

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION

No. VID 595 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

SECOND AFFIDAVIT OF MARK ANTHONY KORDA

On 17 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 refer to my affidavit sworn on 13 August 2009 in this proceeding (**my First Affidavit**). I adopt the same abbreviations and definitions in this affidavit.
- 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.
- 3 This affidavit is made in support of the direction sought in the Amended Originating Process dated 17 August 2009.

TSL does not have clear title to the trees

- 4 In my First Affidavit, I describe the sale/recapitalisation process which has been commenced by us for the Forestry Assets (as defined in paragraph 49). The Forestry Assets include 97,500 hectares of *Eucalyptus globulus* (**the Trees**). Approximately 60% of the Trees are growing on land leased by TSL, or by TL and then sub-leased to TSL,

Filed on behalf of the Plaintiffs

ARNOLD BLOCH LEIBLER
Lawyers and Advisers
Level 21
333 Collins Street
Melbourne 3000

DX 38455 Melbourne
Tel: 9229 9999
Fax: 9229 9900
Ref: 011499489
(Leon Zwier)



from landlords not owned by the Timbercorp Group of Companies. Approximately 40% of the Trees are growing on land owned by Timbercorp Group companies.

- 5 TSL has sub-leased that land owned by the non-Timbercorp-owned landlords to the respective Growers who are members of each of the Forestry Schemes.
- 6 I am informed by Ms Sheridan that the sub-leases by which the Growers lease the land from TSL (**the Sub-Leases**) contain broadly similar clauses which make the Trees the property of the relevant Grower, subject to certain provisos, and grant additional rights in relation to the Trees, such as the right to tend and manage the Trees, and to enter upon the land to harvest the Trees and remove and sell the products derived from the Trees. The Sub-Leases generally provide that those rights and interests constitute "an independent and severable grant of a proprietary interest".

Need for clear title to the Trees

- 7 In order for the sale/recapitalisation process to achieve the best outcome for the creditors of the Timbercorp Group, including Growers, we believe that potential bidders need to be satisfied that they are buying the Trees with clear title. If the potential bidders are not so satisfied, we expect that any bids for the Forestry Assets will be made at a large discount to the price which could be achieved if the Trees were offered with clear title.
- 8 At present, because of the Growers' interests in the Trees under the Sub-Leases and/or at common law, TSL arguably does not have legal title to the Trees. The Growers may own the Trees and also have a right to harvest them.
- 9 One way in which TSL could obtain clear title to the Trees is by terminating the Sub-Leases. The question is therefore whether TSL presently has a right or power to do so, either under the constitutions for each of the Forestry Schemes or under the Sub-Leases. There is no express power for TSL to do so under the Sub-Leases. However, I have been provided with legal advice that under the constitutions, TSL has a right or power to terminate the Grower Sub-Leases on behalf of Growers, or that it is at least arguable that TSL has such a right or power.
- 10 For example, clause 11(f) of the constitution for the 2001 Eucalyptus Project (contained in exhibit MAK-13 to my First Affidavit) provides:

11 *Each Grower agrees that the Responsible Entity has irrevocable power as the agent, representative and attorney of the Grower and whether in the name of the Grower or the Responsible Entity or both:-*

...



(f) *to exercise all rights and powers of the Grower under any Agreement* [Agreement is defined to include the Sub-Lease entered into by a Grower]

- 11 I have been advised that the meaning of the words "*all rights and powers ... under any Agreement*" is arguably not confined to rights and powers expressly conferred under any Agreement, but includes a right or power to terminate the Sub-Lease at common law, whether by surrender or otherwise. Further, express rights of termination are conferred upon Growers under the Sub-Leases if TSL commits a material breach of the Sub-Lease (clause 11.1(a)). The responsible entity's obligations under the Sub-Lease are contained in clause 7. They include an obligation upon TSL to pay all rates and taxes and comply with the provisions of the Head Lease.
- 12 I am further advised that if the Court regards there as being any doubt about it, TSL could amend the relevant constitutions so that such a right or power is expressly conferred on TSL under the constitutions for the managed investments schemes listed in schedules 1 and 2 to the Amended Originating Process (**the Constitutions**) provided TSL is satisfied that such an amendment would not adversely affect the rights of Growers.
- 13 I am informed by Ms Sheridan that clauses to the effect of 11(f) of the Constitution are contained in all of the constitutions for each of the other Forestry Schemes.

Amendment to the Constitutions for the Forestry Schemes

- 14 We believe that in the circumstances of the insolvency of the Timbercorp Group, the sale/recapitalisation process outlined in the Information Memorandum is the means by which the best price can be obtained for the Forestry Assets. In order for the maximum price to be obtained for the Forestry Assets, we believe that potential bidders must be satisfied they will have clear title to those assets. We believe that it is in the best interests of the Growers for TSL to have the means to deliver title to the Trees to any purchaser of the Forestry Assets.
- 15 Although we believe, based upon legal advice, that TSL most probably does have a right or power to terminate the -Sub-Leases under the Constitutions in the manner I have outlined above, in the circumstances I seek a direction that we are justified in causing an amendment to be made to the Constitutions to put the matter beyond doubt. If the Court made such a direction, we would only procure TSL to exercise such a power to terminate the Sub-Leases in the event that a satisfactory bid was made for the Forestry Assets and as a pre-condition to settlement of the contracts.



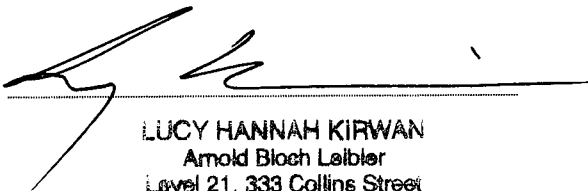
Form of the proposed amendments to the Constitutions

- 16 Exhibit MAK-12 to my First Affidavit is a CD-Rom containing the principal documents governing each of the Forestry Schemes, including the Constitutions and any relevant amending deeds.
- 17 Now produced and shown to me marked **MAK-19** is the form of the proposed Deed Poll to amend to each of the Constitutions to be executed by TSL.

SWORN by the abovenamed deponent at)
Melbourne in the State of Victoria)
this 17th day of August 2009)



Before me:



LUCY HANNAH KIRWAN
Arnold Bloch Leibler
Level 21, 333 Collins Street
Melbourne 3000
An Australian Legal Practitioner within the
meaning of the Legal Profession Act 2004

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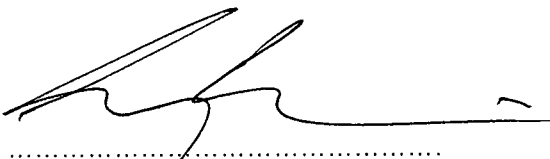
Plaintiffs

AFFIDAVIT - CERTIFICATE OF COMPLIANCE

(Order 14, rule 5A)

I, Lucy Hannah Kirwan, certify to the Court that the affidavit of **MARK ANTHONY KORDA** sworn on 17 August 2009 filed on behalf of the Plaintiffs complies with Order 14, rule 2 of the Federal Court Rules.

Date: 17 August 2009



Lucy Hannah Kirwan

A solicitor of Arnold Bloch Leibler
Solicitor for the Plaintiffs

Filed on behalf of the Plaintiffs

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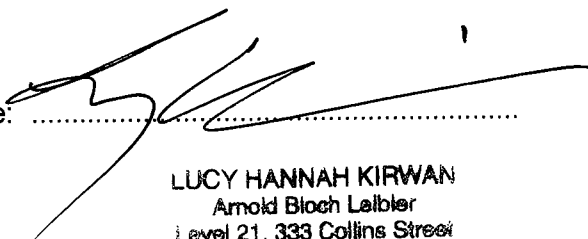
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ACN 092 311 469
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Plaintiffs

CERTIFICATE IDENTIFYING EXHIBIT

This is the exhibit marked "**MAK-19**" now produced and shown to **MARK ANTHONY KORDA**
at the time of swearing his affidavit on 17 August 2009.

Before me:



LUCY HANNAH KIRWAN
Arnold Bloch Leibler
Level 21, 333 Collins Street
Melbourne 3000

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

Amendment Deed

[insert name of Project]
ARSN [insert]

PARTIES

TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)

ACN 092 311 469
of Level 8, 461 Bourke Street, Melbourne 3000
("TSL")

BACKGROUND

- A TSL was appointed the responsible entity of the [insert name of Project] (ARSN insert) pursuant to the Constitution.
- B TSL convened an informal meeting of the Growers to provide an update of key issues facing the Project and to consider a resolution 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 in respect of the Timbercorp forestry assets, including the assets of the Project.
- C The overwhelming majority of Growers who voted on the resolution (in person, by proxy or on-line) voted in favour of the resolution.
- D TSL considers that the power of sale can best be incorporated by amending the Constitution in the manner set out in this Deed.
- E TSL and the liquidators of TSL applied to the Federal Court of Australia for directions that the liquidators of TSL would be justified in executing or procuring TSL to execute a deed amending the Constitution, pursuant to section 601GC(1)(b) of the *Corporations Act*, in the form of this Deed.
- F On 18 August 2009, Justice Finkelstein of the Federal Court of Australia gave the directions sought.
- G In accordance with section 601GC of the *Corporations Act* and the directions of the Court, TSL has executed this deed to modify the Constitution in the manner set out in this deed.

AGREED TERMS

1 Definitions and interpretation

1.1 Definitions

In this deed, unless the context requires otherwise, terms that are defined in the Constitution have the same meaning and:

"**Constitution**" means the constitution dated [insert date] (as amended).

"**Effective Date**" means the date this deed is lodged with the Australian Securities and Investments Commission.

1.2 Interpretation

Clause 1.2 of the Constitution applies to the interpretation of this deed.

2 Amendment

The Constitution is amended with effect on and from the Effective Date as follows:

- (a) by inserting after paragraph (a) of the definition of "Proceeds" in clause 1.1, the following paragraph:
 - "(aa) the net proceeds received for the assignment, termination, surrender or other dealing with the Sub-lease in accordance with clause 11(fa);" and
- (b) by inserting after clause 11(f) the following clause:
 - "(fa) to assign, terminate, surrender or otherwise deal with the Sub-lease for the purpose of facilitating a sale of the Trees;"

2.2 Remains in effect

Except as specifically amended by this document, all terms and conditions of the Constitution remain in full force and effect.

2.3 Read as a single document

With effect on and from the Effective Date:

- (a) the parties are bound by the Constitution as amended by this deed; and
- (b) the Constitution is to be read as a single integrated document incorporating those amendments.

3 General

3.1 Paramountcy of document

If this deed conflicts with any other document, agreement or arrangement, this document prevails to the extent of the inconsistency.

3.2 Attorneys

Each person who executes this deed on behalf of a party under a power of attorney warrants that he or she has no notice of the revocation of that power or of any fact or circumstance that might affect his or her authority to execute this document under that power.

3.3 Governing law and jurisdiction

This deed will be governed by and construed in accordance with the laws in force in the State of Victoria and each party submits to the non-exclusive jurisdiction of the courts of that State.

EXECUTED as a DEED

EXECUTED by **TIMBERCORP**)
SECURITIES LIMITED (in liquidation) by)
being signed in its name and on its behalf)
by **MARK ANTHONY KORDA** in his)
capacity as liquidator in the presence of:)

Signature of witness

Signature of liquidator

Name of witness (print)