

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

SCI 2010 398

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

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

Plaintiffs

SECOND AFFIDAVIT OF MARK ANTHONY KORDA

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

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

- 1 I am a chartered accountant and a partner of the firm KordaMentha Pty Ltd (ACN 100 169 391). I am a Registered Liquidator and an Official Liquidator of the Court. I am, with Leanne Kylie Chessier, the liquidator of the First Plaintiff, Timbercorp Securities Ltd (in liquidation) (ACN 092 311 469) (**TSL**) and of Timbercorp Ltd (in liquidation) (ACN 055 185 067) (**TL**). I am authorised to make this affidavit on behalf of Timbercorp and TSL.
- 2 I previously made an affidavit in this proceeding on 8 February 2010 (**First Affidavit**). Capitalised terms in this affidavit have the same meaning as capitalised terms in the First Affidavit.



3 TSL is a wholly-owned subsidiary of TL. TL is the holding company of the Timbercorp Group. Ms Chesser and I have been appointed as liquidators of both TSL and TL, as well as other companies in the Timbercorp Group.

4 TL owns 35% of the issued shares in CostaExchange Holdings Pty Ltd (**Costa Holdings**). Costa Holdings owns 92% of the issued shares in CostaExchange Limited (**Costa**).

Now produced and shown to me and marked "**MAK-11**" is a company search of Costa Holdings.

Now produced and shown to me and marked "**MAK-12**" is a company search of Costa.

Now produced and shown to me and marked "**MAK-13**" is the 2008 Annual Report for the Timbercorp Group which shows TL's ownership of its interest in Costa Holdings.

5 As stated in paragraph 5 of the First Affidavit, the second meeting of creditors was held on 29 June 2009. In the lead up to that meeting KordaMentha prepared a report to creditors of the Timbercorp Group. Page 19 of the report states that the Timbercorp Group has an investment comprising an indirect 32% equity position in Costa, a major Australian fruit and vegetable producer and marketer (which also managed the Group's citrus orchards and table grape vineyards).

Now produced and shown to me and marked "**MAK-14**" is a copy of the report to creditors.

6 On 12 June 2009, we as the then administrators of the Timbercorp Group successfully applied to the Federal Court for an order that we could send our report to creditors by post, electronic and other means, including placing the report on the KordaMentha and Timbercorp websites. I am informed by Antony Munro, a director of KordaMentha who has been assisting me in the administration and liquidation of the Timbercorp Group, and believe that the report to creditors was placed on the websites, and was lodged with ASIC, on or about 18 June 2009. Around that time, we caused a circular to be sent to creditors of TSL and to all of the members of the managed investments schemes operated by TSL directing the recipient to the report which was available for download from the KordaMentha and Timbercorp websites. I am further informed by Mr Munro and believe that the circular was sent to all scheme members by post on or about 18 June 2009 to the addresses recorded in the

Handwritten signatures in black ink, likely of the legal representatives, located at the bottom right of the page.

databases maintained by the Timbercorp Group, and by email to those scheme members for whom the Timbercorp Group had email addresses.

Now produced and shown to me and marked "**MAK-15**" is a copy of the order of the Federal Court.

Now produced and shown to me and marked "**MAK-16**" is a copy of the circular directing the recipient to the websites.

- 7 As stated in paragraph 12 of the First Affidavit, the Receivers were appointed to OIM#2, the lessor under the head lease of the Solara property described in paragraph 14 of the First Affidavit (exhibit DLM-1 to the McEvoy Affidavit) (**Head Lease**). The appointment of the Receivers followed the default by TL of its obligations to pay rent under the Head Lease (\$494,786 per quarter). TL is hopelessly insolvent. It has been unable to pay the rent under the Head Lease, partly because of its own insolvency, and partly because TSL has been unable to pay rent to TL under the sub lease, which is also described as the underlease (exhibit DLM-2 to the McEvoy Affidavit) (**Sub Lease**). Under the Sub Lease TSL is obliged to pay rent to TL in the same as the amount of the licence fees payable by Growers to TSL under the Licences (clause 7), which are insufficient to cover TL's rent under the Head Lease. I am informed by Mr Munro and believe that, even if all of the Growers paid their licence fees under the Licences, the shortfall of rent owed by TL under the Head Lease would be at least \$250,000 per annum. A further complication is that about 43% of the Growers in the project borrowed from Timbercorp Finance Pty Ltd to fund their licence fees, but that company is insolvent and in liquidation and can no longer fund Growers. TL cannot make up the shortfall in rent due under the Head Lease in any other way.
- 8 The Licences, which in the ordinary course would expire in 2027 (clause 4.1(b)(iii)), impose obligations on TSL, including to ensure the availability of water (clause 3.2), to maintain government approvals (clause 5.1(a)), to comply with the sub lease (clause 5.1(d)), and to pay rates and taxes (clause 5.1(h)). TSL cannot comply with these obligations. As stated in paragraph 7 of the First Affidavit, TSL is hopelessly insolvent. It cannot afford to pay for water, to maintain government approvals or to pay rent and taxes. It cannot afford to comply with its obligations under the Sub Lease, including to maintain insurance (clause 9.1), to pay rates and taxes (clause 8), to comply with best horticultural practice (clauses 4.4 and 10), and to maintain capital

works (clause 10). TSL has no staff to enable it to carry out the obligations under the Licence or under the Sub Lease.

- 9 Under the Licences a number of duties are imposed on Growers (clause 8.2). As they are entitled to do under clause 8.3, each Grower has engaged TSL as the manager to carry out their tasks, under a Citruslot Management Agreement. TSL is no longer able to perform these tasks because of its insolvency.

Now produced and shown to me and marked "**MAK-17**" is a copy of a sample Citruslot Management Agreement.

- 10 As stated in paragraph 13 of the First Affidavit, the Receivers conducted a sale process of the Solora property and entered into a sale and purchase agreement with Agriproperty Pty Ltd, guaranteed by Costa. Agriproperty Pty Ltd is wholly-owned by Costa.

Now produced and shown to me and marked "**MAK-18**" is a company search of Agriproperty Pty Ltd.


- 11 TSL and TL, their liquidators, and my firm (KordaMentha) had no involvement in the selection by the Receivers of Agriproperty as preferred bidder for the Solora property (guaranteed by Costa), nor any involvement in the bid itself (although I was aware that Agriproperty was one of the bidders). Aside from the provision of information to the Receivers upon request, the Receivers' sale process was conducted independently of TSL and TL, their liquidators, and KordaMentha. I first heard that Agriproperty was the preferred bidder on or about 11 December 2009, after Nick Courtney of KordaMentha was informed of this by PriceWaterhouseCoopers (as set out in paragraph 20 of the First Affidavit).

- 12 Paragraph 34 of the McEvoy Affidavit states that the conditions precedent to the Sale Contract include a Court direction that the liquidators of TSL are justified in procuring TSL, in its capacity as responsible entity of the 2005 Citrus Project, to extinguish all of the Growers' Rights in respect of the property the subject of the Sale Contract, including the Licences. TSL and TL, their liquidators, and KordaMentha did not participate in the negotiation of this clause. However, in respect of the sales of property conducted by the liquidators of TSL in relation to the Forestry Schemes, the Almond Schemes and the Olive Schemes, we as liquidators negotiated similar conditions precedent in the respective sale contracts, because the maximum

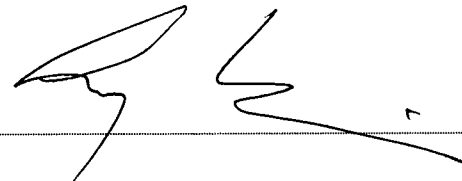
purchase price could be achieved only if the purchaser acquired the assets on an unencumbered basis.

- 13 In paragraph 32 of the McEvoy Affidavit, Mr McEvoy states that the conditions precedent under the Sale Contract must be fulfilled by 3 March 2010 or the purchaser or vendor may terminate the Sale Contract (unless they agree to an extension). I expect that if the sale of the Solora property falls through, in the circumstances described in paragraphs 7 to 9 above, TSL may have no other option but to apply to the Court to wind up the 2005 Citrus Project and the proceeds available for distribution to stakeholders (as directed by the Court) will be lower than if the sale proceeds. In that case I anticipate that the likely return to Growers will be nil.
- 14 Insofar as Costa Holdings benefits from the sale of the Solora property to Agriproperty (the subsidiary of Costa), TL creditors will also receive some benefit given TL's interest in Costa Holdings. It has been alleged that this means that the liquidators are in a position of conflict of interest. There is no reason for TL's interest in Costa to have played any part in the Receivers' selection of Costa as the preferred bidder. We have received confirmation by the Receivers that they have complied with their obligations under s 420A of the Act (as set out in paragraph 16 of the First Affidavit). I consider this the best hope of realising any money for the Growers (subject to the Court's directions about apportionment of sale proceeds).

SWORN at Melbourne in the State of)
 Victoria by **MARK ANTHONY KORDA** this)
 23rd day of February 2010)

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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