

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

LIST D
S CI 2011 6604

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 #3 and others (according to the schedule
attached)

Defendants

AFFIDAVIT OF ALAN DAVID FISHER

Date sworn: 20 September 2012

Filed on behalf of: The First and Second Defendants

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: 5885053.001

Attention: Philip Jones

Email: 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 both the First Defendant, OIM#2 Pty Ltd (Receivers and Managers Appointed) (ACN 112 691 997) (**OIM#2**) as trustee for Timbercorp Orchard Trust #3 (**TOT#3**) and the Second Defendant, OIM#5 Pty Ltd (Receivers and Managers Appointed) (ACN 112 691 997) (**OIM#5**) as trustee for Timbercorp Orchard Trust #5 (**TOT#5**). The composition of the board of directors of OIM#2 is identical to that of OIM#5.
I am authorised to make this affidavit on behalf of OIM#2 and OIM#5.
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 34 to 37 of the First Hinchin Affidavit and paragraph 47 of the Second Hinchin Affidavit, Mr Hinchin deposes correctly that the directors of OIM#2 and OIM#5, are representing the interests of those companies for the purpose of the present proceeding, with the consent of the Third and Fourth Defendants.
4. Except where I state otherwise, defined terms used in this affidavit have the meaning ascribed to them in the Second Hinchin Affidavit.
5. On 25 July 2012, the parties to this proceeding, including the First and Second Defendants 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 Hinchin 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 Liparoo and Yungera 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 and second defendants' agreement to the compromise of the Liparoo and Yungera Rights Proceeding reached between the parties to this proceeding.



OIM#2 and OIM#5

7. By deed poll dated 9 September 2005, being the TOT#3 constitution, OIM#2 undertook to hold all the assets of TOT#3 on trust for the benefit of unitholders in TOT#3, subject to the powers and provisions set out in the TOT#3 constitution. Now produced and shown to me, marked **ADF-1** is a true copy of the TOT#3 Constitution.
8. By deed poll dated 23 February 2006, being the TOT#5 Constitution, OIM#5 undertook to hold all the assets of TOT#5 on trust for the benefit of unitholders in TOT#5, subject to the powers and provisions set out in the TOT#5 Constitution. Now produced and shown to me marked **ADF-2** is a true copy of the TOT#5 Constitution.

Timbercorp Primary Infrastructure Fund

9. I have read the affidavit of David Laurence McEvoy sworn 27 November 2009 in Supreme Court of Victoria proceeding number 10382 of 2009 (**McEvoy Affidavit**). As at the date of the McEvoy Affidavit and at all times to the date of this affidavit, both TOT#3 and TOT#5 were wholly owned sub-trusts of the Timbercorp Primary Infrastructure Fund (ARSN 116 024 830) (formerly Timbercorp Agribusiness Trust) (**TPIF**). Now produced and shown to me marked **ADF-3** are true copies of the unit registers of TOT#3 and TOT#5.
10. 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.
11. 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.



12. 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 (**Bond Trust Deed**), and held for the benefit of bondholders pursuant to the Bond Trust Deed, and held for the benefit of bondholders pursuant to the Bond Trust Deed. Now produced and shown to me marked **ADF-4** is a true copy of the Bond Trust Deed.
13. 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 23 to 25 of the Second Hinchin Affidavit. Now produced and shown to me marked **ADF-5** is a true copy of the notice of crystallisation provided by Trust Company to Align Funds Management Limited.

Landowners of the Liparoo and Yungera Properties

14. As set out in paragraphs 12 to 22 of the Second Hinchin Affidavit, the Almond Projects were carried out on the Liparoo property and Yungera property pursuant to a suite of project documents, lease or sub-lease agreements and licence and joint venture agreements.
15. As noted by Mr Hinchin in paragraph 15 of the Second Hinchin Affidavit:
- (a) OIM#2 was the registered owner of the Liparoo property in its capacity as trustee of TOT#3 together with certain water rights described in paragraph 11 of the McEvoy Affidavit. The Liparoo property is as described in paragraph 10 of the McEvoy Affidavit.



- (b) OIM#5 was the beneficial owner of the Yungera property in its capacity as trustee of TOT#5 together with the water rights described at paragraph 17 of the McEvoy Affidavit. The Yungera property is as described in paragraph 16 of the McEvoy Affidavit.

Proceeds of sale of the Properties

16. The background to the sale of the Properties is more fully set out by Mr Hinchin in paragraphs 23 to 41 of the Second Hinchin Affidavit. As noted by Mr Hinchin in paragraphs 33 to 41 of the Second Hinchin Affidavit, the proceeds of sale of the Properties are being held on trust by the Third and Fourth Defendants in interest bearing accounts pursuant to the 11 December 2009 Orders (**Proceeds Accounts**).

Secured Debt

17. Given the matters set out in paragraphs 23 to 32 of the Second Hinchin Affidavit, I believe that the Plaintiff claims a secured debt against the Liparoo property and the Yungera property (**Secured Debt**).
18. I have also read the affidavit of Clinton Charles Hinchin sworn on 19 September 2012 in the Solara Rights Proceeding (**Second Hinchin Solara Affidavit**). Given the matters set out in paragraphs 24 to 28 of the Second Hinchin Solara Affidavit I believe that the Plaintiff claims a secured debt against the Solara property which, based on the matters set out in paragraph 29 of the Second Hinchin Affidavit, is cross-collateralised by a guarantee given by the First Defendant in this proceeding (**Cross-Collateralised Debt**).

Landowners' interest in the Net Sale Proceeds

19. As Mr Hinchin deposes at paragraphs 28 to 30 of the Second Hinchin 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 and Second Defendants 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 is currently declining by the amount of approximately \$590,000 per month.

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

20. OIM#2 and OIM#5 participated in the negotiations set out in paragraph 96 of the Second Hinchin Affidavit and executed the Deed of Compromise in the Liparoo and Yungera Rights Proceedings having considered:

- (a) the issues raised in paragraphs 54 to 95 of the Second Hinchin Affidavit and the continuing erosion of potential surplus from the Net Sale Proceeds after repayment of the Secured Debt (as noted at paragraph 19 above);
- (b) advice from the companies' solicitors;
- (c) all other relevant issues; and
- (d) that the execution of the Deed of Compromise in the Liparoo and Yungera Rights Proceedings was within the powers of OIM#2, acting in its capacity as trustee of TOT#3, as set out in clause 16.1 of the TOT#3 Constitution including and within the powers of OIM#5, acting in its capacity as trustee of TOT#5, as set out in clause 16.1 of the TOT#5 Constitution.

21. The directors of OIM#2 and OIM#5 ultimately considered that it was in the best interests of all TPIF stakeholders that OIM#2 in its capacity as trustee of TOT#3 and OIM#5 in its



capacity as trustee of TOT#5 execute the Deed of Compromise in the Liparoo and Yungera Rights Proceeding.

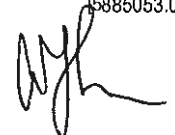
Distribution of any funds received by OIM#2 and OIM#5

22. Assuming that the Receivers and Managers of each of TOT#3 and TOT#5 are removed following repayment of the Secured Debt, any funds received by OIM#2 in its capacity as trustee of TOT#3 or OIM#5 in its capacity as trustee of TOT#5 will be used to pay creditors of TOT#3 and TOT#5 respectively.
23. In the event that there are any assets remaining in either or both TOT#3 and TOT#5 after payments to creditors, these assets will be distributed to TPIF. Given the arrangements set out in paragraphs 9 to 13 above, holders of TPIF Bonds have a secured interest in the assets of TPIF.
24. 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-6** 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 6604

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 #3**

First Defendant

and

**OIM#5 PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ACN 118 204 701) AS
TRUSTEE FOR TIMBERCORP ORCHARD TRUST #5**

Second 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 #3 AND RECEIVER AND MANAGER OF
OIM#5 IN ITS CAPACITY AS TRUSTEE FOR TIMBERCORP ORCHARD TRUST #5**

Third 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 #3 AND RECEIVER AND MANAGER OF
OIM#5 IN ITS CAPACITY AS TRUSTEE FOR TIMBERCORP ORCHARD TRUST #5**

Fourth Defendant

and

**GRAHAM DACE (AS THE REPRESENTATIVE OF THE GROWERS IN THE 2001 TIMBERCORP
ALMOND PROJECT (ARSN 095 649 746))**

Fifth Defendant

and

**GRAHAM GOLDENBERG (AS THE REPRESENTATIVE OF THE GROWERS IN THE 2002
TIMBERCORP ALMOND PROJECT (ARSN 099 611 935))**

Sixth Defendant

and

**GORAN RUNJE (AS THE REPRESENTATIVE OF THE GROWERS IN THE 2003 TIMBERCORP
ALMOND PROJECT (ARSN 103 197 299))**

Seventh Defendant

and

**GRAEME PHILIP COLE (AS THE REPRESENTATIVE OF THE GROWERS IN THE 2004
TIMBERCORP ALMOND PROJECT (ARSN 108 336 670))**

Eighth Defendant

and

**CHRISTOPHER MARK LITTLEY (AS THE REPRESENTATIVE OF THE GROWERS IN THE
2005 TIMBERCORP ALMOND PROJECT (ARSN 112 935 092))**

Ninth Defendant

and

**DAVID BUTTERFIELD (AS THE REPRESENTATIVE OF THE GROWERS IN THE
UNREGISTERED MANAGED INVESTMENT SCHEME KNOWN AS THE 2002 TIMBERCORP
ALMOND PROJECT (PRIVATE OFFER NO. 1))**

Tenth Defendant