

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

LIST B

S CI 2013 01477

BETWEEN

THE TRUST COMPANY (NOMINEES) LIMITED (ACN 000 154 441)

Plaintiff

and

MICHAEL FUNG IN HIS CAPACITY AS RECEIVER AND MANAGER OF ALIGN FUNDS
MANAGEMENT LIMITED (RECEIVER AND MANAGER APPOINTED) (ACN 105 684 231) IN
ITS CAPACITY AS THE RESPONSIBLE ENTITY OF THE TIMBERCORP ORCHARD TRUST
AND ORS

Defendants

THIRD AFFIDAVIT OF CLINTON CHARLES HINCEN
(BELLA VISTA RIGHTS PROCEEDING)


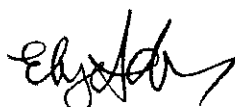
Date of document: 21 March 2014
Filed on behalf of: The plaintiff
Prepared by:

Allens
Lawyers
101 Collins Street
Melbourne VIC 3000

Solicitor code: 21455
DX 30999 Melbourne
Tel 9614 1011 Fax 9614 4661
Ref CCHM:120339854
(Clint.Hinchen@allens.com.au)

I, **CLINTON CHARLES HINCEN** of Allens, 101 Collins Street, Melbourne, in the State of
Victoria, Lawyer, SAY ON OATH that:

- 1 I am a solicitor and a partner in the firm Allens. I have the care and conduct of this proceeding (the **Bella Vista Rights Proceeding**) on behalf of the plaintiff, The Trust Company (Nominees) Limited (**The Trust Company**). I am authorised to make this affidavit on behalf of The Trust Company.
- 2 Except where otherwise indicated, I make this affidavit from my own knowledge. Where I depose to matters from information or belief, I believe those matters to be true.



Exhibits to this affidavit

- 3 There are a large number of documents referred to in this affidavit, some of which are of considerable size. Given the size of the project documents (referred to in paragraph 20 below), I have arranged for them to be placed onto a CD-ROM marked 'Exhibit CCH-1'. All other documents are exhibited individually in hard copy. Now produced and shown to me and marked '**Exhibit CCH-1**' are true copies of the documents mentioned in paragraph 20 below.
- 4 When referring to a document in the balance of my affidavit that has already been exhibited, I also refer in parenthesis to the relevant exhibit number for ease of reference.

Introduction

- 5 The Trust Company commenced the Bella Vista Rights Proceeding on 25 March 2013 by originating motion, as subsequently amended. On 26 June 2013, The Trust Company filed a summons and supporting affidavit sworn by me on 26 June 2013, concerning, among other things, the appointment of the second and third defendants as representative parties, and the general conduct of the proceeding.
- 6 The Bella Vista Rights Proceeding concerns the net proceeds arising from the sale of the land (***Bella Vista Property***) and related assets on which the following table grape projects were conducted:
- (a) the 2004 Timbercorp Table Grape Project (ARSN 108 684 086); and
 - (b) the 2005 Timbercorp Table Grape Project (ARSN 113 512 226).
- (together, the ***Table Grape Projects***). In this affidavit, I refer to each of the Table Grape Projects individually by their year, for example, the "2004 Project".
- 7 The purpose of the Bella Vista Rights Proceeding is to determine how those net sale proceeds are to be apportioned between:
- (a) The Trust Company as the secured creditor;




- (b) the grower investors in the Table Grape Projects (the **Growers**); and
- (c) other interested parties claiming an interest in the net sale proceeds.

8 As stated, the second and third defendants have been appointed by the Court as representatives in accordance with rule 16.01(4) of the *Supreme Court (General Civil Procedure) Rules 2005* (the **Rules**) in respect of each of the Table Grape Projects to represent the interests of the Growers in that Project in the Bella Vista Rights Proceeding (together, the **Representative Growers**).

9 On 14 January 2014, a deed of compromise was executed by the parties to the Bella Vista Rights Proceeding (including the Representative Growers) to effect a compromise of the proceeding subject to certain conditions, including:

- (a) approval of the compromise by the Debenture Holders in accordance with the procedure prescribed in the Trust Deed (as those terms are defined in paragraph 22 below); and
- (b) approval of the compromise by the Court in accordance with rule 16.01(4) of the Rules,

(the **Bella Vista Deed of Compromise**). Now produced and shown to me and marked 'Exhibit CCH-2' is a true copy of the Bella Vista Deed of Compromise.

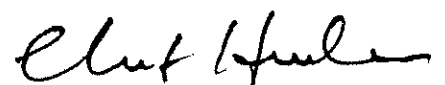
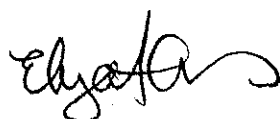
Purpose of this affidavit

10 This affidavit is made in support of The Trust Company's summons dated 12 March 2014 by which (among other things), in accordance with Rule 16.01(4) of the Rules, application is made to this Honourable Court for approval of the compromise the subject of the Bella Vista Deed of Compromise.

11 I address the following matters in this affidavit (defined terms used in this paragraph have the meaning ascribed to them elsewhere in this affidavit):





- (a) the Table Grape Projects the subject of the Bella Vista Rights Proceeding (paragraphs 13 to 20 below);
- (b) The Trust Company's security position, appointment of receivers and managers and the sale of the Bella Vista Property and Water Rights (paragraphs 21 to 31 below);
- (c) conditions to completion of the Bella Vista Sale Contracts (paragraphs 32 to 34 below);
- (d) application to the Court to satisfy the conditions precedent to the sale of the Bella Vista Property and Water Rights (paragraphs 35 and 36 below);
- (e) the Net Sale Proceeds the subject of the Bella Vista Rights Proceeding (paragraphs 37 and 38 below);
- (f) completion of the Bella Vista Sale Contracts and deposit of the Net Sale Proceeds (paragraph 39 below);
- (g) the parties to the Bella Vista Rights Proceeding and the involvement of Align and Sandhurst (paragraphs 40 to 50 below);
- (h) the issues for determination in the Bella Vista Rights Proceeding (paragraphs 51 to 53 below);
- (i) the Rights Issue (paragraph 54 below);
- (j) the Valuation Issue (paragraph 55 below);
- (k) entitlements (if any) to the Net Sale Proceeds of The Trust Company and the Growers (paragraph 56 below);
- (l) Justice Davies' Judgment in the Almond Land Rights Proceeding (paragraphs 57 to 65 below);



- (m) relevance of the Almond Land Rights Proceeding to The Trust Company's application for approval of the Bella Vista Deed of Compromise (paragraphs 66 to 67 below);
 - (n) application of Justice Davies' Judgment in respect of the Rights Issue (paragraph 68 below);
 - (o) application of Justice Davies' Judgment in respect of the Valuation Issue (paragraphs 69 to 79 below);
 - (p) Court approval of the global compromise in the Resolved Timbercorp Apportionment Proceedings (paragraphs 80 to 84 below);
 - (q) the Bella Vista Deed of Compromise (paragraphs 85 to 93 below);
 - (r) approval of the compromise by the Debenture Holders (paragraphs 94 to 96 below); and
 - (s) communications with ASIC (paragraphs 97 to 98 below).
- 12 Pursuant to clause 8 of the Bella Vista Deed of Compromise (Exhibit CCH-2), the parties have agreed that, if Court approval of the compromise in accordance with clause 3.2 of the deed is not obtained by 30 June 2014, then the deed ceases to have any effect and, in that event (among other things), the deed, any documents prepared or circulated pursuant to the deed, and any other documents prepared or circulated in anticipation of, or for the purpose of, the application the subject of The Trust Company's summons filed on 12 March 2014 (including, among other things, this affidavit) may not be referred to or tendered in evidence in the Bella Vista Rights Proceeding or the Kangara Rights Proceeding to which I refer below.

The Table Grape Projects the subject of the Bella Vista Rights Proceeding

- 13 Each of the Table Grape Projects was governed by a suite of project documents including a constitution, licence agreement, head lease and sub-lease (*Project*

Documents). The members of the Table Grape Projects are referred to in the Project Documents as "**Growers**" and, as noted above, I adopt that terminology in this affidavit.

14 I have reviewed:

- (a) the Project Documents for each of the Table Grape Projects; and
- (b) the affidavit of Paul William Kirk sworn 22 December 2010 in Supreme Court of Victoria proceeding number SCI 2010 7029 and tendered in evidence in that proceeding (the **Kirk Affidavit**). Now produced and shown to me and marked '**Exhibit CCH-3**' is a true copy of the Kirk Affidavit, without exhibits.

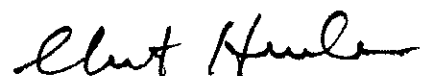
The matters to which I depose in paragraphs 15 to 39 below are based on these documents, other documents to which I refer in these paragraphs and my own knowledge.

- 15 The purpose of the Table Grape Projects was the cultivation of fresh table grapes for commercial sale.
- 16 The Projects were conducted on properties in New South Wales referred to as "Costa's Crest" and "Bella Vista" which are the subject of this proceeding, and which are referred to collectively as the Bella Vista Property.
- 17 The Bella Vista Property was owned by Align Funds Management Limited (formerly Orchard Investments Management Limited) (ACN 105 684 231) in its capacity as responsible entity of the Timbercorp Orchard Trust (ARSN 106 557 297) (Receiver and Manager Appointed) (**Align**).
- 18 Timbercorp Securities Limited (in Liquidation) (**TSL**) was the responsible entity of the Table Grape Projects the subject of the Bella Vista Rights Proceeding and each of the Table Grape Projects is a registered managed investment scheme under Part 5C of the *Corporations Act 2001* (Cth) (the **Act**).
- 19 Align also owned certain water rights associated with the Bella Vista Property, being:




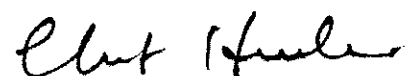

- (a) a water access entitlement of 214.0 mega litres per annum held under water share WEE018428 and a water access entitlement of 2028.8 mega litres per annum held under water share WEE045487, each granted pursuant to the *Water Act 1989* (Vic) (the **Victorian Water Rights**); and
 - (b) a water access entitlement of 867 shares held under Water Access Licence 21485 and Works Approval 60CA581917, each granted pursuant to the *Water Management Act 2000* (NSW) (the **New South Wales Water Rights**),

(collectively, the **Water Rights**).
- 20 The Project Documents for the Table Grape Projects included constitutions and a series of lease agreements which were executed by Align and certain Timbercorp group entities in respect of the Bella Vista Property, namely:
- (a) constitutions for the 2004 Project and the 2005 Project dated 5 April 2004 and 22 March 2005 respectively (and as subsequently amended on 29 December 2009 and 28 January 2010) (**Exhibit CCH-1, documents 1 and 2**).
 - (b) leases between Align (as lessor) and Timbercorp Limited (In Liquidation) (**TL**) (as lessee) for each of the 2004 Project and the 2005 Project, dated 15 April 2004 and 28 April 2005 respectively, pursuant to which Align leases the Bella Vista Property to TL (**Exhibit CCH-1, documents 3 and 4**);
 - (c) underleases between TL (as underlessor) and TSL (as underlessee) for each of the 2004 Project and the 2005 Project dated 15 April 2004 and 28 April 2005 respectively, pursuant to which TL subleases the Bella Vista Property to TSL (**Exhibit CCH-1, documents 5 and 6**); and
 - (d) licence agreements between TSL and each Grower in the 2004 Project and the 2005 Project respectively (**Exhibit CCH-1, documents 7 and 8**).

The Trust Company's security position, appointment of receivers and managers and sale of Bella Vista Property and Water Rights

- 21 Align raised funds for the original purchase of the Bella Vista Property and Water Rights through the issue of debentures which were issued pursuant to prospectuses dated 24 October 2003 and 5 May 2005 respectively. Now produced and shown to me and marked '**Exhibit CCH-4**' and '**Exhibit CCH-5**' respectively, are true copies of the prospectuses dated 24 October 2003 and 5 May 2005.
- 22 The Trust Company is the trustee for the holders of the debentures issued by Align (**Debenture Holders**) pursuant to the Timbercorp Orchard Trust Debenture Trust Deed dated 17 October 2003 (**Trust Deed**). Now produced and shown to me and marked '**Exhibit CCH-6**' is a true copy of the Trust Deed.
- 23 Security was granted in favour of The Trust Company, for the benefit of the Debenture Holders, including the following:
- (a) a fixed and floating charge over the assets of the Timbercorp Orchard Trust granted to The Trust Company in accordance with clause 4 of the Trust Deed and registered with the Australian Securities and Investments Commission on 30 April 2004 (**Charge**); and
 - (b) two real property mortgages over the Bella Vista Property registered on 4 May 2005 and 16 June 2006 respectively (**Mortgages**).
- Now produced and shown to me and marked '**Exhibit CCH-7**', '**Exhibit CCH-8**' and '**Exhibit CCH-9**' respectively, are true copies of the Charge, the 4 May 2004 Mortgage and the 16 June 2006 Mortgage.
- 24 On 22 October 2009, Stephen Longley and Paul William Kirk of PricewaterhouseCoopers were appointed by The Trust Company as joint and several receivers and managers of the charged assets of Align, including the Bella Vista Property and the Water Rights.

25 Michael Fung of PricewaterhouseCoopers replaced Mr Longley as joint and several receiver and manager of these assets on 25 May 2010.

26 I am informed by Mr Fung and believe that Mr Kirk resigned from the PricewaterhouseCoopers partnership and was removed from his role as receiver of Align on 31 August 2012. Mr Fung and his predecessors are referred to in this affidavit in their capacity at the relevant time as the "**Receivers**".

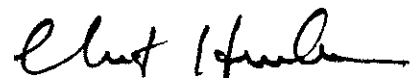
27 On 23 July 2010, the Receivers, Align and Costa Holdings Investments Pty Ltd (as trustee for the Charlie Costa Investments Trust and for Paul Costa Investments Trust) (**Costa**) signed a contract for the sale of the Bella Vista Property and other associated assets falling within the definition of "Property" in that contract (the **Bella Vista Land Sale Contract**). Now produced and shown to me and marked 'Exhibit CCH-10' is a true copy of the Bella Vista Land Sale Contract.

28 On 22 December 2010:

- (a) the Receivers, Align and Vicsuper Ecosystem Services Pty Ltd (as trustee for the Vicsuper Future Farming Landscapes Trust) (**Vicsuper**) executed a contract for the sale of the Victorian Water Rights (the **Victorian Water Sale Contract**); and
- (b) the Receivers, Align and Tandou Ltd (**Tandou**) executed a contract for the sale of the New South Wales Water Rights (the **New South Wales Water Sale Contract**).

Now produced and shown to me and marked 'Exhibit CCH-11' and 'Exhibit CCH-12' respectively, are true copies of Victorian Water Sale Contract and the New South Wales Water Sale Contract.

29 I refer in the balance of this affidavit to the Bella Vista Land Sale Contract, the Victorian Water Sale Contract and the New South Wales Water Sale Contract as, collectively, the **Bella Vista Sale Contracts**.



30 I am informed by Rupert Smoker, Head of Responsible Entity Services at The Trust Company, and believe, that:

- (a) the total amount of the debt owed to The Trust Company under the Trust Deed and secured by the Charge and the Mortgages as at 29 June 2009 was AUD\$56,773,700 with the interest margin accruing from that date at the fixed rate of 3.5% per annum above the "2 Year Bank Bill Swap Rate" as defined in rule 5.1 of schedule 2 to the Trust Deed; and
- (b) at the date of this affidavit, the debt owed as at 29 June 2009 has not been repaid and the interest that has accrued since 29 June 2009 has not been paid.

31 Based on the Kirk Affidavit, I believe that The Trust Company was the only secured creditor of Align in its capacity as responsible entity for the Timbercorp Orchard Trust, as at the date Mr Kirk deposed to the matters in that affidavit (ie 22 December 2010) in support of the Receivers' application to this Honourable Court for orders, declarations or directions in order to satisfy the conditions precedent under the Bella Vista Sale Contracts (as addressed in the following section of this affidavit).

Conditions to completion of the Bella Vista Sale Contracts

32 The Bella Vista Land Sale Contract provides, at clause 5.1(a) of the Special Conditions, that settlement was conditional upon, among other things:

- (a) the Court directing that the Liquidators of TSL were justified in procuring TSL, in its capacity as responsible entity of the Table Grape Projects, to extinguish all of the rights of Growers in respect of the property the subject of the Bella Vista Sale Contracts, including the Growers' licences; and
- (b) the Court making orders determining the rights of all and any persons (including Growers and The Trust Company) to all or any part of the net proceeds of sale under the Bella Vista Land Sale Contract, or ordering that those net proceeds be



held on trust until the rights of those persons are determined by a further order of the Court.

33 The Victorian Water Sale Contract provided at clause 6.1.2, that settlement was conditional upon, among other things:

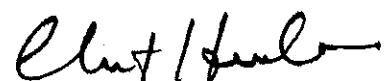
- (a) the Court directing that the Liquidators of TSL were justified in procuring TSL, in its capacity as responsible entity of the Projects, to extinguish all of the rights of Growers in respect of the property the subject of the Bella Vista Sale Contracts, including the Growers' licences; and
- (b) the Court making orders determining the rights of all and any persons (including the Growers and The Trust Company) to all or any part of the net proceeds of the sale under the Bella Vista Sale Contracts, or ordering that those net proceeds be held on trust until the rights of those persons are determined by a further order of the Court.

Clause 6.1.3 also provided that settlement was conditional upon completion taking place under the Bella Vista Land Sale Contract.

34 The New South Wales Water Sale Contract provided at clause 31.1 that settlement was conditional upon completion taking place under the Bella Vista Land Sale Contract.

Application to the Court to satisfy the conditions precedent to the Bella Vista Sale Contracts

35 In order to satisfy the conditions precedent to the Bella Vista Sale Contracts, the Liquidators of TSL (in its capacity as responsible entity of the Table Grape Projects) brought an application on 2 February 2011 in proceeding No. SCI 2010 7029. Justice Davies handed down her judgment in that proceeding on 7 February 2011 (**7 February 2011 Judgment**) and made orders on the same date (**7 February 2011 Orders**). Now produced and shown to me and marked 'Exhibit CCH-13' and 'Exhibit CCH-14'

respectively, are true copies of the 7 February 2011 Judgment and the 7 February 2011 Orders.

36 Paragraphs 1 and 2 of the 7 February 2011 Orders satisfied the conditions precedent in the Bella Vista Sale Contracts. These paragraphs were in the following terms.

1 The Second and Third Plaintiffs (in their capacity as Liquidators of the First Plaintiff) are justified in procuring the First Plaintiff as responsible entity of the 2004 Timbercorp Table Grape Project (ARSN 108 648 086) and the 2005 Timbercorp Table Grape Project (ARSN 113 512 226) (**Table Grape Projects**), to terminate or surrender each relevant Grower licence and to extinguish all of the rights of Growers (investors in the Table Grape Projects) in respect of the assets the subject of the Sale Contracts (**Grower Rights**).

2 The Second and Third Plaintiffs (in their capacity as liquidators of the First Plaintiff) are justified in making, doing and executing such documents or things to give effect to the extinguishment of all of the Grower Rights in order to enable [Align] and the Receivers to perform the Sale Contracts.

The net sale proceeds the subject of the Bella Vista Rights Proceeding

37 In the 7 February 2011 Judgment, Justice Davies stated at paragraph 3 that:

... The Court has already given similar directions to the liquidators in earlier applications by the liquidators in the court of winding up other managed investment schemes of which TSL is the RE. The earlier decisions provide considerable guidance for the disposition of this application and I am satisfied that the directions sought in this application should also be made. [Citations omitted.]

38 Accordingly, Justice Davies made orders for the holding of the sale proceeds on trust pending supervision by the court of the apportionment of the funds. Paragraphs 3 to 5 of the 7 February 2011 Orders (Exhibit CCH-14) provided that:

3 Upon completion of any sale under the Sale Contracts the net proceeds of sale (after payment of the Receivers' selling costs and expenses, retentions (if any),

the costs and expenses of the Receivers referable to the preservation and realisation of the assets the subject of the Sale Contracts, and the costs and expenses of the liquidators of the First Plaintiff which are to be reimbursed by the Receivers in accordance with the Bella Vista Grower Rights Deed (as defined in the Kirk Affidavit) (**Net Sale Proceeds**) are to be held by the Receivers of [Align] in an interest bearing trust account with an Australian bank (as defined in section 9 of the *Corporations Act*), pending the hearing and determination by the Court of a proceeding to determine which person or persons have any rights to all or any part of the Net Sale Proceeds, and to be held on trust for the person or persons who are able to establish such a right, or until further order of the Court.

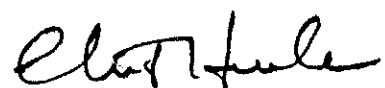
- 4 Insofar as The Trust Company (Nominees) Limited (ACN 004 134 441) has any rights to the assets the subject of the Sale Contracts, whether under its securities over those assets or otherwise, nothing in the release of those securities upon completion of the Sale Contracts will prejudice those rights for the purposes of its claim to all or any part of the Net Sale Proceeds.
- 5 Insofar as the Growers have any rights to the assets the subject of the Sale Contracts nothing in orders 1 and 2 above, or any action taken thereunder by the Second and Third Plaintiffs, will prejudice those rights for the purposes of their claim to all or any part of the Net Sale Proceeds.

In the balance of this affidavit, the defined term, **Net Sale Proceeds**, has the same meaning as that ascribed to the same defined term in paragraph 3 of the 7 February 2011 Orders, set out above.

Completion of the Bella Vista Sale Contracts and deposit of the Net Sale Proceeds

39 I am informed by Mr Fung and believe that:

- (a) settlement of the Bella Vista Land Sale Contract occurred on 2 March 2011;
- (b) settlement of the Victorian Water Sale Contract occurred on 15 July 2011;

(c) settlement of the New South Wales Water Sale Contract occurred on 24 March 2011; and

(d) in accordance with order 3 of the 7 February 2011 Orders:

- (i) the amounts of \$1,280,000 and \$50,000 were transferred on or about 9 August 2011 and 4 May 2012 respectively to the following account of the Receivers:

Account name: ALIGN FUNDS MANAGEMENT LIMITED IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE TIMBERCORP ORCHARD TRUST (R&M APPOINTED) BELLA VISTA LAND

BSB: 083-004

Account number: 11732-9125 (being the *Bella Vista Land Account*);
and

- (ii) the amounts of \$3,960,000 and \$50,000 were transferred on or about 9 August 2011 and 4 May 2012 respectively to the following account of the Receivers:

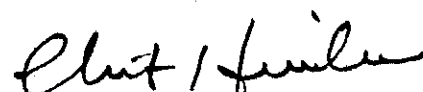
Account name: ALIGN FUNDS MANAGEMENT LIMITED IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE TIMBERCORP ORCHARD TRUST (R&M APPOINTED) BELLA VISTA WATER

BSB: 083-004

Account number: 11733-4178 (being the *Bella Vista Water Account*).

These amounts comprised the Net Sale Proceeds.

- (e) In accordance with paragraph 6 of the orders made by the Honourable Justice Judd on 19 July 2013 in the Bella Vista Rights Proceeding (the **19 July 2013 Orders**), the Receivers have subsequently paid amounts out of the Net Sale Proceeds to Allens (the solicitors for the Plaintiff) for the legal costs and

disbursements incurred by the Plaintiff in the Bella Vista Rights Proceeding. Further amounts may be deducted pursuant to paragraph 6 of the 19 July 2013 Orders following the date of the swearing of this affidavit. Now produced and shown to me and marked 'Exhibit CCH-15' is a true copy of the 19 July 2013 Orders.

(f) As at 19 March 2014:

- (i) the balance of the Bella Vista Land Account and the term deposit investment account in which the Receivers have invested funds from the Bella Vista Land Account, was \$1,364,183.53; and
- (ii) the balance of the Bella Vista Water Account, and the term deposit investment account in which the Receivers have invested funds from the Bella Vista Water Account, was \$4,535,654.17.

Accordingly, the total balance of Net Sale Proceeds as at 19 March 2014 was \$5,899,837.70.

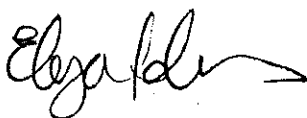
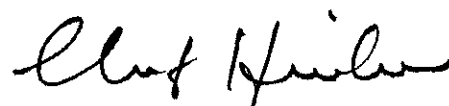
The parties to the Bella Vista Rights Proceeding and the involvement of Align and Sandhurst

The Trust Company

40 The Trust Company is the plaintiff in the Bella Vista Rights Proceeding. Its claim to the Net Sale Proceeds arises out of its position as the sole secured lender to Align (in its capacity as responsible entity of the Timbercorp Orchard Trust), the former owner of the Bella Vista Property and Water Rights.

The Receivers

41 As noted in paragraphs 24 to 26 above, the Receivers are appointed as receivers and managers of the charged assets of Align. Mr Fung has been joined as the first defendant

to the Bella Vista Rights Proceeding in his capacity as 'stakeholder' of the Net Sale Proceeds.

42 Paragraph 8 of the 19 July 2013 Orders provides that:

8. Until further order, the First Defendant is excused from taking any step in the proceeding, including court appearances, but may do so in relation to the following matters:
 - (a) his right to be paid remuneration and expenses from the Net Sale Proceeds (to the extent that remuneration and those expenses have not already been paid);
 - (b) any allegations made about the First Defendant's personal conduct during his appointment and, in particular, with respect to the sale of the assets the proceeds of which represent the Net Sale Proceeds; and
 - (c) to ensure disposal in full of the Net Sale Proceeds currently held on trust by the First Defendant.

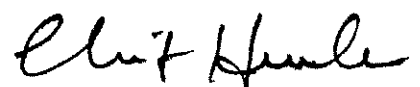
Grower Representatives

43 I am informed by Jing Chang of Arnold Bloch Leibler, solicitors for the Liquidators of TSL, and believe that:

- (a) 207 Growers invested in the 2004 Project; and
- (b) 302 Growers invested in the 2005 Project.

44 In light of the number of Growers who invested in the Table Grape Projects, and the considerable time and cost that would have been involved in locating and serving each of them, The Trust Company sought an order in the Bella Vista Rights Proceeding that representatives of the Growers be appointed pursuant to rule 16.01(2) of the Rules.

45 By paragraph 3 of the 19 July 2013 Orders (Exhibit CCH-15), pursuant to rule 16.01(2) of the Rules, the Representative Growers were appointed as follows:

- (a) Anthony Cormick was appointed as the representative of the Growers in the 2004 Project; and
- (b) Jeyarasa and Anne Rasiah were appointed as the representatives of the Growers in the 2005 Project.

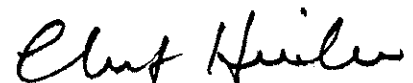
46 By paragraph 4 of the 19 July 2013 Orders, the Representative Growers were joined as the second and third defendants in the Bella Vista Rights Proceeding pursuant to rule 9.02 and/or rule 9.06(b) of the Rules.

Align's involvement

47 As the amount of The Trust Company's secured debt (being \$56,773,700 as at 29 June 2009) exceeds the combined current balance of the Net Sale Proceeds (being \$5,899,837.70) and the current balance of the net sale proceeds the subject of the Kangara Rights Proceeding (being \$20,336,356.45), there will be no surplus for payment to Align by The Trust Company in accordance with the terms of the Trust Deed. By letter dated 3 April 2013, Allens confirmed The Trust Company's view to Align that Align does not have any interest in the outcome of the Bella Vista Rights Proceeding and is therefore not a necessary party in accordance with order 9.03 of Rules. By email dated 8 April 2013, Maddocks, solicitors for Align, confirmed that Align does not propose to take any role in the Bella Vista Rights Proceeding. Accordingly, Align has not been joined as a defendant to this proceeding (although it is a party to the Bella Vista Deed of Compromise). Now produced and shown to me and marked 'Exhibit CCH-16' and 'Exhibit CCH-17' respectively, are true copies of Allens letter to Align dated 3 April 2013 and the email from Maddocks dated 8 April 2013.

Sandhurst's involvement

48 In accordance with the terms of the "Annuity Bond Trust Deed [2]" entered into between Align and Sandhurst Trustees Limited (**Sandhurst**) on 3 December 2003 (**Sandhurst Trust Deed**), Align issued unsecured annuity bonds to bondholders. Sandhurst holds on

trust for the benefit of the bondholders their right to enforce Align's obligation to repay the annuity bonds.

- 49 As referred to in paragraph 47 above, there will be no surplus for payment to Align by The Trust Company in accordance with the terms of the Trust Deed. It follows that there will be no surplus for payment to Sandhurst in accordance with the terms of the Sandhurst Trust Deed. By letter dated 3 April 2013, Allens confirmed The Trust Company's view that Sandhurst does not have any interest in the outcome of the Bella Vista Rights Proceeding and is therefore not a necessary party in accordance with order 9.03 of Rules. By email dated 23 April 2013, Mr Frank O'Brien of Sandhurst stated that on the information currently available, Sandhurst does not intend to take any role in the proceeding. Accordingly, Sandhurst has not been joined as a defendant to this proceeding. Now produced and shown to me and marked '**Exhibit CCH-18**' and '**Exhibit CCH-19**' respectively, are true copies of the letter from Allens to Sandhurst dated 3 April 2013 and the email from Mr O'Brien dated 23 April 2013.
- 50 By email dated 5 December 2013, Mr Hayden Williams of Sandhurst confirmed that Sandhurst does not propose to be a party to the deed of compromise. Now produced and shown to me and marked '**Exhibit CCH-20**' is a true copy of the email from Mr Williams dated 5 December 2013.

The issues for determination in the Bella Vista Rights Proceeding

- 51 As noted in paragraph 7 above, the purpose of the Bella Vista Rights Proceeding is to resolve the dispute as to how the Net Sale Proceeds are to be apportioned between:
- (a) The Trust Company as the secured creditor;
 - (b) the Growers; and
 - (c) other interested parties claiming an interest in the Net Sale Proceeds.



52 It is not yet possible to identify with complete certainty the contested issues to be determined at any trial of the Bella Vista Rights Proceeding, having regard to the proceeding still being in its early stages with no submissions or witness statements having been filed.

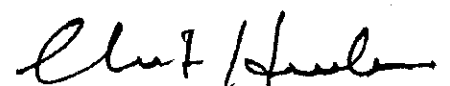
53 I believe, however, that, based on the matters referred to in the following paragraphs, and based also on:

- (a) the issues raised for determination in the Almond Land Rights Proceeding and Justice Davies' judgment in that proceeding (see further paragraphs 57 to 64 below); and
- (b) the position adopted by the appellant representative growers in the Almond Land Rights Appeal Proceeding in their grounds of appeal filed in that proceeding (see further paragraph 65 below),

the following are likely to be the key issues addressed at any trial of the Bella Vista Rights Proceeding:

- (c) what rights (if any) The Trust Company and the Growers have to the Net Sale Proceeds (the **Rights Issue**);
- (d) what the value is of any such rights of The Trust Company and the Growers respectively (the **Valuation Issue**); and
- (e) how much (if any) of the Net Sale Proceeds The Trust Company and the Growers are entitled to receive.

I address these three issues in paragraphs 54 to 56 below.



The Rights Issue

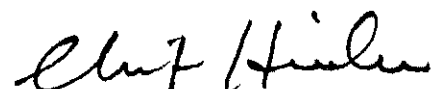
54 In respect of the Rights Issue, having regard to the matters referred to at paragraphs 53(a) and (b) above, I believe that the relevant matters which will arise for consideration in determining the entitlements of the parties to the Net Sale Proceeds are as follows:

- (a) the nature and extent of the rights (if any) of, on the one hand, The Trust Company and, on the other hand, the Growers, in respect of the assets the subject of the Bella Vista Sale Contracts; and
- (b) the extent to which such rights give rise to an entitlement to any part of the Net Sale Proceeds.

The Valuation Issue

55 In respect of the Valuation Issue, having regard to the matters referred to at paragraphs 53(a) and (b) above, I believe that the relevant matters which will arise for consideration are as follows:

- (a) to the extent that the Growers held rights (whether proprietary or contractual in nature) which entitle them to make a claim against the Net Sale Proceeds, for the purpose of valuing those rights:
 - (i) what is the appropriate valuation methodology to adopt;
 - (ii) is the Growers' case analogous to a loss of opportunity claim; and
 - (iii) to what extent were the Table Grape Projects the subject of the proceeding viable such that they would run their full term under the relevant constituent documents or otherwise;
- (b) what was the value of the Growers' rights (if any); and
- (c) how, having regard to the foregoing, the proceeds available for distribution from the Net Sale Proceeds are to be apportioned between the Growers, The Trust Company and other interested parties.

Entitlements (if any) to the Net Sale Proceeds of The Trust Company and the Growers

56 The determination of the entitlements (if any) of The Trust Company and the Growers to the Net Sale Proceeds will turn on the resolution by this Honourable Court of the matters bearing on the Rights Issue and the Valuation Issue as referred to in the preceding paragraphs.



Justice Davies' judgment in the Almond Land Rights Proceeding

57 Similar issues to those that I believe will be the subject of the Bella Vista Rights Proceeding (as set out in paragraphs 53 to 56 above) were raised for determination in the Almond Land Rights Proceeding (which concerned a conditional sale and purchase deed entered into on 18 September 2009 between TSL, Almond Management Pty Ltd, Almond Land Pty Ltd (in liquidation) and Olam Orchards Australia Pty Limited for almond properties and associated assets owned by Almond Land).

58 I had conduct of the Almond Land Rights Proceeding on behalf of Australia and New Zealand Banking Group Limited (**ANZ**), which was one of the secured creditors of Almond Land. The background facts and purpose of the Almond Land Rights Proceeding closely resemble those of the Bella Vista Rights Proceeding.

59 At the commencement of the Almond Land Rights Proceeding, on 22 December 2009, Justice Davies made orders appointing representative growers in that proceeding in the same form as paragraphs 3 and 4 of the 19 July 2013 Orders (see paragraphs 45 and 46 above) (Exhibit CCH-15).

60 There were a large number of complex facts and issues in dispute in the Almond Land Rights Proceeding in connection with managed investment schemes for the cultivation of almonds for commercial sale. As noted below, many of these issues concerned matters within specialised fields of knowledge in respect of which expert opinion was provided to the Court. In advance of the trial of the proceeding, the issues were addressed by the parties by way of:



- (a) contentions and reply contentions of in excess of 300 pages;
- (b) lay evidence from 10 witnesses in the form of 14 affidavits; and
- (c) expert evidence from 5 witnesses in the form of 13 affidavits and six joint expert reports.

61 The expert evidence covered the following fields of expertise:

- (a) the appropriate revenue and cost inputs necessary to model the value of the relevant growers' rights (including, among other things, almond prices, almond yields, operating expenditure, inflation, responsible entity fees, licence/rental fees, capital expenditure, water requirements and the cost of temporary and permanent water), together with the appropriate discount rate to be adopted in the valuation exercise;
- (b) water allocation, availability and cost;
- (c) estimated future operating costs and almond yields; and
- (d) the valuation of the rights of the relevant growers and secured lenders in connection with the relevant managed investment schemes.

62 The trial itself took place over 12 sitting days in February and March 2011. At the trial, oral evidence was given by four lay witnesses and four expert witnesses. Justice Davies delivered her reasons for judgment in the Almond Land Rights Proceeding on 15 June 2011 (*Justice Davies' Judgment*). Her Honour found that the growers were unsuccessful in their claims against the fund of net sale proceeds the subject of that proceeding and that ANZ, together with the other secured lender in that proceeding, BOSI Security Services Limited as trustee for ANZ and BOS International (Australia) Limited and Westpac Banking Corporation (*BOSI*), were entitled to the entire amount of those net sale proceeds. Justice Davies' Judgment is reported at (2011) 84 ACSR 341.

Elizabeth *Chit / file*

Now produced and shown to me and marked 'Exhibit CCH-21' is a true copy of Justice Davies' Judgment.

- 63 By orders made by Justice Davies in the Almond Land Rights Proceeding on 27 June 2011, the net sale proceeds the subject of that proceeding were to be distributed to BOSI and ANZ, subject to certain ancillary orders. Now produced and shown to me and marked 'Exhibit CCH-22' is a true copy of the orders made by Justice Davies in the Almond Land Rights Proceeding dated 27 June 2011.
- 64 Having regard to the issues which I believe will arise for determination in the Kangara Rights Proceeding (as set out in paragraphs 53 to 56 above), I consider that the key findings made in Justice Davies' Judgment are those set out below (including in parenthesis the relevant paragraph in Justice Davies' Judgment):

In respect of the Rights Issue

- (a) to share in the relevant fund, growers needed to establish rights of a proprietary nature in, and with respect to, the almond assets that were converted into the fund constituted by the net sale proceeds (paragraph 30);
- (b) for licence-based projects, the growers acquired rights of a contractual nature only and did not obtain a proprietary interest in the almond assets (paragraph 47) – so growers in those projects had no right to share in the fund;
- (c) for lease-based projects, the growers held rights of a proprietary nature in the land, trees and capital works (but of a contractual nature in the water licences) – so growers in those projects had a right to share in the fund if and to the extent their proprietary rights were valuable on extinction (paragraphs 73 and 79);

In respect of the Valuation Issue

- (d) if the (lease-based) projects in which growers held proprietary rights were not viable at the time those rights were extinguished by the Court (either in their



existing form or, on the balance of probabilities, upon restructure including the replacement of the responsible entity), then no measure of value could be attributed to those rights (paragraphs 82 and 95);

- (e) since there was no possibility other than a theoretical possibility that the projects would have continued if the growers' rights had not been extinguished, no value could be attributed to the growers' rights (paragraph 137); and

In respect of the respective entitlements of the parties to the relevant net sale proceeds

- (f) on the basis of Justice Davies' findings in respect of the Rights Issue and the Valuation Issue (as those issues arose in the Almond Land Rights Proceeding), the securities held by ANZ and BOSI over the assets sold to Olam entitled these parties to receive the entire amount of the net sale proceeds as the amounts secured were greater than the net sale proceeds held in trust as at the date of judgment and the growers had not been successful in establishing their entitlement (paragraph 167).

Appeal from Justice Davies' Judgment

65 The growers in the Almond Land Rights Proceeding subsequently appealed Justice Davies' decision in proceeding No S APCI 01013 (***Almond Land Rights Appeal Proceeding***). The appeal did not proceed to a hearing as the parties to the Almond Land Rights Appeal Proceeding and TSL entered into a Deed of Compromise on 25 July 2012. The compromise reached by the parties is discussed further at paragraphs (80 to 84 below).

Relevance of the Almond Land Rights Proceeding to The Trust Company's application for approval of the Bella Vista Deed of Compromise

66 As noted in paragraphs 53 to 56 above, I believe the key issues likely to be addressed in the Bella Vista Rights Proceeding will be the same or substantially similar to the matters



determined by Justice Davies in the Almond Land Rights Proceeding, which were all the subject of appeal (before the case was settled).

- 67 Further, the constituent documents for the Almond projects the subject of the Almond Land Rights Proceeding are similar in content and form to the corresponding documents for the Table Grape Projects the subject of the Bella Vista Rights Proceeding. In this regard, I note that the Growers in the Table Grape Projects are subject to licence agreements rather than leases (see paragraph 20(d) above). As such, the constituent documents for the Table Grape Projects bear a greater resemblance to the constituent document for the license-based projects the subject of the Almond Land Rights Proceeding, namely, the 2001 Almond Project, the 2002 Almond Project, the 2002 Private Offer Project and the 2003 Almond Project.

Application of Justice Davies' Judgment in respect of the Rights Issue

- 68 If the Court were to apply, without modification, the findings from Justice Davies' Judgment to determine the rights of the parties in the Bella Vista Rights Proceeding, then, in relation to the Rights Issue, the likely findings would be as follows:

- (a) to share in the Net Sale Proceeds, Growers would need to establish rights of a proprietary nature in and with respect to the table grape assets that were converted into the fund constituted by the Net Sale Proceeds (see paragraph 30 of Justice Davies' Judgment);
- (b) Growers in the Table Grape Projects, all being subject to licence agreements (as noted at paragraph 20(d) above), will be found to have acquired rights of a contractual nature only and, therefore, found not to have obtained a proprietary interest in the Net Sale Proceeds (see paragraph 48 of Justice Davies' Judgment).

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Application of Justice Davies' Judgment in respect of the Valuation Issue

69 In relation to the Valuation Issue, even if it were assumed (contrary to the findings in Justice Davies' Judgment) that the Growers in the Table Grape Projects had a right to share in the Net Sale Proceeds to the extent that they held rights which were valuable on extinction pursuant to paragraphs 1 and 2 of the 7 February 2011 Orders, the following matters of which I am aware support the proposition that any such rights held by the Growers in the Table Grape Projects were valueless in any case.

70 In Justice Davies' Judgment, a number of relevant findings were made in the context of the Valuation Issue in respect of the almond projects the subject of the Almond Land Rights Appeal Proceeding. It is apparent from those findings, to which I refer in paragraph 71 below, that her Honour approached the Valuation Issue insofar as it applied in the Almond Land Rights Proceeding by addressing two principal questions:

- (a) first, were the relevant projects viable under the existing structures; and
- (b) secondly, were the projects viable if restructured?

I consider these two questions, in turn below, in the context of the Table Grape Projects.

71 The key findings made by Justice Davies in the Almond Land Rights Proceeding concerning the viability of the relevant almond projects) under their existing structures were as follows:

- 82. The first issue for determination is whether any of the projects were viable at the time that the growers' rights were extinguished. If the projects were not viable, it follows that there is no measure of value to be attributed to those rights to support an apportionment of the proceeds to the growers. The growers' rights under the sub-leases could only be exercised for the purposes of the projects and thus any value attributable to the growers' rights was coterminous with the continuation of the projects. If they were viable, the value of the growers' rights measures the extent of their legal claim to the proceeds of sale.

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Were the projects viable under the existing structures?

83. I am satisfied that the evidence established that by the time the growers rights' were extinguished, the projects could not continue under their existing structures and were at risk of imminent and inevitable termination.
84. First, the insolvency of the Timbercorp Group meant that the projects could not continue under their existing structures. It was not a disputed fact that TSL, AL and AM were hopelessly insolvent. Nor was it a disputed fact that the Timbercorp group had no capacity to fund the capital expenditure for which it was responsible and that it had no capacity to absorb any funding shortfall arising from any defaults on participant grower invoices. All of the projects required significant cash contributions above the fees that the growers were contractually obliged to pay in order to meet operating requirements in relation to the management and harvesting of the 2010 crop. The lack of immediate funds meant that the continued operations could not be funded.
85. Secondly, the operating and capital expenses of each of the projects were expected to exceed the anticipated 2010 harvest returns. The projects themselves had cash flow deficiencies and, in the view of the liquidators (which was not challenged), were insolvent because the projected returns were less than the project expenses, which the projects could not meet.
86. Thirdly the orchards were at risk of wastage and impairment because of the lack of immediate funds available to the projects and the lack of any means of funding the continued operations.
87. I find that the growers' rights under the projects as they were structured held no value at the time of extinguishment of those rights. The insolvency of the Timbercorp group and the cash flow deficiencies of the projects meant that the projects could not be funded and that they were at imminent and inevitable risk of termination as the purpose of the projects could not be accomplished.



- 72 In Supreme Court of Victoria Proceeding No S 2010 7029, the Liquidators of TSL filed an affidavit of Mark Anthony Korda sworn on 23 December 2010 (**Korda Affidavit**) in support of the Liquidators' application the subject of that proceeding. At paragraph 6 of that affidavit, Mr Korda deposed as follows:

TSL is hopelessly insolvent and is unable to continue managing the 2004 Project and the 2005 Project.

Now produced and shown to me and marked '**Exhibit CCH-23**' is a true copy of the Korda Affidavit, without exhibits.

- 73 In relation to the viability of the Table Grape Projects in the event that they were restructured, based on paragraph 95 of Justice Davies' Judgment in the Almond Land Rights Proceeding (Exhibit CCH-21), the Representative Growers would be required to establish on the balance of probabilities that the extinguishment of their rights lost them the opportunity to have the project restructured and continued to full term. In other words (and also as noted in paragraph 95 of the Justice Davies' Judgment), the Representative Growers would require an evidentiary basis from which the Court could evaluate the likelihood of a "restructure counterfactual" eventuating had the Growers' rights not been extinguished.

- 74 Having regard to the matters referred to in the Justice Davies' Judgment at paragraphs 96 to 136 thereof, and depending on the basis of any counterfactual case advanced by the Representative Growers, the Court is likely to have regard to the following matters in considering whether there was a chance for restructure of the Table Grape Projects:

- (a) legal issues concerning, among other things, the change of responsible entity for the Table Grape Projects and constitutional and contractual amendments;
- (b) factual issues concerning, among other things, the market for hire of responsible entities and the terms of any consent given by a possible replacement responsible entity;



- (c) the likelihood of any replacement responsible entity taking over as responsible entity of the Table Grape Projects, based on the probability of the Table Grape Projects continuing to term in light of (among other things):
- (i) the immediate cash needs of the Table Grape Projects as against its expected future revenue;
 - (ii) the solvency position of other relevant companies in the Timbercorp group;
 - (iii) the need for constitutional and contractual changes;
 - (iv) the need to find a consenting responsible entity; and
 - (v) the possibility of conditions being imposed to any consent given by a responsible entity to assume that role in respect of the Table Grape Projects.

75 In the 7 February 2011 Judgment, Justice Davies considered the viability of the Table Grape Projects. Relevantly, her Honour noted:

- 1 Timbercorp Securities Limited (in liquidation) ("TSL") is the responsible entity ("RE") of the 2004 Timbercorp Table Grape Project and the 2005 Timbercorp Table Grape Project ("the Table Grape Projects"), which the liquidators of TSL are in the course of winding up because TSL is hopelessly insolvent. ...
- 3 ... The Court has already given similar directions to the liquidators in earlier applications by the liquidators in the course of winding up other managed investment schemes of which TSL is the RE. The earlier decisions provide considerable guidance for the disposition of this application and I am satisfied that the directions sought in this application [to extinguish the Growers' rights] should also be made.

...

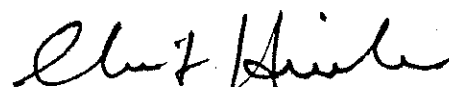


5 ... In *Re Timbercorp Securities Limited* I addressed the requirements for the valid exercise of power under s 601GC(1)(b) [for a responsible entity to amend the constitution of a managed investment scheme]. The section requires the responsible entity to consider and form the opinion that there would be no "adverse" effect on the "rights" that members held before the amendment with the "rights" that they would hold after the amendment. This requires a comparison of members' rights before and after the proposed amendment. The section also requires that the opinion formed by the responsible entity be an opinion that the responsible entity "reasonably" holds. I am satisfied that each of those requirements has been met. The evidence before the Court was that the liquidators gave due consideration to the effect on "members' rights" of the proposed constitutional amendment before they made it. In this instance, the amendments were made after the liquidators became aware that the land and water rights had been put up for sale, in the circumstance where TSL has no funds to contain to manage the Table Grape Projects and is hopelessly insolvent and unable to continue its task as RE because of its insolvency. The evidence also was that the liquidators followed the same process that they applied in determining to amend the constitutions of the forestry schemes, the almond schemes and the olive schemes where TSL was the RE, as part of the informal winding up of those schemes. Had the liquidators instead sought to have the projects wound up by direction of the Court or sought to take steps to wind up the scheme in accordance with s 601NC of the Act, the licence agreements would have been terminated by operation of clause 4.1(b)(iv) of the growers' licences.

[Citations omitted.]

76 I note also that, based on paragraphs 28, 29, 30, 46, 65, 88, 98, 102, 112 and 115 of the Kirk Affidavit (Exhibit CCH-3):

- (a) the Table Grape Projects were unlikely to continue as a going concern due largely to the insolvency of the Timbercorp Group;

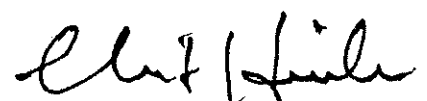
- (b) upon appointment, the Receivers did not have funds to continue maintenance of the crop, which risked wasting if it was not attended to urgently with irrigation, fertiliser, and pest and disease sprays;
- (c) the Liquidators were unable to fund the ongoing maintenance of the vineyards (due to the insolvency of the Timbercorp Group);
- (d) the Receivers were prepared to consider all offers for the Bella Vista Property and Water Rights either as encumbered by the Table Grape Projects or on an unencumbered basis;
- (e) the Receivers received seven offers for the purchase of the Bella Vista Property in the final stage of negotiation of the Bella Vista Land Sale Contract and 14 expressions of interest for the purchase of the Water Rights;
- (f) the terms of the Bella Vista Land Sale Contract negotiated with the preferred purchaser, Costa, required the Bella Vista Land to be transferred free of any encumbrances relating to the rights of the Growers in the Table Grape Projects;
- (g) the terms of the Victorian Water Contract negotiated with the preferred purchaser, Vicsuper, required the Bella Vista Water Rights to be transferred free of any encumbrances relating to the rights of the Growers in the Table Grape Projects; and
- (h) the terms of the New South Wales Water Contract negotiated with the preferred purchaser, Tandou, required the Bella Vista Water Rights to be transferred free of any encumbrances relating to the rights of the Growers in the Table Grape Projects.

77 Other than on a confidential basis, the Kirk Affidavit does not disclose whether any of the other bids contemplated a continuation of the Table Grape Projects. I note, however, that, in the 7 February 2011 Judgment (Exhibit CCH-13), Justice Davies found as follows:

Elyse John *Cliff Hulse*

- 6 ...the receivers and managers have confirmed with the liquidators that they have complied with their obligations under s 420A of the Act and the evidence from the receivers and managers bears out that they have undertaken a robust and thorough sale process calculated to maximise the value of the land and water rights. The receivers and managers have explained that process and the basis for their view that the proposed sales will realise the maximum value for the land and the water rights.
- 7 Next, the receivers and managers support the proposed orders and directions that are sought and there has been no opposition by or on behalf of any of the growers.

- 78 Based on the matters to which I refer in paragraphs 71 to 77 above, there is reason to believe that, if it were assumed (contrary to the findings in Justice Davies' Judgment) that the Growers in the Table Grape Projects had a right to share in the Net Sale Proceeds to the extent that they held contractual rights which were valuable on extinction pursuant to paragraphs 1 and 2 of the 7 February 2011 Orders, any such rights held by the Growers were valueless in any case because the Table Grape Projects were not viable at the time that the Growers' rights were extinguished.
- 79 In all the circumstances, if the key findings in the Justice Davies' Judgment are applied consistently in the present proceeding, the Growers in this proceeding are likely to be found to have no entitlement to the Net Sale Proceeds.



Court approval of global compromise in the Resolved Timbercorp Apportionment Proceedings

80 Following the Almond Land Rights Proceeding, various related rights proceedings in relation to the collapse of the Timbercorp group were commenced in the Supreme Court of Victoria to determine which person or persons had any rights to all or any part of the net sale proceeds held on trust from the sale of assets the subject of those proceedings. These proceedings were:

- (a) proceeding No. SCI 2011 6606 (the *Solara Rights Proceeding*);
- (b) proceeding No. SCI 2011 6604 (the *Liparoo and Yungera Rights Proceeding*);
- (c) proceeding No. SCI 2010 1354 (the *BB Olives Rights Proceeding*); and
- (d) proceeding No. SCI 2011 6777 (the *Fenceport Rights Proceeding*).

Together with the Almond Land Rights Appeal Proceeding, these proceedings are collectively referred to as the *Resolved Timbercorp Apportionment Proceedings*.

81 On 25 July 2012, each of the parties to the Resolved Timbercorp Apportionment Proceedings and TSL agreed to a separate (but inter-connected) compromise in respect of each proceeding, substantially in the same form as the compromise the subject of the Kangara Deed of Compromise discussed at paragraphs 85 to 93 below, whereby:

- (a) approximately 5% of the Gross Sale Proceeds of the subject assets were to be apportioned between the growers in those projects based on a rateable distribution in accordance with the number of lots held by the growers in each project;
- (b) the secured creditors applied the remaining Net Sale Proceeds to discharge their security (including interest and costs); and



- (c) any remainder was to be distributed to the landowning entities of the relevant properties the subject of the proceeding (which is not relevant to the compromise reached in the Kangara Rights Proceeding).

82 Similarly to the compromise the subject of the Kangara Rights Proceeding, these compromises, as they were entered into by representative growers on behalf of the absent growers, had to be approved by the Court pursuant to rule 16.01(4) Rules as being in the best interests of the absent growers.

83 On 3 and 4 October 2012, Justice Judd concurrently heard the applications for the approval of the compromises the subject of each Resolved Timbercorp Apportionment Proceeding and, by orders dated 12 December 2012, approved the compromises as being in the best interests of the absent Growers pursuant to rule 16.01(4) of the Rules. Now produced and shown to me and marked 'Exhibit CCH-24' is a true copy of the orders of Justice Judd dated 12 December 2012 in the Resolved Timbercorp Apportionment Proceedings.

84 In his reasons for judgment delivered on 12 December 2012, Justice Judd stated that:

88 One relevant consideration for the court on an application of this kind is to make some assessment of the participating growers' prospects of success in each proceeding so as to form a view about the likelihood of their obtaining a judgment for an amount significantly in excess of the settlement offer.

...

93 Had the decision of Davies J in the Almond Land Rights Proceeding been strictly applied, the participating growers would not have enjoyed any part of the proceeds of settlement.

...

102 It is always difficult for a court to make an assessment of litigants' prospects without the benefit of hearing all of the evidence and detailed submissions. But, as the secured creditors and representative growers submitted, this case had the

Elizabeth *Cliff Hilder*

unique feature of a decision of a judge at first instance in one proceeding that provided a readily applicable basis upon which a prediction may be made in the other proceedings. Perhaps more important is the very practical matter of the dependency of the schemes, and thus value for growers, on the solvency of the responsible entity and Timbercorp group as a whole. In the absence of a suitable replacement entity, with additional and substantial new funding, the schemes would fail, and the value of any investment made by the participating growers would be substantially lost. Viewed from that perspective, it is my firm view that the offer accepted by the representative growers in each of the deed of compromise exceeds all reasonable prospects of a better outcome if any of the proceedings were to be litigated.


- 103 The payment structure under each deed of compromise by which approximately 5% of the sale proceeds are set aside for the participating growers, to be allocated according to the number of agricultural lots acquired by a grower in each project, is practical, reasonable and fair. While the amounts differ from scheme to scheme, depending upon the proceeds realised from the sale of assets, the principle is uniform, logical and just.

(Emphasis added).

Now produced and shown to me and marked 'Exhibit CCH-25' is a true copy of Justice Judd's reasons for judgment in the Resolved Timbercorp Apportionment Proceedings dated 12 December 2012.

The Bella Vista Deed of Compromise

- 85 On 1 October 2013, on behalf of The Trust Company, my firm made a without prejudice settlement proposal to Macpherson + Kelley, acting on behalf of the Representative Growers, for the compromise of the Bella Vista Rights Proceeding. That proposal noted, among other things, that The Trust Company, as the secured creditor in both the Bella Vista Rights Proceeding and Supreme Court of Victoria Proceeding SCI 2013 1478 (the



Kangara Rights Proceeding) proposed a global resolution the proceedings on the basis that there would be a compromise of:

- (a) the Bella Vista Rights Proceeding; and
- (b) the Kangara Rights Proceeding.

86 This settlement proposal (insofar as it applied to the Bella Vista Rights Proceeding) was then the subject of negotiation between my firm, Macpherson + Kelley Lawyers, Arnold Bloch Leibler (the representatives of the Liquidators of TSL), Maddocks (the legal representatives of Align) and Norton Rose Fulbright (the legal representatives of the Receivers) until 14 January 2014, on which day the Bella Vista Deed of Compromise was executed by or on behalf of each of the parties to the Bella Vista Rights Proceeding and also on behalf of Align and TSL (Exhibit CCH-2).

87 Also on 14 January 2014, a deed of compromise for the Kangara Rights Proceeding was executed by or on behalf of each of the relevant parties and on behalf of Align and TSL. I refer in the balance of this affidavit to the deeds of compromise for the Kangara Rights Proceeding and this proceeding as, collectively, the **Deeds of Compromise**.

88 I outline in paragraphs 89 to 93 below, in general terms, the key features of the Bella Vista Deed of Compromise. Where, in these paragraphs, I refer to clause numbers, I am referring to the relevant clause number in the Bella Vista Deed of Compromise.

89 By clause 2, subject to the conditions precedent set out in clauses 3.1 and 3.2 being satisfied, the parties agree to compromise the Bella Vista Rights Proceeding by:

- (a) the making of the payments in accordance with clause 4; and
- (b) the giving of releases in accordance with clause 5

(the **Bella Vista Compromise**).

90 By clause 3.1, it is a condition precedent to the Bella Vista Deed of Compromise that, on or before 7 March 2014:



- (a) The Debenture Holders approve the Bella Vista Compromise in accordance with the procedure described in the Trust Deed; and
 - (b) the Debenture Holders approve the compromise the subject of the deed of compromise in the Kangara Rights Proceeding.
- 91 By clause 3.2, it is a condition precedent to the Bella Vista Deed of Compromise that, as soon as practicable after the condition precedent in clause 3.1 is satisfied, and on or before 30 June 2014:
- (a) the Court approve the Bella Vista Compromise in accordance with rule 16.01(4) of the Rules; and
 - (b) the Court approve the compromise the subject of the deed of compromise in the Kangara Rights Proceeding.
- 92 By clause 4, as soon as practicable after the condition precedent in clause 3 is satisfied:
- (a) the following payments will be made by the Receivers from the Net Sale Proceeds:
 - (i) the unpaid costs of the Receivers, as agreed by the Receivers and The Trust Company;
 - (ii) to TSL to be held on trust for Growers for distribution to, or on behalf of, Growers in accordance with their entitlements (as addressed further in sub-paragraphs (b) to (h) below), \$385,000 or approximately 5% of the gross sale proceeds of the subject assets (**Bella Vista Settlement Amount**); and
 - (iii) to The Trust Company, the balance of the Net Sale Proceeds;
 - (b) the Bella Vista Settlement Amount will be divided between Growers in the Table Grape Projects on a pro-rated basis according to the number of grapelots held by each such Grower on 2 June 2011 (being the date on which Growers' rights in

the Table Grape Projects were extinguished by the Liquidators of TSL). The amount payable per grapelot will be \$93.93. The entitlement of each Grower to the Bella Vista Settlement Amount, in accordance with the above, is defined as its ***Bella Vista Settlement Entitlement***);

(c) in respect of each Grower who is not recorded in the books and records of:

(i) Timbercorp Finance Pty Limited (in liquidation) (***TFL***) as owing amounts under an outstanding loan from TFL in connection with their investment in the Table Grape Projects (***TFL Indebtedness***); or

(ii) TSL as owing amounts to TSL (***Timbercorp Indebtedness***),

TSL will pay its Bella Vista Settlement Entitlement as soon as practicable to or at the direction of that Grower;

(d) subject to sub-paragraphs (e) to (h) below, any Grower who is recorded in the books and records of:

(i) TFL as having TFL Indebtedness:

(ii) TSL as having Timbercorp Indebtedness,

will be able (should they choose) to direct that their Bella Vista Settlement Entitlement is paid, in whole or in part, to TFL or TSL to pay, to the extent possible, its TFL Indebtedness or Timbercorp Indebtedness (as applicable);

(e) in respect of any Grower who has TFL Indebtedness and has directed TSL to pay its TFL Indebtedness, to the extent possible, out of its Bella Vista Settlement Entitlement (as the case may be), TSL will, as soon as practicable, use the Grower's Bella Vista Settlement Entitlement to pay, to the extent possible, the TFL Indebtedness as soon as practicable and remit the balance of the Grower's Bella Vista Settlement Entitlement (if any) to the Grower (or, if directed by the Grower, to TSL in payment of any Timbercorp Indebtedness);

- (f) in respect of any Grower who has TFL Indebtedness and has not directed TSL to pay any part of its Bella Vista Settlement Entitlement to TFL, TSL will hold that Grower's Bella Vista Settlement Entitlement on trust pending agreement between TFL and the Grower or court order as to whom it should be paid;
- (g) in respect of any Grower who has TFL Indebtedness and has directed TSL to use its Bella Vista Settlement Entitlement to pay only part of the Grower's TFL Indebtedness, TSL will, as soon as practicable, pay to TFL that part of the Grower's TFL Indebtedness and retain the balance of the Grower's Bella Vista Settlement Entitlement (if any) on trust pending agreement between TFL and the Grower or court order as to whom it should be paid; and
- (h) a Grower who has both TFL Indebtedness and Timbercorp Indebtedness may not direct TSL to pay all or part of their Timbercorp Indebtedness out of its Bella Vista Settlement Entitlement before there is an agreement in writing between TFL and the Grower, or a court order, about the manner in which the entitlement is to be disbursed.

93 By clause 5, upon satisfaction of the conditions precedent in clause 3 and the making of the payments in clause 4, each party will release all other parties from any further claim in relation to their entitlement to the Net Sale Proceeds or the allocation and disbursement of the Net Sale Proceeds.

Debenture Holder approval

- 94 I am informed by Mr Chris Volpe of The Trust Company and believe that, on 6 February 2014, The Trust Company issued a covering letter accompanied by a notice of meeting and explanatory memorandum, informing the Debenture Holders that a meeting to vote on special resolutions to approve the compromises in respect of the Bella Vista Rights Proceeding and the Kangara Rights Proceeding would be held on 28 February 2014. The covering letter and explanatory memorandum also directed Debenture Holders to the plaintiff's website <http://thetrustcompany.com.au/corporate/debt-capital-markets/timbercorp-orchard-trust/> on which, among other things, a frequently asked questions document was posted. The explanatory memorandum is not exhibited to this affidavit as it contains confidential legal advice provided to the Debenture Holders. Now produced and shown to me and marked '**Exhibit CCH-26**', '**Exhibit CCH-27**' and '**Exhibit CCH-28**' respectively, are true copies of the covering letter dated 6 February 2014, the notice of meeting dated 6 February 2014 and the frequently asked questions document.
- 95 On 28 February 2014, The Trust Company held the meeting of Debenture Holders at my firm's offices located at 101 Collins Street, Melbourne. I was present at the meeting. The meeting was convened for the purpose of considering and, if thought fit, passing the following resolutions as special resolutions:

Special Resolution 1: 'That the Compromise set out in clause 2 of the deed of compromise executed on 14 January 2014 in the Kangara Rights Proceeding is approved.'

Special Resolution 2: 'That the Compromise set out in clause 2 of the deed of compromise executed on 14 January 2014 in the Bella Vista Rights Proceeding is approved.'

Two handwritten signatures are present at the bottom of the page. The signature on the left is 'Elizabeth' and the signature on the right is 'Chris Hulse'.

- 96 In accordance with the Trust Deed and in satisfaction of the conditions noted in paragraph 90 above, the Debenture Holders passed the two special resolutions approving the Bella Vista Compromise and the compromise the subject of the Kangara Rights Proceeding at the meeting.

Communications with ASIC

- 97 By letter from Allens to ASIC dated 24 February 2014:

- (a) ASIC was informed of:

- (i) the background to the Bella Vista Rights Proceeding and the Kangara Rights Proceeding;
- (ii) the background to the Resolved Timbercorp Apportionment Proceedings;
- (iii) the status of the Bella Vista Rights Proceeding and the Kangara Rights Proceeding;
- (iv) the recently executed Deeds of Compromise and the conditions precedent to those deeds;
- (v) the proposed process for notification of the respective compromises to Growers in each of the Timbercorp managed investment schemes; and
- (vi) the proposed applications to be made to the Supreme Court, in accordance with rule 16.01(4) of the Rules, for approval of each compromise the subject of the Deeds of Compromise (together, the **Approval Applications**), and

- (b) confirmation was sought from ASIC as to:

- (i) whether ASIC wished to sight the Deeds of Compromise;

Elizabeth Chif/Hunter

- (ii) what level of involvement, if any, ASIC wished to have in the process of notification of the respective compromises to Growers in each of the relevant Timbercorp managed investment schemes;
- (iii) what level of involvement, if any, ASIC wished to have in overseeing the process by which the Representative Growers in each of the Bella Vista and Kangara Rights Proceedings address any comments, questions or objections raised by Growers in relation to the compromises, the Approval Applications or the individual circumstances of Growers;
- (iv) whether ASIC wished to participate in any directions hearing relating to the Approval Applications; and
- (v) whether ASIC wished to participate at the hearing of the Approval Applications to report to the Court on the above mentioned processes or in relation to any other matters concerning the compromises.

The letter was sent on behalf, and with the authority, of all the parties to each of the Bella Vista and Kangara Rights Proceedings and also TSL. Now produced and shown to me and marked 'Exhibit CCH-29' is a true copy of the letter from Allens to ASIC dated 24 February 2014.

98 By letter dated 26 February 2014 from ASIC to Allens in response to Allens' letter dated 24 February 2014, Mr Paul Eastment of ASIC informed the parties to the Bella Vista and Kangara Rights Proceedings and also TSL (among other things) that:

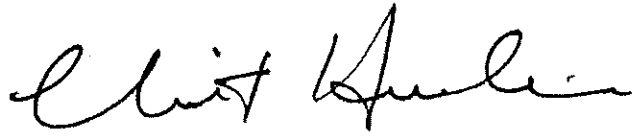
- (a) as the Bella Vista Rights Proceeding and the Kangara Rights Proceeding are currently the subject of Court proceedings, processes appeared to be in place for providing disclosure to growers and for dissenting growers to raise concerns with the Court;
- (b) ASIC did not consider it necessary to be involved in the processes, or to participate in the Approval Applications;



- (c) ASIC did not consider it necessary to sight the deeds of compromise; and
- (d) ASIC requested to be notified of any significant changes to the proposed compromise and of the outcomes of the Approval Applications.

Now produced and shown to me and marked 'Exhibit CCH-30' is a true copy of the letter from ASIC to Allens dated 26 February 2014.


SWORN by Clinton Charles Hinchon at



Melbourne in the State of Victoria this

21st day of March 2014

Before me



ELYSE KATE ADAMS
of 101 Collins Street, Melbourne
Victoria 3000
An Australian Legal Practitioner
within the meaning of the
Legal Profession Act 2004

SCHEDULE
INDEX OF EXHIBITS

Tab	Exhibit
1	<p>CCH-1, being a CD-ROM containing true copies of the project documents mentioned in paragraph 20, namely:</p> <p>1 The constitution for the 2004 Project dated 5 April 2004</p> <p>2 The constitution for the 2005 Project dated 22 March 2005</p> <p>3 Lease between Align and Timbercorp Limited for the 2004 Project dated 15 April 2004</p> <p>4 Lease between Align and Timbercorp Limited for the 2005 Project dated 28 April 2005</p> <p>5 Underlease between Timbercorp Limited and TSL for the 2004 Project dated 15 April 2004</p> <p>6 Underlease between Timbercorp Limited and TSL for the 2005 Project dated 28 April 2005</p> <p>7 Licence agreement between TSL and each Grower in the 2004 Project</p> <p>8 Licence agreements between TSL and each Grower in the 2005 Project</p>
2	CCH-2 , being a true copy of the Bella Vista Deed of Compromise
3	CCH-3 , being a true copy of the affidavit of Paul William Kirk sworn 22 December 2010, without exhibits
4	CCH-4 , being a true copy of the prospectus dated 24 October 2003
5	CCH-5 , being a true copy of the prospectus dated 5 May 2005
6	CCH-6 , being a true copy of the Trust Deed dated 17 October 2003
7	CCH-7 , being a true copy of the Charge over the assets of the Timbercorp Orchard Trust
8	CCH-8 , being a true copy of the Mortgage granted over the Bella Vista Property registered on 4 May 2005
9	CCH-9 , being a true copy of the Mortgage granted over the Bella Vista Property registered on 16 June 2006
10	CCH-10 , being a true copy of the Bella Vista Land Sale Contract
11	CCH-11 , being a true copy of the Victorian Water Sale Contract
12	CCH-12 , being a true copy of the New South Wales Water Sale Contract
13	CCH-13 , being a true copy of the judgment of Justice Davies in proceeding No SCI 2010 7029

	dated 7 February 2011
14	CCH-14 , being a true copy of the orders of Justice Davies in proceeding No SCI 2010 7029 dated 7 February 2011
15	CCH-15 , being a true copy of the orders of Justice Judd in the Bella Vista Rights Proceeding dated 19 July 2013
16	CCH-16 , being a true copy of the letter from Allens to Align dated 3 April 2013
17	CCH-17 , being a true copy of the email from Maddocks to Allens dated 8 April 2013
18	CCH-18 , being a true copy of the letter from Allens to Sandhurst dated 3 April 2013
19	CCH-19 , being a true copy of the email from Mr Frank O'Brien to Allens dated 23 April 2013
20	CCH-20 , being a true copy of the email from Mr Hayden Williams to Allens dated 5 December 2013
21	CCH-21 , being a true copy of the judgment of Justice Davies in the Almond Land Rights Proceeding dated 15 June 2011
22	CCH-22 , being a true copy of the orders of Justice Davies in the Almond Land Rights Proceeding dated 27 June 2011
23	CCH-23 , being a true copy of the affidavit of Mark Anthony Korda sworn 23 December 2010, without exhibits
24	CCH-24 , being a true copy of the orders of Justice Judd in the Resolved Timbercorp Apportionment Proceedings dated 12 December 2012
25	CCH-25 , being a true copy of the judgment of Justice Judd in the Resolved Timbercorp Apportionment Proceedings dated 12 December 2012
26	CCH-26 , being a true copy of the covering letter dated 6 February 2014
27	CCH-27 , being a true copy of the notice of meeting dated 6 February 2014
28	CCH-28 , being a true copy of the frequently asked questions document
29	CCH-29 , being a true copy of the letter from Allens to ASIC dated 24 February 2014
30	CCH-30 , being a true copy of the letter from ASIC to Allens dated 26 February 2014

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

List B

S CI 2013 01477

BETWEEN

THE TRUST COMPANY (NOMINEES) LIMITED (ACN 000 154 441)

Plaintiff

and

MICHAEL FUNG IN HIS CAPACITY AS RECEIVER AND MANAGER OF ALIGN FUNDS
MANAGEMENT LIMITED (RECEIVER AND MANAGER APPOINTED) (ACN 105 684 231) IN
ITS CAPACITY AS THE RESPONSIBLE ENTITY OF THE TIMBERCORP ORCHARD TRUST
AND ORS (ACCORDING TO THE SCHEDULE ATTACHED)

Defendants

CERTIFICATE IDENTIFYING EXHIBIT

Date of document: 21 March 2014

Filed on behalf of: The plaintiff

Prepared by:

Allens

Lawyers

101 Collins Street

Melbourne VIC 3000

Solicitor code: 21455

DX 30999 Melbourne

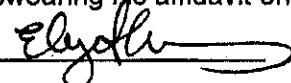
Tel 9614 1011 Fax 9614 4661

Ref CCHM:120339854

(Clint.Hinchen@allens.com.au)

This is the **Exhibit** marked '**CCH-1**' now produced and shown to **Clinton Charles Hinchen** at the time of swearing his affidavit on 21 March 2014.

Before me



ELYSE KATE ADAMS
of 101 Collins Street, Melbourne
Victoria 3000

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

**'CCH-1': a CD-ROM containing
true copies of the project
documents noted in paragraph
20 (documents 1 to 8)**

