

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

List D

No. 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 & ORS (according  
to the attached Schedule)

Defendants

THIRD AFFIDAVIT OF CELIA JANE ARMSTRONG

Date of document:  
Filed on behalf of:  
Prepared by:  
Clarendon Lawyers  
Level 17, Rialto North Tower  
525 Collins Street  
MELBOURNE VIC 3000

September 2012  
the Fourth Defendant

Tel: 03 8681 4400  
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Solicitors Code: 101294  
Ref: MJF:1100563

michael.fernon@clarendonlawyers.com.au

I, **CELIA JANE ARMSTRONG** of Level 17, Rialto North Tower, 525 Collins Street, Melbourne, make oath and say that:

- 1 I am an employee of the firm Clarendon Lawyers Pty Ltd (**Clarendon Lawyers**), the solicitors for the Fourth Defendant, being the Representative Growers in this proceeding. Subject to the supervision of my principal, Michael Fernon, I have the carriage of this matter on behalf of the Representative Growers and I am authorised to make this affidavit on their behalf.
- 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.
- 3 This is my third affidavit in connection with the application for approval of the Deed of Compromise entered into by the parties to the proceeding and TSL on 25 July 2012 (**Deed of Compromise**). My first and second affidavits were each sworn on 30 August 2012 and filed in this proceeding on that day. They were headed, respectively, "Affidavit of Celia Jane Armstrong" and "Second Affidavit of Celia Jane Armstrong" and I adopt that terminology in this affidavit. Except where otherwise stated, defined terms used in this affidavit have the meaning ascribed to them in my earlier affidavits.
- 4 The Deed of Compromise is exhibit CJA-4 to the Second Affidavit of Celia Jane Armstrong filed in this proceeding on 30 August 2012.
- 5 Pursuant to clause 9(b) of the Deed of Compromise the Representative Growers requested that TSL establish and, in the period 14 August 2012 to 14 September 2012, operate effectively an appropriate telephone hotline facility and email facility to receive and, in accordance with instructions from the



Representative Growers, address comments and questions from growers in connection with the Deed of Compromise and the Approval Application and receive any objections to the Deed of Compromise made by the growers (**Grower Notification and Consultation Process**).

- 6 Pursuant to clause 9(c) of the Deed of Compromise, in respect of the growers who raised comments, questions or made objections, TSL was required to record in appropriate detail the identity of those growers, the comments and questions raised by those growers and the responses provided to those growers and any objections made by those growers and any response provided in relation to those objections.
- 7 Pursuant to clause 9(e) of the Deed of Compromise, TSL was required to provide the Representative Growers, on a timely basis, a record with appropriate detail, of:
  - (a) all comments, questions and answers given by TSL in accordance with the protocol agreed pursuant to clause 9(d) of the Deed of Compromise, which did not require preparation of a response by the Representative Growers;
  - (b) all comments and questions requiring preparation of a response from the Representative Growers;
  - (c) any objections by the Growers to which TSL has provided a response in accordance with the agreed protocol; and
  - (d) any objections requiring the preparation of a response by the Representative Growers.
- 8 The details of how TSL conducted the Grower Notification and Consultation Process and complied with its obligations under clause 9 of the Deed of Compromise are set out in the Affidavit of Mark Anthony Korda (*Solara Rights Proceeding*) sworn on 18 September 2012 in relation to this proceeding. That affidavit explains, among other things, that TSL prepared what Mr Korda refers to as a "Communication Spreadsheet" which recorded details of all telephone and email communications with Growers for a particular day during the course of the Grower Notification and Consultation Process (**Communication Spreadsheets**) and exhibits the Communication Spreadsheets as confidential exhibit MAK-6.
- 9 During the Grower Notification and Consultation Process I received regular emails from Antony Munro of KordaMentha, on behalf of TSL, attaching the Communication Spreadsheets. I received Communication Spreadsheets for 14-17 (inclusive), 20-24 (inclusive) and 27-31 (inclusive) August 2012 and 3-7 (inclusive), 10-14 (inclusive) and 17 September 2012.
- 10 In accordance with clause 9(d) of the Deed of Compromise, TSL referred to Clarendon Lawyers the comments, questions and objections in respect of which it was unable to respond and in respect of which Clarendon Lawyers, on behalf of the Representative Growers, was to prepare an appropriate response. In this affidavit I refer to the requests, comments or objections passed onto Clarendon Lawyers collectively as **Escalated Queries and Comments**.
- 11 TSL also referred to Clarendon Lawyers any requests for a copy of the advice prepared by Counsel for the Representative Growers in respect of the Deed of Compromise. In my first Affidavit of Celia Jane Armstrong I exhibit the Advice, being the original advice prepared by Counsel, the Updated Advice, being than updated version of the Advice and the Supplementary Memorandum prepared by Counsel





as confidential exhibits CJA-1, CJA-2 and CJA-3 respectively. In this affidavit I generally refer to the Updated Advice and the Supplementary Memorandum as the '**Advice**'.

- 12 Alexandra Gleed, a graduate employed by Clarendon Lawyers has assisted me in managing the Escalated Queries and Comments. To manage this process, I asked Ms Gleed to prepare extracts of the Communication Spreadsheets which included only the Escalated Queries and Comments (**Escalated Queries and Comments Call Sheet**).
- 13 On behalf of the Representative Growers, I responded, or caused responses to be sent, to any Escalated Queries and Comments that required a response. Details of any responses were recorded in the Escalated Queries and Comments Call Sheet. The Escalated Queries and Comments Call Sheet also records various comments which did not require response but which the Representative Growers consider it appropriate to bring to the attention of the Court. Now produced and shown to me marked **confidential exhibit CJA-9** is a true copy of the Escalated Queries and Comments Call Sheets together with copies of any related emails with growers.
- 14 Exhibit CJA-9 is sealed. The Escalated Queries and Comments Call Sheets contain personal information of growers and the Representative Growers will seek orders that CJA-9 remain confidential.

#### **Results of the Grower Notification and Consultation Process**

- 15 I have read the Communication Spreadsheets and set out below an overview of all communications received from Growers as noted on the Communication Spreadsheets:
- (a) a total of twenty-eight (28) growers have made comments, questions or objections in relation to the Deed of Compromise;
  - (b) ten (10) growers requested the First Letter to Growers, Notice to Growers, Frequently Asked Questions, Bank Account Nomination Form and/or Direction to Pay be emailed or posted to them;
  - (c) eight (8) growers requested information in relation to the particulars of their investments, such as how many lots they had invested in or which scheme they had invested in;
  - (d) eight (8) growers requested financial information, such as how much they were entitled to under the Deed of Compromises or how much TSL or TFL indebtedness they had;
  - (e) six (6) growers returned their Bank Account Nomination Form and/or their Direction to Pay to TSL;
  - (f) five (5) growers requested more information about the Deed of Compromise in general;
  - (g) two (2) growers notified TSL of a change of address or change of contact details; and
  - (h) five growers made Escalated Queries or Comments (as addressed further in paragraph 16 below).
- 16 I have read the Escalated Queries and Comments Call Sheet and set out below an overview of all communications received from Growers as noted on that document (paraphrasing):



- (a) On 14 August 2012 a grower emailed TSL notifying it that the information received had been forwarded to ITSA's Trustee Services area for further assessment.
- (b) On 15 August 2012 a grower called TSL to inquire about the Deed of Compromise. When informed by TSL of the settlement amount to be received the grower commented that they had been "conned again". The grower was informed that they could make an objection or have their query escalated for Clarendon Lawyers to respond to. The grower declined.
- (c) On 17 August 2012 a grower emailed TSL with the question as to which proceeding the 2005 Citrus Project related to. On 21 August 2012 I emailed the grower's question to Jane Sheridan of Arnold Bloch Leibler for clarification. On 21 August 2012, Jane Sheridan replied by return email and confirmed that the 2005 Citrus Project was conducted on both the Solara and Kangara land and that the 2005 citrus project would also be subject of the future rights proceeding in respect of the Fund created following the sale of the Kangara property. On 23 August 2012 I caused a reply to be sent to the grower by email setting out these points.
- (d) On 27 August 2012 a grower called TSL to object to the compromise as they did not think it was in the interests of growers. On 11 September 2012, I emailed the grower asking whether the grower wished to maintain their objection and if so, whether they would like to make any additional points known to the Court. On 11 September 2012, I received a return email from the grower, in which the grower made the following comments:
- (i) the 5% of the sale proceeds offered to the growers in an insult;
  - (ii) that they failed to see how any fair minded person would consider recommending to accept the offer in the best interests of the growers;
  - (iii) they view the offer as nothing more than opportunistic and unconscionable and those making the offer to be taking advantage of those that have already lost a lot and in a position of weakness;
  - (iv) growers are now faced with the prospect of being forced to settle a loan with no tangible return;
  - (v) it would be unreasonable not to expect an element of risk with any investment, but it is evident that with the failure of Timbercorp, Forest Enterprises Australia and Great Southern Plantations, but to name a few, those who invested in these managed investment schemes have been comprehensively deceived;
  - (vi) no one has been held to account;
  - (vii) the perpetuation of the deception by those appointed to protect the interests of the growers, namely Korda Mentha is galling;
  - (viii) the conflict of interest that has permitted to continue to the extent that it has is truly an indictment on the ACCC;





- (ix) to date, it has not been satisfactorily explained how the offer of 5% was arrived at, and in their opinion, it seems the intrinsic value of the plantations, orchards and groves, which the growers paid to have planted and nurtured has been totally ignored;
- (x) any self respecting person would not accept the offer; and
- (xi) the grower would rather spend the proceeds paying lawyers to negotiate a better deal, that way if the banks are going to get their way they will have to fight for it,

On 18 September 2012 I replied to the grower's comments by return email assuring the grower that Clarendon Lawyers would put the grower's objection before the Court. I suggested to the grower that it may assist them to obtain a copy of the Advice. On 18 August 2012 the grower requested a copy of the Advice. I replied by return email on 18 September 2012 requesting that the grower sign a deed of undertaking and acknowledgement to protect the confidentiality in and privilege attaching to the Advice (**Undertaking**). Upon receipt of the signed Undertaking from the grower on 19 September 2012 I emailed the grower a copy of the Advice.

- 17 Additionally, on 5 September 2012 Tom May of Herbert Geer sent me an email asking me to provide him with, *inter alia*, a copy of the Advice. By return email on the same day I informed Mr May that we could only provide the Advice to a grower or the legal representative of a grower. I also informed Mr May that we would require a signed Undertaking before releasing the Advice. I asked Mr May which grower he acted for so that I could prepare an Undertaking. Mr May has not responded to this request.

#### Advice

- 18 At paragraph 7 of the first Affidavit of Celia Jane Armstrong filed and served on 30 August 2012 I refer to the Supplementary Memorandum of advice from counsel to the Representative Growers. The Supplementary Memorandum was provided to the Representative Growers by email on 29 August 2012.
- 19 I have reviewed the Advice and confirm that Clarendon Lawyers agrees with its contents.

#### Deed of Covenant

- 20 On 26 September 2006 the Plaintiff entered into a Deed of Covenant which provided, *inter alia*, that the Plaintiff was only entitled to exercise its rights under its security subject to the rights of the Growers. Now produced and shown to me marked **CJA-10** is a true copy of the Deed of Covenant.

SWORN by CELIA JANE ARMSTRONG  
at Melbourne in the State of Victoria  
this 19 day of September 2012

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)  
)

Before me: .....

**SARAH DORN**  
of Clarendon Lawyers Pty Ltd  
Level 17, Rialto North Tower  
525 Collins St, Melbourne Victoria 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**

**BETWEEN**

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

Plaintiff

**OMI#2 PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) as trustee for  
TIMBERCORP ORCHARD TRUST #2**

First Defendant

**MICHAEL FUNG**

**(in his capacity as receiver and manager of OIM#2 Pty Ltd (Receivers and Managers Appointed) (ACN  
112 691 997) as trustee for Timbercorp Orchard Trust #2)**

Second Defendant

**PAUL WILLIAM KIRK**

**(in his capacity as receiver and manager of OIM#2 Pty Ltd (Receivers and Managers Appointed) (ACN  
112 691 997) as trustee for Timbercorp Orchard Trust #2)**

Third Defendant

**ROBERT AND ELIZABETH BUGDEN**

**(as the representatives of the Growers in the 2005 Timbercorp Citrus Project (ARSN 114 091 299))**

Fourth Defendant

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

List D

No. 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 & ORS (according  
to the attached Schedule)

Defendants

EXHIBIT NOTE

Date of document:

19 September 2012

Filed on behalf of:

the Fourth Defendant

Prepared by:

Clarendon Lawyers

Tel: 03 8681 4400

Level 17, Rialto North Tower

Fax: 03 8681 4499

525 Collins Street

Solicitors Code: 101294

MELBOURNE VIC 3000

Ref: MJF:1100563

michael.fernon@clarendonlawyers.com.au

This is the exhibit marked "**CJA-10**" now produced and shown to **CELIA JANE ARMSTRONG** at the time of  
swearing her affidavit on 19 September 2012.

Before me:.....

**SARAH DORN**

of Clarendon Lawyers Pty Ltd  
Level 17, Rialto North Tower  
525 Collins St, Melbourne Victoria 3000  
an Australian Legal Practitioner within the  
meaning of the *Legal Profession Act 2004*

**Exhibit CJA-10**

**Deed of Covenant**



Deacons

TIMBERCORP

672452/3

Dated 26 September 2006

## Almond Agreement Deed of Covenant

Parties

The Growers

**Australia and New Zealand Banking Group Limited**  
ABN 11 005 357 522

**Timbercorp Securities Limited**  
ABN 12 092 311 469

**Almond Management Pty Ltd**  
ABN 71 094 468 845

**Contact**

Gillad Dalal  
Partner  
RACV Tower, 485 Bourke Street, Melbourne VIC 3000  
Telephone: 03 8686 6375  
Email: gillad.dalal@deacons.com.au  
Website: www.deacons.com.au  
Our ref: 256353



**Deed** dated *26 September 2006*

**By** **Australia and New Zealand Banking Group Limited**  
ABN 11 005 357 522  
of Level 10, 53-0 Collins Street, Melbourne, Victoria, 3000  
(Lender)

**In Favour of**

**The Growers**

**Timbercorp Securities Limited** ABN 12 092 311 469 (on behalf of the Growers for which it acts as Responsible Entity under any Project) of Level 8, 461 Bourke Street, Melbourne, Victoria, 3000

**Almond Management Pty Ltd** ABN 71 094 468 845 (on behalf of the Growers for whom it acts as a representative under any Project) of Level 8, 461 Bourke Street, Melbourne, Victoria, 3000

**Recitals**

- A. The Borrower and Lender have agreed to enter into the Facility Agreement to provide funding in relation to the Timbercorp 2005 Almond Project and Timbercorp 2006 Almond Project.
- B. As security for the Facility Agreement the Borrower has agreed to grant to the Lender the Security.
- C. The Lender has agreed to take the Security subject to the rights of the Growers in accordance with the terms of this Deed.

## **It is agreed**

### **1. Interpretation**

#### **1.1 Definition**

In this document:

**Facility Agreement** means the Facility Agreement dated on or around the date of this Deed between Almond Land Pty Ltd and the Lender as may be amended from time to time.

**Growers' Rights** means:

- (1) in respect of existing Growers, all of their present rights and interest under the Project Documents and any other rights and interests under the Project Documents which are on terms consented to in writing by the Lender; and
- (2) in respect of future Growers, all of their rights and interests which are on the same terms as the rights and interest of Growers under the Project Documents as at the date of this document and any other rights and interests under the Project Documents which are on terms consented to by the Lender in writing,

in each case to the extent that those rights are affected by the Security.

#### **1.2 Terms used**

Terms used but not defined in this document have the meaning given to them in the Facility Agreement.

### **2. Covenants by the Lender**

- (1) The Lender acknowledges, covenants and agrees that:
  - (a) it takes the Security, and is and will be only entitled to exercise its rights under the Security, subject to all of the Growers' Rights;
  - (b) if the Lender enforces any of its Security then if the Lender, or any Controller appointed by the Lender to any party who has granted a Security, decides (in its absolute discretion) to adopt any or all of the Project Documents, then the Lender will ensure that the Lender or the Controller (as the case may be) complies with, observes and performs the obligations of the relevant Borrower or Security Provider (as the case may be) under each Project Document which has been adopted;




- (c) if a Project Document adopted by the Lender or any Controller includes an agreement under or in respect of which Management Fees are payable by a Grower ("Management Agreement"), then the Lender or the Controller (as the case may be), in their absolute discretion (but without limiting their respective obligations under paragraph (b)), must first make any Management Fees received during or after the enforcement of any Security available to either:
    - (i) the relevant Timbercorp manager to the extent reasonably required to satisfy or perform (or procure the satisfaction or performance of) that manager's obligations under the relevant Management Agreement (after which any surplus remaining may be applied in or towards payment of the Amount Owed); or
    - (ii) the Growers who paid them; and
  - (d) if, during or after the enforcement of any Security, the Lender or any Controller receives Management Fees relating to a Management Agreement that it has not adopted, it must repay those fees (or procure their repayment) to the Growers who paid them.
- (2) Nothing in this Deed requires the Lender or any Controller appointed by the Lender to pay money to any Grower, except to the extent required under any Project Document adopted pursuant to clause 2(1)(b) or clause 2(1)(c).

### **3. Governing Law**


This document is governed by the law in force in Victoria.


Executed as a Deed Poll in Melbourne

Signed for and on behalf of **Australia  
and New Zealand Banking Group  
Limited** ABN 11 005 357 522 by a  
duly appointed attorney in the  
presence of:

  
\_\_\_\_\_  
Signature of Witness

  
\_\_\_\_\_  
Name of Witness (please print)

  
\_\_\_\_\_  
Signature of Attorney (I have no  
notice of revocation of the power of  
attorney under which I sign this  
document)

  
\_\_\_\_\_  
Name of Attorney (please print)