

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION

No. VID 541 of 2009

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

AND

IN THE MATTER OF TIMBERCORP LIMITED (IN LIQUIDATION)
(ACN 055 185 067)

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

Plaintiffs

WA CHIP & PULP CO. PTY LTD
and OTHERS
(ACN 008 720 518)

Defendants

SECOND AFFIDAVIT OF IAN ROBERT DELROY

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Filed on behalf of:

The Third Defendant

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I, **IAN ROBERT DELROY** of 49 William Place, Busselton in the State of Western Australia, Certified Practicing Accountant, MAKE OATH AND SAY that:

1. I refer to my affidavit made on 28 July 2009 in these proceedings (my First Affidavit). I adopt the same abbreviations and expressions used in my First Affidavit in this affidavit.

Project Recapitalisation and Alternative Responsible Entity

2. In paragraph 41 and 42 of the Affidavit of Mark Anthony Korda sworn the 28th of July 2009 and filed in these proceedings, the deponent details discussion with key stakeholders on the proposed sale and recapitalisation of the Forestry Schemes and states that additional time is required due to the "...effective deadline of 1 October 2009 and owing to the high level of interest received by the Liquidators to date in relation to forestry assets...". No evidence or information of a corresponding high level of interest, or of any level of interest, by a prospective alternate Responsible Entity in the Avocado Project has been filed.
3. JFH is aware that Timbercorp has annual rental/license fee obligations that exceed the rental/license fees of \$760,000 payable by growers in the 2009/2010 Project year. JFH is unaware as to how Timbercorp or its Liquidators propose funding this shortfall given that the company is insolvent.
4. Modelling undertaken by JFH indicates that the Project requires a further \$7.2 to \$11.6 million dollars to be invested in the Project before it becomes cash flow positive. There has been no proposal from the Liquidator as to how that sum might be raised.
5. The Liquidators have published on their web site a document entitled "Discussion Paper – Replacing Timbercorp Securities Limited (TSL) as Responsible Entity". Now produced and shown to me and marked **IRD -2** is a copy of that Discussion Paper. It sets out multiple issues facing a new Responsible Entity and any restructure of the Project. The Liquidators have not filed any details as to if and how any of the concerns raised in that discussion paper might be resolved.



Crop Sale and/or Crop Lien

6. In paragraph 50 of the Affidavit of Mark Anthony Korda sworn the 28th of July 2009 and filed in these proceedings, the deponent states that in early June 2009 "our staff had discussion with Jasper Farms, with a view to concluding a crop sale agreement".
7. As stated in my First Affidavit, on the 16th of May 2009 the Liquidators previously declined to grant a crop sale arrangement in respect of the Jasper Farms portion of the Project in WA due to the immaturity of the trees.
8. The Liquidators advised on the 24th of June 2009 that they were considering a crop lien and that they would advise JFH "shortly" of the decision.
9. In mid July 2009, the Liquidators reiterated via teleconference that they would not be providing any security to JFH over the 2009 avocado crop.
10. On the 28th of July the Liquidators, by email proposed a crop sale arrangement in respect of the Western Australian portion of the avocado crop in response to the need to fund pollination costs. No draft or detail on the proposed agreement has been provided.
11. JFH will not be adequately indemnified by the implementation of any such crop sale agreement as the avocado trees on the Jasper Farms portion of the Project are immature and any net proceeds from the 2009 avocado crop, after harvesting, packing and sale costs, are not likely to cover the costs of managing the orchard up to and including the completion of harvest. Nor are such proceeds likely to cover Land rent, water licence rent and the arrears of management costs owed to JFH and no arrangement has been put forward by the Liquidator as to funding those rents or the shortfall between the harvest proceeds and management costs likely to be incurred between now and the end of the 2009 harvest.

Scheme Continuation and Scheme Documents

12. In paragraph 54 of the Affidavit of Mark Anthony Korda sworn the 28th of July 2009 and filed in these proceedings, the deponent states that "If any one of a



Grower's Avocado License is terminated, then all of that Grower's other licenses are automatically terminated." The Avolot Management Agreements entered into by each grower in the Project state in clause 20.6 that Timbercorp Securities may amend the provisions of the agreement to such extent as may be required to "comply with the effect of any judicial decision" or to "enable the provisions of this Agreement, or the Project, to be more conveniently, advantageously, profitably or economically administered or managed."

13. That provision was utilised by Timbercorp as recently as 1st October 2008 to unilaterally make significant amendments to the agreement. Now produced and shown to me and marked **IRD-3** is a copy of that Supplemental Avolot Management Agreement. It is open to the Liquidators (a) to amend the grower agreements provided such amendments do not adversely affect the rights of growers or (b) to apply to the court for orders amending the constituent documents such that growers wishing to remain involved in the Queensland part of the Project may do so.
14. Further, all growers in the Project currently have the right to terminate their Avolot Management Agreements and their licences to occupy as a result of the liquidation of the Timbercorp companies. If growers do not exercise that right and wish to remain involved in the Project or the Queensland portion of the Project, they are able to consent to amendments to the constituent documents to allow that to happen.
15. In paragraph 55 of the Affidavit of Mark Anthony Korda sworn on the 28th of July 2009 and filed in these proceedings, the deponent states "It is not clear whether termination of the head leases or sub-leases will terminate any of the underlying Avocado Licenses." JFH understand that the Avocado Licenses include a clause dealing with the termination of the Sub-Lease whereby the Land Owner is able to be "named as the licensor in lieu of Timbercorp Securities from the termination of the Jasper Sub-Lease;"
16. In addition, the Project documents allow for the grant of direct occupancy rights to growers and for the substitution of new Land and water licence leases with a new Responsible Entity.



17. Subject to all arrears being made good and the relevant growers paying their annual management fees and rent, JFH will consent to growers in the Project being granted a direct licence to occupy or will consent to entering into new leases for the Land and the water licence with any properly capitalised and experienced new Responsible Entity appointed to the Project .

Maintenance Obligations

18. In paragraph 16 of my First Affidavit, I note that the Land lease between JFH and Timbercorp includes a clause 7.1 requiring the Lessee to maintain and manage "the Avocado Trees, the Avocado Orchard, and land generally, in good workmanlike and commercially responsible manner and to a standard consistent with Best Horticultural Practice".
19. The Jasper License Agreements made between Timbercorp Securities, the Participant Grower and Timbercorp Limited includes a corresponding provision (clause 8.2) whereby each Participant Grower must at its expense, undertake certain matters including "comply with Best Horticultural Practice" and "undertake the Avolot Operations on the relevant Jasper Avolots."
20. Clause 8.4 of those licence agreements states that "Any delegation by the Participant Grower under clause 8.3 does not release the Participant Grower from liability under this Agreement."

Scheme Continuation

21. JFH acknowledges that the rights of growers in the Project granted in clause 11.2 sub-clauses (c) to (f) inclusive of the Land lease will survive any termination or disclaimer of the Land lease and water licence lease by virtue of the provisions of clause 10.3(b) of the Land lease and confirms that it will, subject to all arrears being made good, consent to and will grant direct rights to occupy to growers in the Project or enter into new Land and water licence leases with a new Responsible Entity on substantial the same terms and conditions as the originals.



22. JFH can not afford to, and will not consent to, Timbercorp or the Liquidators continuing as lessors without paying rent for the Land or water licence, without insuring the assets, without paying management costs and without any plan to finance the millions of dollars of additional capital required in the Project.

23. Any further maintenance of the status quo will almost exclusively be at the expense of JFH and can only be for the benefit of the Liquidators as the growers can be adequately protected if the Project continues. The Land and water rights in the Western Australian part of the Project belong to JFH and the avocado trees planted on Jasper Farms in WA currently belong to Timbercorp.

24. The only assets of the Project (other than the annual fruit crop) in respect of which the Liquidators could conduct a "structured sale" are the avocado trees and some equipment which, as the Project documents specifically provide, don't belong to the growers. Any proceeds of sale will flow to the Liquidators and any delay to allow such a sale is for the benefit of the Liquidators, not growers.

SWORN by the above named deponent)
 at Busselton in the State of Western)
 Australia this 30th day of July 2009)




Witness:

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 Of the Legal Profession Act 2004.