

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

SCI 2013 01478

THE TRUST COMPANY (NOMINEES) LIMITED (ACN 004 134 441)

Plaintiff

and

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

Defendant

CERTIFICATE IDENTIFYING EXHIBIT

Date of document: 19 May 2014
Filed on behalf of: The Second and Third Defendants
Macpherson + Kelley
Lawyers
Level 22, 114 William Street
MELBOURNE VIC 3000

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This is the exhibit marked **YCH-22** now produced and shown to **YU-CHIAO HSUEH** at the time of affirming his affidavit on 19th May 2014.

Before me:

BEFORE ME.....
Madeleine Joanne Karipidis
An Australian Legal Practitioner
(within the meaning of the Legal Profession Act 2004)
Level 22, 114 William St, Melbourne Vic 3000

YCH-22

**Emails between Kerree Bezencon and Yu-chiao Hsueh
of M+K Lawyers dated 16 May 2014**

Hsueh, Yu-chiao

From: Kerree Bezencon <kerree@siger.com.au>
Sent: Friday, 16 May 2014 3:58 PM
To: Hsueh, Yu-chiao
Subject: RE: statement for court

there is another following Yu-chiao along similar lines with the cashflows etc

Kerree Bezencon

B.Ec (Accounting & Finance),
ASIA (Grad Dip Applied Finance & Investment),
CPA(Certified Practising Accountant) PFP (Specialist in Financial Planning),
CFP (Certified Financial Planner),
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From: Hsueh, Yu-chiao [mailto:Yu-chiao.Hsueh@mk.com.au]
Sent: Friday, 16 May 2014 3:45 PM
To: 'Kerree Bezencon'; nick@nickstretchlegal.com.au
Cc: Fernon, Michael
Subject: RE: statement for court

Thank you Kerree.

We will make sure this is produced to the Court.

Yu-chiao Hsueh
Senior Associate

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VICTORIA | NEW SOUTH WALES | TASMANIA | QUEENSLAND

From: Kerree Bezencon [mailto:kerree@siger.com.au]
Sent: Friday, 16 May 2014 3:22 PM
To: Hsueh, Yu-chiao; nick@nickstretchlegal.com.au
Subject: statement for court

I, Kerree Anne Bezencon, of 953 Don Road, Healesville in the State of Victoria, Accountant, state

1. I make this in support of myself and the TGG Citrus Committee Inc in this proceeding and am authorised to do so on behalf of the TGG Citrus Committee Inc
2. Except where I otherwise indicate, I make this application from my own knowledge. Where I depose to matters from information or belief, I believe those matters to be true.

3. The purpose of this is to object to the compromise in relation to the citrus growers and to allow the arguments for these growers rights to be contended and addressed in a later hearing with an appropriately qualified contradictor in place and being funded by the proceeds similar to the other parties. The arguments are not the same as the almond case, and as assumed in the more recent 2005 citrus case..
4. An Entity of which I am a director is a member (usually referred to as a grower) in the 2005 Timbercorp Citrus Project (ASRN.....) (**Scheme**). I personally am also a grower in various almond and olive schemes. I have been the accountant for approximately 30 other growers in various Timbercorp Projects.
5. I am currently on the Committee of Inspection to represent growers views to the liquidators
6. I am also the chairperson of the TGG Citrus Committee Inc and other TGG Committees (**Committees**), which are incorporated associations formed for the sole purpose of representing growers in the Timbercorp Projects and of seeking to secure and advance the growers' interests.
7. In particular, the constitution of the Committee states that the purposes of the Committee are:
 - " 1. *To seek representation on behalf of Growers involved in the Timbercorp Managed Investment Schemes that are managed by the responsible entity known as Timbercorp Securities Limited, which is now in liquidation.*
 2. *To facilitate meetings with Growers to provide updates relating to the status of their projects and to also seek their opinions on the relevant issues involved.*
 3. *To seek funds from the above Growers and their financial advisers to provide payment for such representation. In addition such funds would also be available to reimburse committee members for such outlays as interstate travel (by Senior Committee Members), postage, phone and other incidental out of pocket expenses.*
 4. *Such representation would include legal, financial and independent expert advice to pursue outcomes to seek to secure and advance Grower's interests in these projects. Such advice sought would be to provide Growers with potential options regarding the legal and financial structures that may be able to be applied to these projects.*
 5. *To communicate on behalf of Growers with the current administrator of these projects, (Korda Mentha) and any other relevant stakeholders.*
 6. *To provide an ongoing communication role to keep Growers and their financial advisers updated on the performance of their projects.*

7. *To consider the establishment of a web site for Grower updates."*

8. The other senior committee members of the Committee were growers or financial planners with clients who were growers in the Timbercorp Projects.
9. As chairperson of the Committee, I am also in regular email and/or telephone contact with approximately 1,800 financial advisers and accountants who obtain views from their grower clients and communicate them to me. We have a database covering over 80% of growers and 96% of citrus growers with whom we are in contact.

CLARENDONS NOT REPRESENTATIVE OF GROWERS INTERESTS

10. Neither the Clarendon representatives have been involved in any of the proceedings nor shown any interest in citrus growers projects, grower representative action groups and Committees and cannot be said to represent them. It is unlikely therefore that representative growers reflects the sentiment of all the other growers, whereas the TGG Citrus Committee do.

THE DEBATE & JUSTICE

11. I have represented growers and attended many of the court hearings and have observed something of the way the legal system operates. I do not possess the legal knowledge of a solicitor nor the eloquence of barristers.
12. All those present in court appear to know the rules of this "debating game" and I am at a severe disadvantage. Please excuse my lack of ability in this presentation, and if I offend it is not intentional.
13. It appears to me as an onlooker, as a game of words, something like a school debate run at a higher level. The debaters can take either side and argue the merits of that side, and tomorrow may argue the exact opposite. The best debater, the most eloquent and forceful debater wins. The bar table is a friendly table at which adversaries today may well be working with each other tomorrow. I should not be affronted that in the face of utterly serious and life threatening decisions, jokes are made and banalities are discussed amongst the debaters - it seems to bring some calmness and some ordinariness/ sanity to their world of words. But it deeply upsets those of us who are the victims, whose voice is totally dependent on the barristers voice and conviction.
14. No morality about the position is taken.
15. It appears that in all this game of words, in all this debating, the truth is lost and often not even sought- it is a sadly forgotten player. Yes - I can see that it is the game that is all important. Who will win the war of words - that is the focus amongst this crawling ant-hill of lawyers & barristers. Once debated, we can all go home or across the road for a beer or wine and start all over again on Monday. Life goes on.
16. Whilst this might be understandable, I stand to implore a different approach. I stand to ask you all, and you Justice Judd in particular to see past the debate game to the very plight of many growers who I have spoken to and who seem bewildered to continually get the short straw in the argument. Where is justice they ask?
17. I understood that the law comprises of not just the rules of legislation but also is made on the hop as it were, by new and good arguments that can be developed as new law emerges with

changed circumstances and arguments. Many of the cases that create a precedent are based, I think, on new ways of looking at things especially in relation to the law of equity/justice.

18. I implore you - who know the game - to look through my totally inadequate abilities in this regard and seek that rare essence of justice and equity - and help the argument that might be presented somewhat in an unsophisticated manner but has merit and can, with help be developed.

MOTIVATION

19. I do believe that one should not just do the right thing, but we should raise the bar and do it for the right motivation. If you do the right thing because it is only because of fear of being caught for doing otherwise, that's the lowest standard to adopt. If you give a gift to help someone because it makes you feel good about your generosity that's only slightly better. If you do it with the motive that it's the best thing for the other, then we will have achieved the ultimate - it is that approach that I am pleading with you to adopt
20. So that I am transparent, I note that all the players in this debate are being rewarded for their efforts and being well paid, I am not receiving any payment for this affidavit - in fact all this is costing me - in both time and money.
21. There is obviously certainly a self-interested motive by all the debaters to make money. This is not unreasonable, but I here really urge you all to make this NOT the primary motive - there is no test, only your heart will know the truth. Only you will know what you will tell your children/wife about your day, when you reach home.
22. Lastly, there is a choice, between doing good and doing just a job and this choice rests with you - the consequences to the growers dire - some will lose their homes, their retirement dreams, their kids education, their sanity - more than one is deeply depressed with little hope to redo their lives

TAX, GROWERS BEST INTERESTS & ACCESS TO INFORMATION

23. One of the greatest misconceptions is that all growers invested all in the name of tax. Our experience and data files indicate that the majority of investors were super funds where the tax advantage is minimal. They invested because of the annuity like income stream that suited very well the long-term time frame of superannuants - some 20-30 years.
22. There has been much talk about "the best interests of the growers." Many have decided that growers are voiceless, powerless or need to be patronised, they are often given little information while the lawyers or liquidators decide what is in the growers best interest. But these are accountants or lawyers who are generally conservative people, deciding our fate, always looking for so-called "certainty," according to court affidavits - and prefer certainty, even where it is the certainty of nothing. How is that in our best interests?
22. The growers however are not conservative and did not chose certainty when investing in agriculture - one of the most volatile investments of all - in that it varies greatly from the standard mean, much like equities. Over long-term time frames the probability of a loss in such volatile assets approaches zero according to actuaries. Adding to this, this asset class is very much uncorrelated to other assets classes and is regarded as aiding the diversity and minimising the risks of a model portfolio.

24. Thus, many of us took a calculated risk with these investments. Many appreciated the issues after reading in the PDS about the various risks that we might face - of climate, pest, water, AUD dollar, price variations, operating costs variations etc (forgetting here the issue of the one risk generally not highlighted of the RE going into liquidation) We are grown-ups, we made choices and we need to be given the same degree of information required at the time of investing as now with the "compromise".

INFORMATION ACCESS

25. This is clearly not the case at present. Too many hurdles are being put there to be able to easily access information. The initial letter from Clarendons carries no explanations whatsoever, but refers one onto 3 website - Clarendons, ABL & Timbercorp Korda Mentha - to get further information. Those people not computer literate or without net access are severely disadvantaged.
26. The grower must then scroll through then print out the various documents They are certainly not contained in just one document for these interests, like a PDS. Then he/she must read them - well over a ream of documents.
27. If they want to know the Barristers view, they must contact the 3 companies, find out the appropriate person, speak with them and request the document.
28. First they must read, understand, talk to a lawyer about signing a confidentiality agreement. Then after all that, and several days they might get the information - to read and digest, difficult without all the background.
29. Then they must go back into the web-site documents again, and find the phone number and/or the email address to lodge an objection. This all takes time and is not self evident and just makes it all too hard.

NO ALTERNATE/CONTRARY VIEWS AIRED & CRITICAL INFO MISSING & NO DEBATE ABOUT THE BASIS FOR 5%

30. They have not been provided with alternate views and the reasoning behind such.
31. Critical cash flow analysis is missing. Debate as to these pros and cons is therefore also missing.
32. No information is given about the basis for agreeing to the 5%- why should it be on a seeming proportion of sale proceeds - why not on the basis of the investment made by growers or some other point? Why just rubber stamp and repeat other decisions, without any debate.

PROJECTS ARE NOT ALL THE SAME - CITRUS GROWERS

33. All projects are not the same. The structures do vary with each one and whilst there may be similarities, the total end picture can and is quite different - this should be acknowledged without using blanket rules applying 5% of sale proceeds to all projects.
34. There is much at stake for growers in the citrus projects. No viability analysis has been done by any judge to ascertain if these projects are different to the almonds. To lump them together is a gross injustice. To not hear the arguments for their viability and understand the cash flows is unjust
35. Different locations and different farm properties yield different results.

36. Different produce yield different results - citrus, olives and almonds have very different factors.
37. Different marketers, their marketing and distributions yields different results.
38. Different operating costs yield different results
39. Different factors in the contracts yield different results. Different structures yield different results and inter-entity relationships
40. Different constitutions yield different results
41. Different arguments can be mounted for each project, yielding different results
42. Lumping them altogether simply does not do justice to the outcomes to growers
43. Citrus should have the same opportunity with a contradictor to present their significantly different arguments regarding the growers rights

04 & 05 CITRUS GROWERS

44. The Citrus growers in 05 share the property with 04 citrus growers, some 330 growers in all on our database.
45. Korda Mentha has never convened a meeting of citrus growers to discuss their options as was done for the almond and olive growers.
46. No airing of differing views has been provided to grower/members of the Scheme to consider the alternatives that might be argued and enable the growers to be fully informed of the alternate views and object to the "compromise" 5%

LACK OF INFORMATION & RESOURCES

47. Despite court orders and though we represent significant numbers of growers, we have not received critical information on time.
48. Clarendons have not involved the TGG Citrus in the process of the growers rights issues, except for 2 short inadequate phone calls and we have clearly not been given any opportunity to participate in relation to the "compromises"
49. The TGG committees are severely disadvantaged and under-resourced to be able to legally insist on having access to this information. We are at a severe disadvantage to be able to present our case - and lacked the requisite legal basis and time to argue many aspects. Lack of time and the expertise and resources has meant we are often disadvantaged and late.
50. We want our voice heard and appropriate representation based on an "even playing field". We will answer and provide any evidence that might be required, and seek any guidance in this respect, not being lawyers, but we require funding to appear.

NO URGENCY

51. As there is no pressing urgency, no crops are about to die (as if they ever were with crop sale agreements in place) we request that the citrus proceedings regarding growers entitlements are deferred until appropriate representation can be organised and funding in place..
52. My motivation is to seek a just outcome where growers and the court are informed and given the information to make proper decisions and present the best argument for the project. We would want every opportunity to present complete and thorough analysis of the projects to the court in regards particularly to the viability of the growers projects

Regards

Kerree Bezencon

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