Project and Management Agreement (**PMA**). Now produced and shown to me marked **MAK-24**

is the LJVA between OLPL and each Grower (with variation of 16 July 2002) and the PMA.

108 The 2000 Private Offer Scheme was not subject to the Court proceedings. Under the PMA between the 2000 Private Offer Growers and OML, OML as project manager, was required to:

- (a) generally manage and administer the 2000 Private Offer Scheme;
- (b) cultivate the groves, harvest the olives and perform the grove services;
- (c) as agent and attorney for the Grower, procure and perform the grove services; and
- (d) sell the olives as agent and attorney for the Grower.

109 The Project Manager does not have any authority to act for, or to assume any obligation or liability on behalf of, the Grower or the Growers except such authority as is conferred on the Project Manager by the PMA. The Project Manager does not have any proprietary interest in or title to the any 2000 Private Offer Scheme assets under the PMA.

110 OML was required to immediately retire as Project Manager of the 2000 Private Offer Scheme if it went into liquidation other than for the purposes of reconstruction or amalgamation or a Controller or Administrator was appointed in relation to all or any part of its undertaking,

111 Following our appointment as administrators of OML, we sought consent from the Growers to sell the 2009 Crop to BBEM for OML to remain as Project Manager. We did so because we formed the view that in order to maximise the sale proceeds of all Olive Assets for all stakeholders it would be better for there to be only one sale or recapitalisation process managed by us. We obtained the consent from all of the Growers. OML has therefore continued to act as Project Manager.

112 OML is insolvent and cannot comply with its obligations under the PMA. Therefore, OML wishes to disclaim the PMA. This will automatically terminate the licence and joint venture agreement and the 2000 Private Offer Scheme. Given this, and to protect Grower's interests, OML has not previously sought to disclaim the PMA.

- 113 The LJVA provides that at all times during the term of the 2000 Private Offer Scheme the Olive Trees are and remain the property of OLPL. It also provides that on termination of the 2000 Private Offer Scheme for whatever reason before its expiry, the Olive Trees, the Olives and any resulting product will be the property of OLPL, provided that the last crop of Olives harvested before that termination and any resulting product will remain the property of the Grower. On expiry of the 2000 Private Offer Scheme, the Olive Trees, the Olives and any resulting product will be the property of OLPL.
- 114 OLPL has agreed with OML, for the benefit of the Growers, that if OML disclaims the PMA with Growers whose Grovelots are on land owned by OLPL and OLPL sells the land it owns which is used for the 2000 Private Offer Scheme, OLPL will share with those Growers, on the same basis as it is sharing with Growers in the 2001-2002 Olive Schemes, the net proceeds received, without having regard to the provisions of the LJVA.

Appointment of Special Purpose Liquidator

- 115 As a result of the disagreements between Growers and Secured Creditors concerning apportionment of any sale proceeds during the sale or recapitalisation process we decided to appoint a special purpose liquidator to help facilitate the settlement of the disputes between Growers and Secured Creditors and if necessary to provide a report to the Court on the reasonableness of any offer that we may receive for the Olive Assets.
- 116 On 14 September 2009, Justice Robson had given a direction in proceeding 7114 of 2009 that TSL was justified in appointing Ian Carson of PPB by private treaty to fulfil the role of a special purpose liquidator in relation to Almond Schemes, to assist in managing potential conflicts between Ms Chesser and my roles as liquidators of both TSL and Almond Land.
- 117 On 17 September 2009 we filed an application for Ian Carson to be appointed by the Court as a special purpose liquidator in relation to the Boort Olive Schemes. As with the Almond Schemes, we considered we would be assisted in having Ian Carson as a special purpose liquidator to help us manage any potential conflict between TSL and OLPL. These conflicts are explained in more detail in the affidavit of Andrew Malarkey filed in support of the application. Now produced and shown to me marked exhibit **MAK-25** is the interlocutory application and Andrew Malarkey's affidavit.

- 118 On 18 September 2009 the hearing of that application took place before Justice Robson. Now produced and shown to me marked exhibit **MAK-26** is the transcript of that hearing (**Transcript**). The TGG was represented at that hearing by Senior Counsel instructed by Clarendons. Justice Robson ordered that Ian Carson be appointed an "additional liquidator". Now produced and shown to me marked exhibit **MAK-27** are the Justice Robson's orders of 18 September 2009.
- 119 Ian Carson has retained Mallesons Stephen Jaques to independently advise him in relation to his appointment and discharging his function.
- 120 The purpose of Mr Carson's appointment was to negotiate with OLPL on behalf of TSL for the extinguishment of the leases, subleases and LJVAs.
- 121 On 9 October 2009 Justice Robson made orders in proceeding 9408 of 2009 in relation to the almond asset sale that, rather than the net proceeds of sale being apportioned by negotiation between the parties (which in that case had not reached an agreed position), the net proceeds of the sale should be held on trust, pending the hearing and determination of a proceeding to determine apportionment (discussed in paragraph 57 above).
- 122 Our original intention was that the Secured Creditors and Growers would agree apportionment of the sale proceeds between themselves. In light of Justice Robson's decision in proceeding 9408 of 2009 the negotiations to reach an agreement are not necessary. Instead, we seek the same orders granted in respect of the almond asset sale for the olive asset sale. As no negotiation is proposed, and also taking into account the costs involved in Ian Carson carrying out his role, the liquidators do not consider it is necessary for Ian Carson to remain in the position of an additional liquidator.
- 123 We sought the interested parties' consent to orders releasing Ian Carson from the role of additional liquidator on 30 October 2009. Now produced and shown to me and marked **MAK-28** is a copy of this request.

Urgency of the Application - Maintenance of the Olive groves

- 124 As explained above, the Immediate Conditions Precedent must be fulfilled on or before 12 November 2009, including obtaining a direction from the Court that the liquidators are justified in entering into the SPD and extinguishing Growers' rights. The other factor requiring urgency is the potential for the olive groves to waste.

Crop Maintenance and Wastage

- 125 The olive groves require ongoing maintenance, and therefore expenditure, to produce a harvestable crop. Now produced and shown to me marked exhibit **MAK-29** is a cashflow analysis for the 2001- 2008 Olive Schemes showing the amount of money estimated that is required to maintain the olive groves.
- 126 I am informed by Darren Lipton, General Manager of Horticulture, October, November and December is a critical period for the olive trees.
- 127 Flowering commenced in the last week of October at Boundary Bend and at Boort in the first week of November. Flowering is the first step to crop production. In the event that irrigation at both Boort and Boundary Bend, and fertiliser application (especially at Boundary Bend) were neglected, the stress on the trees during the flowering period would decimate the crop for 2010. There is an expectation of a 50,000+ tone crop on Boort and Boundary Bend for 2010 with in excess of 9 million litres of olive oil expected to be produced. This equates to approximately \$40m of production. This value would be materially reduced if irrigation and fertilization did not occur.
- 128 November and December are the key time for the growth of wood on the trees that will produce a crop in 2011. If these sites are not irrigated during these months, growth is compromised and the crop potential for 2011 is adversely affected.
- 129 A major risk to the site is fire and if no weedicide and slashing program are in place, the overgrown foliage will present a major fire risk.
- 130 It is therefore critical to maintain the Boort and Boundary Bend properties throughout November and December to ensure growth and therefore revenues are not adversely affected.

BBEM Crop Sale Agreement

- 131 In order to ensure that the olive groves were maintained pending a sale and that TSL continued to have access to the olive groves, the land owning entities entered into arrangements with BBEM in respect of each of the Boundary Bend Schemes. Under the arrangements, BBEM agreed to provide maintenance services for a defined period (**Relevant Period**), the relevant land owning entity agreed to continue to provide access to BBEM for the Relevant Period and we, as liquidators of the

relevant land owning entity, agreed not to disclaim the leases for the Relevant Period. Given that TSL has no funds with which to pay for the services provided, TSL sold a portion of the crop to BBEM and to the relevant land owning entity as consideration (**Crop Sale Agreements**).

- 132 Under the Crop Sale Agreement, BBEM and the land owning entities are each entitled to a portion of the 2010 crop from the relevant Olive Scheme. The portion sold to BBEM is that part of the crop as will give rise, when sold, to net proceeds equal to the costs incurred by BBEM in maintaining the olive groves for the Relevant Period. The portion sold to the relevant land owning entity is that part of the crop as will give rise, when sold, to net proceeds equal to an agreed use and occupancy fee. That fee is calculated by reference to the licence fee or rent that the Growers would normally be required to pay in respect of the Relevant Period. Now produced and shown to me marked **confidential exhibit MAK-30** is the Crop Sale Agreement for the 2006 Olive Scheme. The terms of the Crop Sale Agreements for the other Boundary Bend Olive Schemes vary slightly in their terms to reflect the structure, project documents and land ownership of each Olive Scheme but are materially identical.
- 133 TSL, OML, OLPL and BBMB entered into a materially identical agreement in respect of the Boort Schemes (including the 2000 Private Offer Scheme). Now produced and shown to me marked **confidential exhibit MAK-31** is the Crop Sale Agreement for the 2002 Olive Scheme.
- 134 BBEM and BBMB agreed to maintain the olive groves on this basis, originally until 30 September 2009. This was later extended to 11 October 2009.

BBL Transition avoids wastage

- 135 The Boort and Boundary Bend SPDs include an agreement that as soon as possible after signing, the parties must use their best endeavours to procure an extension of the Crop Sale to operate between signing and completion. The extension to the Crop Sale Agreement was agreed on 14 October 2009 and has now been documented in an amendment deed. Now produced and shown to me marked **confidential exhibit MAK-32** is an amendment deed for the 2006 Olive Scheme. Materially identical amendment deeds were entered into in respect of the other Olive Schemes.



Committee of Inspection

- 136 On 30 October 2009 we convened a meeting of the TSL Committee of Inspection (Committee). The Committee includes Grower representatives who are also members of the TGG. We told the Committee of the developments and that we would be making an application to the Court for directions on 10 November 2009 to, amongst other things, satisfy the conditions precedent of the SPDs. I explained in broad terms what orders we were seeking.

Notice of these Proceedings

- 137 I am told by my lawyers that a copy of this affidavit and originating process will be e-mailed to ASIC, Clarendons and the Secured Creditors as well as posted on the websites, as has been the practice for all the Court applications in the liquidation of TSL.
- 138 My solicitors gave informal notice of these proceedings to ASIC, Clarendons, Maurice Blackburn, and the Secured Creditors, by e-mail on 15 October 2009. They told these parties that the orders sought would be the same as those made by Justice Robson in respect of the Almond Schemes.

Conclusion

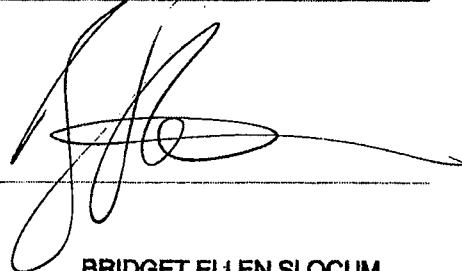
- 139 In summary:
- (a) From the time that Timbercorp Securities Limited was placed into voluntary administration on 23 April 2009 some of the olive Growers, represented by the TGG, wanted to recapitalise the Olive Schemes;
 - (b) The TGG was given every opportunity to recapitalise the Olive schemes in general and as a result of the orders and directions made by Robson J in the winding up application in particular;
 - (c) Notwithstanding the aspirational goals of the TGG to recapitalise the Olive Schemes they have been unable to do so;
 - (d) When we commenced our sale and recapitalisation process we openly and transparently foreshadowed the timetable for its completion;

- (e) The TGG was aware of that timetable and actively participated in the sale and recapitalisation process;
- (f) We have conducted a robust sale or recapitalisation process and attracted a financially able purchaser, BBL, willing to pay \$59.5m for the Olive Assets;
- (g) The SPDs include an extension of the Crop Sale Agreement to ensure maintenance of the Grovelots and avoid wastage;
- (h) We are unable to inject further funds to maintain the Olive Schemes;
- (i) We will hold the proceeds of sale on trust pending the outcome of a proceeding to determine apportionment between the Growers and Secured Creditors.

SWORN at)
 in the State of Victoria)
 by **MARK ANTHONY KORDA** this 10th)
 day of November 2009)



Before me:



BRIDGET ELLEN SLOCUM
 Arnold Bloch Leibler
 Level 21, 333 Collins Street
 Melbourne 3000
 An Australian Legal Practitioner within the
 meaning of the Legal Profession Act 2004