

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

List E
No. 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 & ORS (according to
the attached Schedule)

Defendants

THIRD AFFIDAVIT OF CELIA JANE ARMSTRONG

Date of document:	19 September 2012
Filed on behalf of:	the Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Defendants
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:1000126
	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 Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Defendants, 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 (*Liparoo and Yungera 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 three hundred and three (303) growers have made comments, questions or objections in relation to the Deed of Compromise;
 - (b) one hundred and one growers (101) 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) fifty-three (53) 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) forty-one (41) 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) one hundred and twenty (120) growers returned their Bank Account Nomination Form and/or their Direction to Pay to TSL;
 - (f) seventeen (17) growers requested more information about the Deed of Compromise in general;
 - (g) eighteen (18) growers notified TSL of a change of address or change of contact details; and
 - (h) eleven (11) 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 called TSL and questioned how the lawyers came to the amounts offered under the Deed of Compromise per lot when they paid approximately \$14,000 for the investment. The grower requested that Clarendon Lawyers contact them. On 16 August 2012 I called the grower and left a message for them to call me. I have had no response from the grower.
- (b) On 14 August 2012 a grower called TSL and commented that they were naturally disappointed with the compromise. The call was marked as escalated. On 16 August 2012 I email the grower noting that they had contacted TSL and to contact me with any further questions that had not been address by TSL. On 16 August 2012 the grower replied by return email commenting:
 - (i) that the correspondence and web references were confusing;
 - (ii) that the person answering the TSL hotline call seemed hesitant and offered nothing in the way of explanation;
 - (iii) that the grower had not been kept up to date with arrangements made;
 - (iv) there was never any mention of a new owner continuing to run the almond plantations, but this seemed possible in view of the trifling compensation offered; and
 - (v) where could they find an explanation of the compromise.

I replied to the grower's concerns by return email on 16 August 2012. I attached to this email the First Notice to Growers and Frequently Asked Questions and requested that the grower contact me as I would be happy to discuss the documents with them. In my email I also briefly outlined the proceedings and Deed of Compromise. I have had no response from the grower.

- (c) On 14 August 2012 a grower called TSL and commented that they were happy to see the end of this and that they wouldn't complain to receiving a little bit back.
- (d) On 15 August 2012 a grower emailed TSL and myself requesting a copy of the Advice. I replied by return email on 15 August 2012 requesting that the grower sign a deed of undertaking and acknowledgement (**Undertaking**) to protect the confidentiality in and privilege attaching to the Advice. Upon receipt of the signed Undertaking from the grower on 16 September 2012 I emailed the grower a copy of the Advice on 17 August 2012. On 30 August 2012 I emailed the grower attaching a copy of the Supplementary Memorandum of advice.

On 31 August 2012 the grower emailed me to ask for the time frames that came out of the directions hearing held on that day. I replied by email that day attaching a copy of the proposed orders which showed the dates for exchange of the relevant material and informed the grower that copies of the attached orders would be available on the Clarendon Lawyers website as soon as we received them.



On 4 September 2012 the grower called me to discuss the dates for the filing of affidavits and submissions in the proceeding. On 14 September 2012 the grower called me to discuss the Advice. On 17 September 2012 the grower contacted me by email. I replied to this email by return email on 17 September 2012 notifying me that there were growers who would be objecting to the compromise. In my reply I reminded the grower that Clarendon Lawyers is due to file and serve affidavit material in respect of the approval application on 19 September 2012 and that in order for any objections from growers to be set out in that material, I would have to receive their objections prior to this date. I have had no further response from the grower.

- (e) On 16 August 2012 a grower emailed TSL requesting a copy of the Advice. I replied by return email on 20 August 2012 requesting that the grower sign an Undertaking. I have not received the signed Undertaking from the grower and accordingly, have not provided the grower with a copy of the Advice.
- (f) On 16 August 2012 a grower emailed TSL and commented:
 - (i) could TSL spare around \$600,000 to reimburse the growers overall loss and help their kids purchase their own homes; and
 - (ii) the Timbercorp executives and their accountant are blood sucking parasites that do not belong in this world.
- (g) On 16 August 2012 a grower emailed TSL and asked the question whether the compromise was the best possible outcome. I replied to this grower by return email on 28 August 2012 and noted that the Representative Growers had received advice from counsel on the compromise and have decided that the compromise is in the best interests of growers. I also told the grower that we were able to provide them with a copy of the Advice provided to the Representative growers if so requested. The grower has not requested the Advice.
- (h) On 16 August 2012 a grower called TSL and commented that they thought the Timbercorp proceedings had been finished and that they would not receive anything further so they were pleasantly surprised by the chance to receive further payments.
- (i) On 20 August 2012 a grower email TSL and commented that they were happy with the outcome reached and they want the compromise to proceed.
- (j) On 21 August 2012 a grower emailed TSL requesting a copy of the Advice. I replied by return email on 24 August 2012 requesting that the grower sign an Undertaking. Upon receipt of the signed Undertaking from the grower on 28 September 2012 I emailed the grower a copy of the Advice.
- (k) On 31 August 2012 a grower emailed TSL and commented that the sooner this sorry mess is over the better.

Advice

- 17 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.

18 I have reviewed the Advice and confirm that Clarendon Lawyers agrees with its contents.

Deed of Covenant

19 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 19th day of 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*

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

**OIM#2 PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) AS TRUSTEE FOR
TIMBERCORP ORCHARD TRUST #3**

First Defendant

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

Second Defendant

**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

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

Fourth Defendant

**GRAHAM DACE (as the representative of the Growers in the 2001 Timbercorp Almond Project (ARSN
095 649 746))**

Fifth Defendant

**GRAHAM GOLDENBERG (as the representative of the Growers in the 2002 Timbercorp Almond Project
(ARSN 099 611 935))**

Sixth Defendant

**GORAN RUNJE (as the representative of the Growers in the 2003 Timbercorp Almond Project (ARSN
103 197 299))**

Seventh Defendant

**GRAEME PHILIP COLE (as the representative of the Growers in the 2004 Timbercorp Almond Project
(ARSN 108 336 670))**

Eighth Defendant

**CHRISTOPHER MARK LITTLEY (as the representative of the Growers in the 2005 Timbercorp Almond
Project (ARSN 112 935 092))**

Ninth Defendant

**DAVID BUTTERFIELD (as the representative of the Growers in the 2002 Timbercorp Almond Project
(Private Offer No. 1))**

Tenth Defendant

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

List E
No. 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 & ORS (according to
the attached Schedule)

Defendants

EXHIBIT NOTE

Date of document:	19 September 2012
Filed on behalf of:	the Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Defendants
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:1000126
	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 Owing); 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

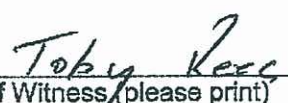
This document is governed by the law in force in Victoria.

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)