

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

LIST D
S CI 2011 6606

BETWEEN

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522)

Plaintiff

and

OIM#2 PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) AS
TRUSTEE FOR TIMBERCORP ORCHARD TRUST #2 and others (according to the schedule
attached)

Defendants

AFFIDAVIT OF ALAN DAVID FISHER

Date sworn: 20 September 2012
Filed on behalf of: The First Defendant
Prepared by:
Maddocks
Lawyers
140 William Street
Melbourne VIC 3000

Solicitor's Code: 230
DX 259 Melbourne
Tel: (03) 9288 0555
Fax: (03) 9288 0666
Ref: 5885065.001
Attention: Philip Jones
E-mail Address: philip.jones@maddocks.com.au

I, Alan David Fisher of 4 Parkview Road, Brighton East, Victoria, company director, make oath and
say as follows:

1. I am a director of the First Defendant, OIM#2 Pty Ltd (Receivers and Managers Appointed) (ACN 112 691 997) (**OIM#2**) as trustee for Timbercorp Orchard Trust #2 (**TOT#2**). I am authorised to make this affidavit on behalf of OIM#2.
2. I make this affidavit from my own knowledge except where otherwise indicated. Where I depose to matters on the basis of information and belief, I believe those matters to be true.
3. I have read the affidavits of Clinton Charles Hinchin sworn on 5 December 2011 (**First Hinchin Affidavit**) and on 19 September 2012 in this proceeding (**Second Hinchin Affidavit**). At paragraphs 30 to 33 of the First Hinchin Affidavit and paragraph 41 of the



Second Hinchon Affidavit, Mr Hinchon deposes correctly that the directors of OIM#2, are representing the interests of that company for the purpose of the present proceeding, with the consent of the Second and Third Defendants.

4. Except where I state otherwise, defined terms used in this affidavit have the meaning ascribed to them in the Second Hinchon Affidavit.
5. On 25 July 2012, the parties to this proceeding, including the First Defendant executed a deed of compromise to effect a compromise of the proceeding subject to certain conditions, including approval of the compromise by the Court in accordance with rule 16.01(4) of the Rules. A copy of the deed of compromise is exhibit **CCH-2** to the Second Hinchon Affidavit.

Purpose of this affidavit

6. This affidavit is made in support of the Plaintiff's summons dated 27 August 2012 by which, among other things:
 - (a) in accordance with Rule 16.01(4) of the *Supreme Court Rules*, application is made to the Court for approval of the compromise of the Solara Rights Proceeding reached between the parties to this proceeding; and
 - (b) in accordance with rule 54.02 of the Rules, application is made to the Court for approval of the First Defendant's agreement to the compromise of the Solara Rights Proceeding reached between the parties to this proceeding.

OIM#2

7. By deed poll dated 25 February 2005, being the TOT#2 constitution, OIM#2 undertook to hold all the assets of TOT#2 on trust for the benefit of unitholders in TOT#2, subject to the powers and provisions set out in the TOT#2 constitution. Now produced and shown to me marked **ADF-1** is a true copy of the TOT#2 Constitution, as amended.

Timbercorp Primary Infrastructure Fund

8. I have read the affidavit of David Laurence McEvoy sworn 25 January 2010 in Supreme Court of Victoria proceeding number 398 of 2010 (**McEvoy Affidavit**). As at the date of the McEvoy Affidavit and at all times to the date of this affidavit, TOT#2 was a wholly owned sub-trust of the Timbercorp Primary Infrastructure Fund (ARSN 116 024 830) (**TPIF**) (formerly known as Timbercorp Agribusiness Trust). Now produced and shown to me marked **ADF-2** is a true copy of the unit register of TOT#2.
9. TPIF is a property trust, which at the date of the swearing of the McEvoy Affidavit was a property trust listed on the Australian Stock Exchange (**ASX**). Units in TPIF were suspended from listing with the ASX in April 2009. The responsible entity of TPIF is and at all times has been Align Funds Management Limited (formerly known as Orchard Investments Management Limited), of which I am also chairman and director.
10. TPIF conducted a series of 3 capital raisings by issuing bonds on either 30 September 2005 or 26 May 2006 (**TPIF Bonds**). The TPIF Bonds on issue have a total face-value of \$31,850,000 and have generally accrued interest since the date of issue at a fixed interest rate of 8.65%, 9.00% and 9.50% respectively.
11. The TPIF Bonds are secured by, amongst other things, a fixed and floating charge (**Bondholders' Charge**) over the assets of TPIF granted to Trust Company Limited (formerly Permanent Trustee Company Limited) (**Trust Company**) under clauses 4.1 and 4.2 of a Bond Trust Deed dated 30 September 2005, as amended (**Bond Trust Deed**), and held for the benefit of bondholders pursuant to the Bond Trust Deed. Now produced and shown to me marked **ADF-3** is a true copy of the Bond Trust Deed.
12. On 17 September 2009 Trust Company gave notice under clause 4.7 of the Bond Trust Deed to Align Funds Management Limited, in its capacity as responsible entity for TPIF, that the Bondholders' Charge had crystallised for reasons including the appointment of



receivers described in paragraphs 21 and 22 of the Second Hinchin Affidavit. Now produced and shown to me marked **ADF-4** is a true copy of the notice of crystallisation provided by Trust Company to Align Funds Management Limited.

Landowner of the Solora Property

13. As set out in paragraphs 12 to 20 of the Second Hinchin Affidavit, the Citrus Project was carried out on the Solora property pursuant to a suite of project documents, lease or underlease agreements and licence agreements.
14. As noted by Mr Hinchin in paragraph 15 of the Second Hinchin Affidavit, OIM#2 was the registered owner of the Solora property in its capacity as trustee of TOT#2 together with certain water rights described in paragraph 9 of the McEvoy Affidavit. The Solora property is as described in paragraph 8 of the McEvoy Affidavit.

Proceeds of sale of the Properties

15. The background to the sale of the Properties is more fully set out by Mr Hinchin in paragraphs 21 to 35 of the Second Hinchin Affidavit. As noted by Mr Hinchin in paragraphs 29 to 35 of the Second Hinchin Affidavit, the proceeds of sale of the Properties are being held on trust by the Second and Third Defendants in interest bearing accounts pursuant to the 26 February 2010 Orders (**Proceeds Accounts**).

Secured Debt

16. Given the matters set out in paragraphs 24 to 28 of the Second Hinchin Affidavit, I believe that the Plaintiff claims a secured debt against the Solora property (**Secured Debt**).
17. I have also read the affidavit of Clinton Charles Hinchin sworn on 19 September 2012 in the Liparoo and Yungera Rights Proceeding (**Second Hinchin Liparoo Affidavit**). Given the matters set out in paragraph 29 of the Second Hinchin Liparoo Affidavit, I believe that



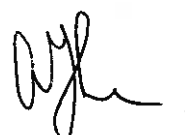

the Plaintiff claims that the Secured Debt is cross-collateralised by a guarantee given by the First Defendant in this proceeding (**Cross-Collateralised Debt**).

Landowner's interest in the Net Sale Proceeds

18. As Mr Hinchin deposes at paragraphs 25 and 26 of the Second Hinchin Affidavit and paragraph 29 of the Second Hinchin Liparoo Affidavit, the accrual of interest (including default interest) and (as applicable) fees charged by the Plaintiff on the Secured Debt and the Cross-Collateralised Debt, continues to erode the potential entitlement of any unsecured creditors, should there be a surplus of net sale proceeds after payment of the Secured Debt and the Cross-Collateralised Debt. When taken together with other arrangements concerning the interest earned on the Net Sales Proceeds, there is a net reduction in the balance of the Net Sales Proceeds available for distribution, including to the First Defendant as landowner. I am informed by Mr Andrew Ashbolt, the internal accountant/company secretary of TPIF, and believe that the amount of the Net Sales Proceeds available for distribution after repayment of the Secured Debt continues to decline and the potential call on the Cross-Collateralised Debt continues to increase.

Execution of deed of compromise by OIM#2 and OIM#5

19. OIM#2 participated in the negotiations set out in paragraph 71 of the Second Hinchin Affidavit and executed the Deed of Compromise in the Solara Rights Proceedings having considered:
- (a) the issues raised in paragraphs 46 to 69 of the Second Hinchin Affidavit and the continuing erosion of potential surplus from the Net Sale Proceeds (or continuing increase in any potential call on the Cross-Collateralised Debt) after repayment of the Secured Debt (as noted at paragraph 18 above);
 - (b) advice from the companies' solicitors;



- (c) all other relevant issues; and
- (d) that the execution of the Deed of Compromise in the Solara Rights Proceedings was within the powers of OIM#2, acting in its capacity as trustee of TOT#2, as set out in clause 16.1 of the TOT#2 Constitution.

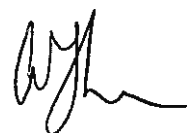
20. The directors of OIM#2 ultimately considered that it was in the best interests of all TPIF stakeholders that OIM#2 in its capacity as trustee of TOT#2 execute the Deed of Compromise in the Solara Rights Proceeding.

Distribution of any funds received by OIM#2

- 21. Assuming that the Receivers and Managers of TOT#2 are removed following repayment of the Secured Debt, any funds received by OIM#2 in its capacity as trustee of TOT#2 will be used to pay creditors of TOT#2.
- 22. In the event that there are any assets remaining in TOT#2 after payments to creditors, these assets will be distributed to TPIF. Given the arrangements set out in paragraphs 8 to 12 above, holders of TPIF Bonds have a secured interest in the assets of TPIF.
- 23. The financial report of TPIF for the year ended 30 June 2011 (**2011 Financial Report**) records the following statement under the heading 'Likely developments':

Due to continuing borrowing costs being incurred by the [TPIF] Group, and irrespective of the outcome of the legal entitlement of Timbercorp Growers to the net proceeds from the sale of the [TPIF] Group's properties, there will be insufficient funds to pay the liabilities due to the secured TPIF bond holders. Accordingly, unit holders in [TPIF] will not receive any further distributions or any return of capital.

From a review of the financial records of the TPIF, I believe that the position outlined in the 2011 Financial Report in respect of any payment to holders of TPIF Bonds remains correct. Consequently, irrespective of the outcome of the Approval Applications, I do not believe that unitholders in TPIF will receive any of the Net Sale Proceeds.

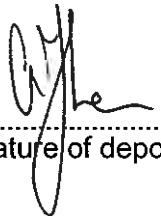



Now produced and shown to me marked **ADF-5** is a true copy of the 2011 Financial Report.

SWORN

at Melbourne
in the State of Victoria
on 20 September 2012

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Signature of deponent

Before me:


Signature of person taking affidavit

STEVEN MICHAEL TANG
140 William St Melbourne 3000
An Australian Legal Practitioner
within the meaning of the
Legal Profession Act 2004

SCHEDULE

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

S CI 2011 6606

List D

BETWEEN

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522)

Plaintiff

and

**OIM#2 PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) AS
TRUSTEE FOR TIMBERCORP ORCHARD TRUST #2**

First Defendant

and

**MICHAEL FUNG IN HIS CAPACITY AS RECEIVER AND MANAGER OF OIM#2 PTY LTD
(RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) IN ITS CAPACITY AS
TRUSTEE FOR TIMBERCORP ORCHARD TRUST #2**

Second Defendant

and

**PAUL WILLIAM KIRK IN HIS CAPACITY AS RECEIVER AND MANAGER OF OIM#2 PTY LTD
(RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) IN ITS CAPACITY AS
TRUSTEE FOR TIMBERCORP ORCHARD TRUST #2**

Third Defendant

and

**ROBERT BUGDEN AND ELIZABETH BUGDEN (AS THE REPRESENTATIVES OF THE
GROWERS IN THE 2005 TIMBERCORP CITRUS PROJECT (ARSN 114 091 299))**

Fourth Defendant