

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION

No. VID of 2009

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

TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)
ACN 092 311 469
and OTHERS

Plaintiffs

AFFIDAVIT OF MARK ANTHONY KORDA
IN SUPPORT OF APPLICATION REGARDING POWER TO SELL FORESTRY ASSETS

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Filed on behalf of the Plaintiffs

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13	MAK-13 Constitution, Management Agreement and Sublease for the 2001 Forestry Scheme
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On 13 August 2009, 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 the liquidator of the First Plaintiff, Timbercorp Securities Limited (**TSL**), and of the Second Plaintiff, Timbercorp Limited (**TL**), with Leanne Kylie Chesser.
- 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 to make this affidavit on her behalf. References in this affidavit to "we", "us", "our" or "ourselves" are references to Ms Chesser and me.
- 3 This affidavit is made in support of an application for orders under section 511 of the *Corporations Act 2001* (Cth) (**Act**), section 63 of the *Trustee Act 1958* (Vic) (**Trustee Act**) and the inherent jurisdiction of the Court for a direction that we have the power to sell the Forestry Assets, as defined below in paragraph 49 or alternatively to amend the constitutions pursuant to section 601GC of the Corporations Act, to empower the TSL to sell the Forestry Assets on the basis that the amendment will not adversely affect members' rights.

General background

- 4 I am a chartered accountant and a partner of the firm 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.

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- 5 On 23 April 2009, we were appointed as voluntary administrators of TSL pursuant to section 436A of the Act. Various partners of KordaMentha Pty Ltd (ACN 100 169 391) and I were appointed as voluntary administrators of TL and 39 of its wholly owned subsidiaries (**Timbercorp Group**).
- 6 On 29 June 2009, the creditors of TSL and TL (and the Timbercorp Group) resolved to wind up the companies.

Timbercorp schemes

- 7 TSL is currently the responsible entity for 11 forestry managed investment schemes registered under Part 5C of the Act. TSL is also the manager of one unregistered managed investment scheme for forestry, known as the 1999 Timbercorp Eucalypts Double Rotation Project. I refer to the 12 schemes, listed in Schedule 1 of the originating process, collectively as the "**Forestry Schemes**".
- 8 The members of the Forestry Schemes are called "**Growers**" in the constitutions for the Forestry Schemes and I adopt that term here.
- 9 The purpose of the Forestry Schemes is the cultivation of Eucalyptus trees for commercial wood production. The Growers sublease allotments of land of approximately, known in the Forestry Schemes variously as "Woodlots" (1 hectare) or Timberlots" (1/3 of a hectare) (**Lots**).

Meeting of Forestry Scheme Growers

- 10 On 7 August 2009 we held an informal Meeting of Growers of the Forestry Schemes (**Meeting**). The Meeting was held in the Victory Room at Etihad Stadium. Matthew Walsh, Special Counsel of Gaden Lawyers, agreed to take the role of independent chairperson at the Meetings (**Chairman**).
- 11 In preparation for the Meeting my staff sent to Growers, and posted on the websites of KordaMentha and Arnold Bloch Leibler, a Notice of Meeting and Proxy Form. My staff also arranged for a link on the Timbercorp website, directing readers to the KordaMentha website. Now produced and shown to me and marked **MAK-1** is the Notice of Meeting and Proxy Form.
- 12 Prior to the formal notification of the Meeting we also sent two emails to Forestry Scheme Growers updating them on the position of the Forestry Scheme and alerting them to the Meeting on 7 August 2009. Now produced and marked **MAK-2** are two emailed letters dated 27 July 2009 and 4 August 2009. The Meeting was also reported widely in

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newspapers with national and state circulation. Now produced and marked **MAK-3** are a bundle of newspaper articles reporting the meeting.

- 13 The purpose of the Meeting was to:
- (a) provide Growers with an update on key issues facing the Forestry Schemes; and
 - (b) put a non-binding resolution to the Growers to request their approval for the Liquidators to seek a power of sale.
- 14 We have commenced a sale or recapitalisation process for the forestry assets (as defined below at paragraph 49). To enable the sale or recapitalisation process we need assurance that we have a power to sell the forestry assets free from encumbrances.
- 15 At the Meeting a number of presentations were given to update the Growers on the Forestry Schemes. A series of PowerPoint slides accompanied each presentation (**PowerPoint Slides**). Now produced and shown to me marked **MAK-4** is a copy of the Powerpoint Slides.
- 16 The order of the Meeting was:
- (a) a presentation on behalf of the Liquidators, which I gave, updating key issues for the Forestry Schemes (PowerPoint Slides 3 - 11);
 - (b) a statement on the independent accountant's report prepared by Ernst & Young regarding the Forestry Schemes (PowerPoint Slides 12 - 13);
 - (c) a statement of the independent forestry expert's report prepared by URS Australia Limited (PowerPoint Slides 14 - 15);
 - (d) an address from Timbercorp Growers Group given by Chris Garnaut (PowerPoint Slides 16 - 29);
 - (e) the sale or recapitalisation strategy and update given by me (PowerPoint Slides 30 - 34).
- 17 Following the presentations the Growers were given the opportunity to ask questions of the presenters. A transcript has been made of the entire meeting including the questions. Now produced and shown to me marked **MAK-5** is a copy of that transcript.

Insolvency of the Forestry Schemes

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- 18 At the meeting I presented information regarding the solvency of the Forestry Schemes and statements summarising independent reviews of the solvency analysis. I also arranged for this information to be posted on KordaMentha's website.
- 19 My staff prepared a "Forestry Schemes Cash Flow Analysis" dated 6 August 2009 (**Cashflow Analysis**). Now produced and shown to me marked **MAK-6** is the Cashflow Analysis which includes as Appendix 1 a "Summary Extract from the Forestry Scheme model as at 31 July 2009" showing the required contributions for the remainder of the life of each Forestry Scheme.
- 20 The Responsible Entity for all of the Forestry Schemes together needs to contribute an estimated \$172.6 million for the remaining life of each Forestry Scheme. This funding comprises key costs such as establishment, maintenance, leasing and forestry operational overheads. TSL as the Responsible Entity is insolvent and is not in a position to provide this funding.
- 21 Many of the Forestry Schemes also require ongoing contributions from Growers. These Grower contributions vary depending on the type of scheme. The types of schemes are explained on page 1 of the Cashflow Analysis. In some Forestry Schemes the Growers pay the rent and maintenance at the outset of the scheme and therefore do not have continuing contributions. In other Forestry Schemes the Growers incur rent and maintenance amounts as offset against harvest proceeds at the time of distributions. Where Growers are required to contribute for the remainder of the life of the Forestry Scheme, these contributions are for establishment, maintenance and rent payments (excluding plantation insurance). In total, the Growers need to contribute an estimated \$168.5 million for the remaining life of the Forestry Schemes.
- 22 The combined future funding requirement for all the Forestry Schemes to the end of their lives is therefore estimated at \$341.1 million. Each Forestry Scheme is projected to eventually make a net return to Growers. However, the long term viability of the Forestry Schemes does not resolve the issue of the insolvency of the Forestry Schemes presently and in the near term. For example rent of \$7.2m became payable on 1 July 2009 for all the Forestry Schemes and TSL and the Timbercorp Group do not have the capacity to meet this cost.
- 23 Ernst and Young reviewed the Cashflow Analysis and provided a report. Now produced and shown to me marked **MAK-7** is the Ernst and Young report dated 6 August 2009. The Ernst and Young report stated "we have reviewed the logic and mathematical formulae in the calculations within the model, noting no matters have come to our attention which indicate that these are not materially correct". They also stated that the

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analysis in Appendix 1 of the Cashflow Analysis was “applied in a consistent manner throughout the model” and the summarised financial information extracted from the model and presented at the Meeting “is consistent with the model on which our procedures were performed”.

- 24 The Cashflow Analysis is based in part on assumptions regarding yield and expected harvest completion dates. I arranged to have posted on KordaMentha’s website Timbercorp management’s projections for the expected weighted/average yields and expected harvesting completion dates for the Forestry Schemes. Now produced and shown to me marked **MAK-8** are the summaries of the harvesting schedule and yields. In general terms, Timbercorp management’s estimates of harvest periods are longer and expected weighted average yields are lower than envisaged in the Product Disclosure Statement for each Forestry Scheme. URS Australia Pty Ltd reviewed Timbercorp’s mapping processes methodologies, inventory processes and site productivity estimates for the Forestry Scheme plantations. Now produced and shown to me marked **MAK-9** is a report by URS Australia Pty Ltd dated 6 August 2009 entitled “Summary of Productivity Review Report” (**URS Report**). I have read the URS Report and I believe its conclusions are that Timbercorp’s methodologies appear reasonable. However, URS conclude that while the productivity estimates are reasonable in respect of the more mature trees (using age 7.5 year data) they are higher than likely to be realised in respect of less mature trees (using age 4.5 year data and pre-plant estimates). As such if URS’s conclusions are borne out the Cashflow Analysis may overstate the actual yield.

Voting at the Meeting

- 25 At the conclusion of question time in the Meeting, the Growers were asked to vote on the non-binding resolution. The non-binding proposal was:

That the Liquidators’ of TSL request the Federal Court of Australia to grant the Liquidators a power of sale to enable the implementation of the sale/recapitalisation strategy.

- 26 Votes were accepted both at the Meeting and by an internet poll on the KordaMentha website. Voting on the internet poll remained open until 4:00 pm on Monday 10 August 2009.
- 27 The results of the voting were recorded on a scheme by scheme basis. Voting was 1 vote per Lot. More than 90% of the Growers who voted, voted in favour of the non-binding resolution. Now produced and shown to me marked **MAK-10** are the results of the voting on the non-binding resolution on a scheme by scheme basis.




28 For each Forestry Scheme, an average of 30% of the possible votes were cast. Now produced and shown to me marked **MAK-11** is a summary of the votes cast as a percentage of possible votes.

Power of Sale in the Scheme Documents

29 Each of the Forestry Schemes is governed by a complex suite of documents. I am informed of the matters contained in this section of my affidavit by Jane Sheridan, Partner of Arnold Bloch Leibler.

30 For each of the Forestry Schemes, there are three documents which could support a power of sale for the Responsible Entity (or TSL in its own capacity) in respect of the trees the subject of the Forestry Schemes:

- (a) the Scheme Constitution;
- (b) the Management Agreement between the Grower and TSL; and
- (c) the Sub-lease between the Grower and TSL.

31 Now produced and shown to me marked **MAK-12** is a CD Rom containing these documents for each of the Forestry Schemes for which we seek a power of sale.

32 In some Forestry Schemes there is more than one Management Agreement or Sub-lease, but each Grower in each scheme is a party to only one of those Management Agreements or Sub-leases in respect of each Lot held by the Grower.

33 While there are differences between the Constitution, Management Agreement and Sub-leases for each of the Forestry Schemes, the following clauses (or clauses which are substantially similar) are common to all. The relevant extracts are from the documents for the 2001 Eucalypts Project. Now produced and shown to me marked **MAK-13** are the Constitution, Management Agreement and Sub-leases for the 2001 Forestry Scheme.

Constitution

34 Under each Constitution, the Responsible Entity has irrevocable power as the agent and attorney of the Grower (amongst other things) to:

- (a) bind the Grower as a party to a Wood Purchase Agreement that is permitted to be entered into under the Management Agreement or the Constitution (clause 9.1(a));



- (b) enter into any contracts which have the effect of varying, replacing or cancelling a Wood Purchase Agreement (clause 9.1(b));
- (c) exercise all rights and powers of the Grower under any Agreement (clause 11(f));
- (d) generally to enter, make or engage in transactions, undertakings, activities and arrangements of every kind and nature which a natural person of full age and capacity could enter, make or engage in and which constitute or are part of or relate to or are incidental to the Plantation Services on behalf of the Grower (clause 11(h)); and
- (e) execute any deed, agreement, certificate or other document and to do all other things necessary or desirable in furtherance of certain powers granted to the Responsible Entity (including those referred to in paragraphs (c) and (d)) (clause 11(g)).

35 For these purposes, the definitions are (relevantly):

Agreement means the Sub-lease, Management Agreement and Wood Purchase Agreement,

Plantation Services means the services and duties which the Grower is required to perform or carry out under the Sub-lease (other than the obligation to pay rent) and which are to be carried out by the Responsible Entity under the Management Agreement.

Trees means the crop of trees farmed or to be farmed on the Lots, for commercial timber production.

Wood means any saleable wood derived from Trees grown pursuant to the Agreements on the Lots, whether in a processed or unprocessed form.

Wood Purchase Agreement means an agreement for the sale of Wood of the Grower from the relevant Lot entered into by the Responsible Entity as agent and attorney for the Grower in accordance with the Management Agreement.

36 For some Forestry Schemes, Wood Purchase Agreements were entered into at, or about, the commencement of the Scheme, that is, before the trees were planted. For other Schemes, no Wood Purchase Agreements have been entered into as yet.

Management Agreement

37 Under the Management Agreement, each Grower commissions and engages the Responsible Entity:



- (a) as an independent contractor (and not as an agent) to carry out the Plantation Services during the Term in accordance with the Management Plan; and
 - (b) as an agent to Harvest and sell the Wood on behalf of the Grower,
- on the terms and conditions set out in the Management Agreement (clause 3).
- 38 The Grower specifically engages the Responsible Entity to sell as agent for the Grower the Wood grown or growing on the relevant Lots to any bona fide purchaser, whether in a processed or unprocessed state for as high a price as it can reasonably achieve for the Wood, taking into account certain factors (clause 7(a)). For these purposes, the Grower appoints the Responsible Entity to be the Grower's attorney and in the Grower's name and on the Grower's behalf to:
- (a) enter into any agreement for the sale and/or processing and sale of the Grower's Wood at any time during the Term (provided that the Responsible Entity discloses that the Responsible Entity is a party to the agreement as agent and attorney for the Grower and that the Grower's liability is limited); and
 - (b) vary, replace or cancel any such agreement
- (clause 7(b)).
- 39 The Management Agreement provides that Harvest must take place between specified dates or as otherwise agreed in writing between the Growers and the Responsible Entity (clause 8(a)).
- 40 The Responsible Entity agrees to give due consideration to any opinions received in writing from the Grower in relation to the activities of the Responsible Entity under the Management Agreement and to use its best endeavours to carry out every recommendation from the Grower, subject to certain conditions (clauses 11(b) and (c)).
- 41 For these purposes, the definitions are (relevantly):

Harvest means the cutting down, felling or logging of the Trees and the extraction and/or processing of the Trees so cut down, fallen or logged to a loading point either on or adjacent to the Plantation.

Trees means the crop of eucalyptus trees the subject of the Management Plan planted, tended and maintained or to be planted, tended and maintained, on the Lots.

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Wood means any saleable wood derived from Trees on the Lots whether in a processed or unprocessed state and whether in the form of trees, logs, timber, woodchips or otherwise. (In the Management Agreements for the 1997, 1998 and 1999 Forestry Schemes, there is no reference to woodchips in the relevant definition of Wood.)

Sub-lease

42 Under the Sub-lease, the sub-lessor agrees that the Trees are and will remain the property of the Grower until the end of the Term (clause 8.3). The Grower is expressly entitled to harvest the Trees and to remove and sell the products derived from the Trees and to retain all income from such sale (clause 8.2).

43 The Grower is granted an independent proprietary interest in the relevant Lots, to establish tend and manage the Trees and to harvest the Trees and remove and sell the products derived from the Trees (clause 13).

44 For these purposes, the definitions are (relevantly):

Wood means any saleable wood derived from Trees on the Lots whether in the form of trees, logs, timber or otherwise.

Trees means the crop of eucalyptus trees the subject of the Management Plan planted, tended and maintained or to be planted, tended and maintained, on the Lots.

Effect

45 The Responsible Entity has power to sell the Wood on behalf of Growers. We, as liquidators, of the Responsible Entity are seeking to confirm that this power extends to the power to sell the Trees now, in their current state of maturity, and is not limited to a power to enter into an agreement now to sell the Trees which only becomes effective when the trees reach the requisite state of maturity.

Sale Process

46 Since early July 2009, a number of parties have contacted KordaMentha to express their interest in the possible acquisition or recapitalisation of the various assets which are the subject of the Forestry Schemes. Richard Forbes, a partner of KordaMentha, has had responsibility for coordinating the expressions of interest. Mr Forbes has informed me of the matters which I depose to below.

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- 47 On 31 July 2009, we published an advertisement in the *Australian Financial Review* in which we sought expressions of interest for the possible acquisition or re-capitalisation of the assets the subject of the Forestry Schemes. Now produced and shown to me marked **MAK-14** is the advertisement that appeared in the 31 July 2009 edition of the *Australian Financial Review*.
- 48 A number of interested parties have executed a Confidentiality Agreement (**the Interested Parties**) and subsequently been given a copy of a Confidential Information Memorandum (**Information Memorandum**), and been granted access to an on-line Data Room. Now produced and shown to me marked **Confidential Exhibit MAK-15** is an anonymous list of the Interested Parties which details the number of documents viewed, printed and downloaded from the Data Room as at 12 August 2009 by those who have accessed the Data Room. Now produced and shown to me marked **Confidential Exhibit MAK-16** is a copy of the Confidential Information Memorandum.
- 49 The assets that we are offering for sale are described in the Information Memorandum as follows:
- (a) 97,500 hectares of high-yielding premium quality *Eucalyptus globulus* distributed across various age classes, and located close to seaports;
 - (b) 38,800 hectares of freehold land owned by Timbercorp group companies in the "Green Triangle" region in Victoria and South Australia, and in south-west Western Australia which has a total book value of \$238 million. These regions are regarded as amongst the best in the world for the cultivation of *Eucalyptus globulus*, with high average annual rainfall and premium quality soils;
 - (c) 58,700 hectares of land leased by Timbercorp group companies in the Green Triangle region and in south-west Western Australia (however, the sale of the leasehold land rights is conditional upon the Liquidators determining to retain and assign those leases in connection with the liquidations or the sale process and obtaining the consent of the relevant landlord if necessary);
 - (d) a dedicated and highly skilled forestry management business, including seed-to-port management and harvesting capacity at maturity of up to 1.8 million GMT and EBITDA exceeding \$20 million per annum; and
 - (e) part ownership of the Albany Chip Terminal which has a load capacity of 1.3 million GMT per annum.

(together "**Forestry Assets**")



- 50 The Information Memorandum sets out a timetable for the sale/recapitalisation process and stipulates that the closing date for first and final binding offers is: 5:00pm AEST on Friday, 18 September 2009.
- 51 Any final binding offer must include a completed Purchase Price Allocation schedule which requires each bidder to ascribe a dollar value to the trees in each of the Forestry Schemes.
- 52 Overall, there has been a significant level of interest expressed by the Interested Parties. A number of the Interested Parties are considering making a bid to acquire all of the Forestry Assets, while others have expressed an interest in also offering a recapitalisation proposal for some of the Forestry Schemes.
- 53 As I explained at the Meeting, we intend to retain an independent accountant for the purpose of reviewing the reasonableness of any offers received from the Interested Parties, having regard to the components of the purchase price allocated to each of the Forestry Assets as set out in the Purchase Price Allocation schedule.

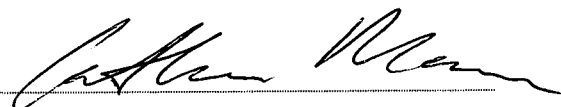
Notification of this proceeding

- 54 On 12 August 2009, KordaMentha notified the Committee of Inspection for the Timbercorp Group of Companies, and ASIC, that this proceeding was to be commenced and would be heard on 14 August 2009. Notice was also posted on the websites of KordaMentha and Arnold Bloch Leibler advising that this proceeding would be heard on 14 August 2009. Now produced and shown to me marked **MAK-17** is the notice (**Notice**).
- 55 On 13 August 2009, the Notice was published in *The Australian*. Now produced and shown to me marked **MAK-18** is the Notice as published in *The Australian*.

SWORN by the abovenamed deponent at)
Melbourne in the State of Victoria)
this 13th day of August 2009)



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

**IN THE FEDERAL COURT OF AUSTRALIA
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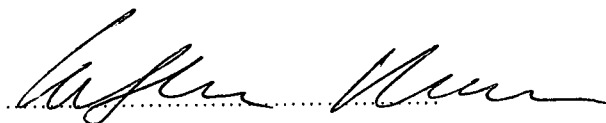
Plaintiffs

AFFIDAVIT - CERTIFICATE OF COMPLIANCE

(Order 14, rule 5A)

I, Catherine Helen Macrae, certify to the Court that the affidavit of **MARK ANTHONY KORDA** sworn on 13 August 2009 filed on behalf of the Plaintiffs complies with Order 14, rule 2 of the Federal Court Rules.

Date: 13 August 2009



Catherine Helen Macrae
A solicitor of Arnold Bloch Leibler
Solicitor for the Plaintiffs

Filed on behalf of the Plaintiffs

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