

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

FOURTH AFFIDAVIT OF CELIA JANE ARMSTRONG

Date of document:	25 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

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 fourth affidavit in connection with the application for approval of the 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. My third affidavit was headed "Third Affidavit of Celia Jane Armstrong" and was sworn on 19 September 2012. Except where otherwise stated, defined terms used in this affidavit have the meaning ascribed to them in my earlier affidavits.
- 4 I am making this affidavit in response to the Affidavit of Kerree Anne Bezencon (**Ms Bezencon**) dated 18 September 2012 (**Ms Bezencon's Affidavit**) and filed in respect of the Approval Applications in:



- (a) Supreme Court of Victoria Proceeding S CI 2010 1354 (generally referred to as the **BB Olives Rights Proceeding**);
- (b) Supreme Court of Victoria Proceeding S CI 2011 6777 (generally referred to as the **Fenceport Rights Proceeding**); and
- (c) Supreme Court of Victoria Proceeding S CI 2011 6606 (generally referred to as the **Solara Rights Proceeding**).

- 5 This affidavit is filed in the Solara Rights Proceeding, however, I adopt the combined approach taken by Ms Bezencon and deal with matters relevant to the three proceedings referred to in paragraph 4 above in the single affidavit. I intend to exhibit a copy of this affidavit to separate affidavits to be filed in the Fenceport Rights Proceeding and the BB Olives Rights Proceeding.
- 6 I collectively refer to the BB Olives Rights Proceeding, Fenceport Rights Proceeding and the Solara Rights Proceeding, together with the proceedings generally known as the **Liparoo & Yungera Rights Proceeding** (Supreme Court of Victoria Proceeding S CI 2011 6604) and **Almond Land Rights Appeal Proceeding** (Supreme Court of Victoria, Court of Appeal Proceeding S APCI 103 2011) as the **Timbercorp Rights Proceedings**.
- 7 Ms Bezencon's affidavit is filed in respect of the proceedings identified in paragraph 4 above which relate to olive and citrus schemes. Ms Bezencon's affidavit also variously refers to almonds. The Timbercorp Rights Proceedings that deal with almonds are the Liparoo & Yungera Rights Proceeding and the Almonds Land Appeal Rights Proceeding mentioned above in paragraph 6. The Almond Land Rights Appeal Proceeding is an appeal from the decision of The Honourable Justice Davies in the proceedings generally referred to as the Almond Land Rights Proceeding (Supreme Court of Victoria Proceeding no S CI 2009 10699). In this affidavit, I also deal with some matters relating to almonds, however, I do not intend to exhibit this affidavit to an affidavit filed in the Liparoo & Yungera Rights Proceeding or the Almond Land Rights Appeal Proceeding.

Background

- 8 Ms Bezencon has been involved in a number of early proceedings concerning the Timbercorp Almond and Olive projects.
- 9 On 3 July 2009 Ms Bezencon filed an affidavit in Supreme Court Proceeding No 7114 of 2009 as a member of the 2004 Olive Project and 2004 Almond Project arguing against the winding up of the schemes. Now produced and shown to me marked **CJA-11** is a true copy of Ms Bezencon's affidavit dated 3 July 2009.
- 10 In Supreme Court Proceeding No 9408 of 2009 Ms Bezencon was represented by Mr M Shand of Her Majesty's Counsel. On 9 October 2009 His Honour Justice Robson made orders in that proceeding. In those orders he directed that the liquidators of Timbercorp Securities Limited (**TSL**) and Almond Management Pty Ltd were justified in, *inter alia*, terminating the Growers' rights and entering into the sale and purchase deed for the sale of the assets used in the operation of the 2002 Timbercorp Almond Project, 2005 Timbercorp Almond Project, 2006 Timbercorp Almond Project, 2007 Timbercorp Almond project and 2002 Timbercorp Almond Project (Private Offer) (Unregistered) (together hereafter referred



to as the **Almond Land Almond Projects**). He also made orders for the creation of a fund from the proceeds of the sale of those assets which was to be held on trust until the determination of a further proceeding to determine which parties had any rights to all or part of the fund. That fund became the subject of the Almond Land Rights Proceeding. In the same proceeding, Ms Bezencon made an application to appoint a temporary RE to the Almond Land Almond Projects. In dismissing that application, Robson J held that:

KERREE ANNE BEZENCON

[63] Ms Bezencon appears on the applications represented by Mr Shand QC. Ms Bezencon is a grower, accountant and the chair of the Timbercorp Growers' Almond Committee Inc. In substance, she opposes the liquidators' application. She complains about the bidding process and the provision of information to her by the liquidators. She seeks the appointment of Huntley Management Ltd as an interim responsible entity of the schemes. She also deposes to a possible higher offer for the almond orchards.

[64] The proposal of Huntley Management Ltd to act as a temporary responsible entity was again subject to conditions and was not an unconditional offer. It was not one that the court was in a position to accept. I can understand the attempts by the growers to seek to extract as much as possible for their investment. The evidence establishes that the liquidators conducted a proper sale process that elicited seven bids. I have seen the bids. In my view the liquidators' are justified in accepting the Olam Orchards bid. The well known expression "a bird in the hand is worth two in the bush" may well be apposite.

[65] To lose the Olam Orchards bid on the basis of a chance of a higher bid is not a responsible or reasonable step to take in view of the legitimate tender process undertaken by the liquidators.

[66] In my view the court should and will do all that it reasonably can to assist the liquidators to complete the sale of the almond orchards to Olam Orchards subject to my decision on the \$6 million offer.

11 Now produced and shown to me marked **CJA-12** is a true copy of Robson J's orders dated 9 October 2009 and his Honour's reasons dated 8 October 2009.

12 Ms Bezencon and the TGG Almond Committee Inc were represented at the commencement of the Almond Land Rights Proceeding by Mr D J O'Callaghan of Senior Counsel and Mr C Archibald of Counsel. On 17 December 2009 the TGG Almond Committee Inc issued a summons in that proceeding seeking orders that it be appointed as the representative of growers in the Almond Land Almond Projects and that it be joined as a defendant to the proceedings. Now produced and shown to me marked **CJA-13** is a true copy of the summons dated 17 December 2009.

13 On 22 December 2009 The Honourable Justice Davies made orders in the Almond Land Rights Proceeding that, *inter alia* (at paragraph 3):

3. ...

(a) *Graham Goldenberg is appointed as the representative of Growers in the 2002 Timbercorp Almond Project ... ;*

(b) *Christopher Mark Littley is appointed the representative of Growers in the 2005 Timbercorp Almond Project ... ;*

(c) *Constantine Moshopoulos is appointed the representative of Growers in the 2006 Timbercorp Almond Project ... ;*

(d) *David Butterfield is appointed the representative of Growers in the 2007 Timbercorp Almond Project ... ; and*



- (e) *Christopher Mark Littley is appointed the representative of Growers in the 2002 Timbercorp Almond Project (Private Offer No 1) ... ;*

and that (at paragraph 9):

9. *Each party serve a copy of the documents referred to in paragraphs 6, 7 and 8 upon the TGG Almond Committee Inc and any other document filed in the proceeding from the date of this order at the same time as that document is served upon a party to the proceeding.*

Now produced and shown to me marked **CJA-14** is a true copy of the orders of Davies J dated 22 December 2009.

- 14 I have reviewed Clarendon Lawyers' file respect of the Almond Land Rights Proceeding. According to my review, Clarendon Lawyers served on Ms Bezencon most of the documents filed on behalf of its clients in the Almond Land Rights Proceeding. Now produced and shown to me marked **CJA-15** is a true copy of a bundle of correspondence from Clarendon Lawyers to Ms Bezencon regarding the service of those documents. The documents not served on Ms Bezencon were a notice to produce addressed to the second, third and fourth named defendants, the Affidavit of Celia Jane Armstrong dated 10 February 2011 concerning the treatment of some confidential ASIC documents and various submissions handed up in Court during or in connection with the hearing.

Paragraphs 10 and 11 of Ms Bezencon's Affidavit

Clarendon Lawyers' involvement in earlier Citrus proceedings

- 15 On 16 February 2010 the hearing of the application by TSL for directions regarding the sale of the assets related to the Timbercorp citrus schemes conducted on the property at Solara (Supreme Court of Victoria Proceeding No 389 of 2010) commenced. Mr S G Hopper of counsel, instructed by Clarendon Lawyers, appeared at that hearing on behalf of the Timbercorp Growers Group. Now produced and shown to me marked **CJA-16** is a true copy of the judgment of the Honourable Justice Davies in Supreme Court of Victoria Proceeding No 389 of 2010 dated 26 February 2010.
- 16 On 3 March 2011 the hearing of the application by TSL for directions regarding the sale of the assets related to the Timbercorp citrus schemes conducted on the property at Kangara (Supreme Court Proceeding S CI 2011 888) commenced. I appeared at that hearing on behalf of the Timbercorp Growers Group. Now produced and shown to me marked **CJA-17** is a true copy of the judgment of the Honourable Justice Judd in Supreme Court Proceeding S CI 2011 888 dated 15 March 2011.

The appointment of the representative growers in the BB Olives Rights Proceeding

- 17 I refer to the Affidavit of Ross Whyte McClymont dated 16 March 2010 and filed in the BB Olives Rights Proceeding. In paragraphs 24 to 35 (inclusive) of Mr McClymont's affidavit he describes the process by which the representative growers in that proceeding were identified. Now produced and shown to me marked **CJA-18** is a true copy of paragraphs 24 to 35 (inclusive) of the Affidavit of Ross Whyte McClymont dated 16 March 2010 and filed in the BB Olives Rights Proceeding together with the exhibits referred to therein.



18 On 22 March 2010 the parties appeared for directions in the BB Olives Rights Proceeding before the Honourable Justice Davies. At that hearing, Davies J made orders (**BB Olives Orders**) that, *inter alia* (at paragraph 3):

3. ...

- (a) *Michael Charles Vicary be appointed as the representative of the Growers in the 2006 Timbercorp Olive Project ...;*
- (b) *Pamela Jan Dry be appointed as the representative of the Growers in the 2007 Timbercorp Olive Project ... ;and*
- (c) *David Butterfield be appointed as the representative of the Growers in the 2008 Timbercorp Olive Project*

and that (at paragraph 13):

- 13. *Each party serve a copy of the documents referred to in paragraph 8,9,10, 11 and 12 upon Herbert Geer ... for TGG Almond Committee Inc and Ms Kerree Bezencon and any other document filed in the proceeding from the date of this order at the same time as the document is served upon a party to the proceeding.*

Now produced and shown to me marked **CJA-19** is a true copy of the orders made by Davies J on 22 March 2010 in the BB Olives Rights Proceeding.

The appointment of the representative growers in the Solora Rights Proceeding

19 I also refer to the Affidavit of Clinton Charles Hinchin dated 5 December 2011 and filed in the Solora Rights Proceeding. In paragraphs 34 to 47 (inclusive) Mr Hinchin describes the process by which the representative growers in that proceeding were identified. Now produced and shown to me marked **CJA-20** is a true copy of paragraphs 34 to 47 (inclusive) of the Affidavit of Clinton Charles Hinchin dated 5 December 2011 and filed in the Solora Rights Proceeding together with the exhibits referred to therein.

20 On 13 December 2011 Mr Fernon of Clarendon Lawyers wrote to Mr Tom May (**Mr May**) of Herbert Geer (**Letter to Mr May**) stating that, *inter alia*, that:

if the TGG (Garnaut) nominated representative is appointed as representative of growers in the 2005 Timbercorp Citrus Project and we act for that representative: we will:

- (a) *keep your client, through Ms Bezencon, informed on any settlement negotiations, to the extent that such negotiations are not confidential, and of any directions or orders by the court that growers be notified and/or be provided with an opportunity to appear at court to make submissions on any proposed settlement...*

Now produced and shown to me marked **CJA-21** is a true copy of Mr Fernon's letter to Mr May dated 13 December 2011.

21 On 16 December 2011 the parties appeared for directions in the Solora Rights Proceeding before the Honourable Justice Davies. At this hearing, Davies J made orders in (**Solora Orders**) that, *inter alia* (at paragraph 3):

- 3. *Robert Bugden and Elizabeth Bugden are appointed as the representatives of the Growers in the 2005 Timbercorp Citrus Project ...;*

and that (at paragraph 8):



8. *Each party serve a copy of all documents filed in this proceeding on the TGG Citrus Committee Inc at the same time as the document is served upon a party to the proceeding.*

Now produced and shown to me marked **CJA-22** and **CJA-23** is a true copy of the transcript of the hearing on 16 December 2011 and a true copy of the orders made by Davies J on 16 December 2011 in the Solara Rights Proceeding respectively.

The appointment of the representative growers in the Fenceport Rights Proceeding

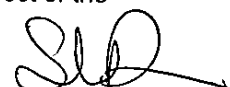
- 22 I further refer to the Affidavit of Mark Anthony Korda dated 13 December 2011 and filed in the Fenceport Rights Proceeding. In paragraphs 29 to 38 (inclusive) of Mr Korda's affidavit he describes the process by which the representative growers in that proceeding were indentified. Now produced and shown to me marked **CJA-24** is a true copy of paragraphs 29 to 38 (inclusive) of the Affidavit of Mark Anthony Korda dated 13 December 2011 and filed in the Fenceport Rights Proceeding together with the exhibits referred to therein.
- 23 On 16 December 2011 the parties appeared for directions the Fenceport Rights Proceeding before the Honourable Justice Davies. At this hearing, Davies J made orders (**Fenceport Orders**) that, *inter alia* (at paragraph 2):
2. ...
- (a) *Con Mosopoulos is appointed as representative of the Growers in teh 2000 Timbercorp Olive Project (Private Offer) (Unregistered);*
 - (b) *Pauline Emma Hammer is appointed as representative of the Growers in teh 2001 Timbercorp Olive Project ... ;*
 - (c) *David Sydney Butterfield is appointed as representative of Growers in the 2002 Timbercorp Olive Project ... ;*
 - (d) *Graham Goldenberg is appointed as the representative of Growers in the 2003 Timbercorp Olive Project ... ; and*
 - (e) *Shun King Li is appointed as representative of Growers in the 2004 Timbercorp Olive Project*

The directions hearing in the Fenceport Rights Proceeding on 16 December 2011 was held in conjunction with the directions hearing in the Solara Rights Proceeding. The transcript is exhibit CJA-22 referred to above. Now produced and shown to me marked **CJA-25** is a true copy of the orders made by Davies J on 16 December 2011 in the Fenceport Rights Proceeding.

- 24 There is no paragraph in the Fenceport Orders which requires any document to be served on Ms Bezencon or the TGG Olives Committee Inc.

Receiving instructions from the representative growers to accept the compromise

- 25 I refer to the first Affidavit of Celia Jane Armstrong dated 30 August 2012 filed in each of the BB Olives Rights Proceeding, the Fenceport Rights Proceeding and the Solara Rights Proceeding. Those affidavits are substantially identical. Paragraph 7 in each of those affidavits describes the meeting held on 20 July 2012 at Clarendon Lawyers (defined in my earlier affidavit as the **Meeting**). As set out in my earlier affidavit, the purpose of the Meeting was to discuss and answer any questions from the representative growers about the written advice prepared for them by counsel in respect of the



proposed compromise of each of the Timbercorp Rights Proceedings (defined in my earlier affidavit as the **Advice**).

- 26 In all of the Timbercorp Rights Proceedings, there are 12 representative growers. Six growers attended the meeting in person. Two growers attended by telephone, including Mr Robert Bugden who with his wife, is the representative grower appointed in respect of growers in the 2005 Timbercorp Citrus Project and, in that capacity is a party to the Solara Rights Proceeding. Four growers were unable to attend the meeting in person or by telephone as they were either travelling or incapacitated.
- 27 In addition to the representative growers, I attended the meeting with my principal Michael Fernon and my colleague and fellow employee of Clarendon Lawyers, Edward Orum. Garry Bigmore QC and Samuel Hopper of counsel attended in person. The only other person who attended the meeting was the personal adviser of Mr Shun King Li, Ms Susanne Mass.
- 28 I provided the representative growers who attended the meeting in person or by telephone with a copy of counsels' written Advice in advance of the meeting. At the conclusion of the meeting, these representative growers gave their unanimous oral instructions to accept the compromise.
- 29 I provided the representative growers who were unable to attend the meeting with a copy of counsels' written Advice by email. These growers subsequently provided me with their instructions to accept the compromise either by telephone or email.

Paragraphs 31 to 33 of Ms Bezencon's Affidavit

- 30 On 23 January 2012 I contacted Ms Bezencon and her associate, Mr Rex Booker to discuss with them the Timbercorp citrus projects. I contacted them to see if they would be willing to provide me with, *inter alia* copies of any information they had in respect of the viability of the 2004 and 2005 Timbercorp Citrus Projects and any proposal for a replacement responsible entity for those schemes.
- 31 Ms Bezencon informed me that she had "a wealth of information" however, she did not provide me with any of the requested material. Now produced and shown to me marked **CJA-26** is a true copy of a chain of emails between me and Ms Bezencon between 24 January 2012 and 3 February 2012. In the last email of the chain, I explained to Ms Bezencon that:

We have discussed your concerns with counsel and agree that there is some scope for reimbursing you for any photocopy costs you incur in providing us with copies of the documents we have requested. Your significant contribution to the cause of the growers has not gone unnoticed, however, I am sure that you appreciate the difficult position we are in with respect to funding. At this stage we have received confirmation that we have limited funds to participate in the settlement discussions. However, counsel agree that, depending on how the matter progresses, it may be necessary for the growers to engage Rex as an expert consultant. This will of course be subject to our ability to confirm additional funding at a later point in time.

and asked her if she was:

... willing to provide the documents and information requested.

I have received no reply from Ms Bezencon to my email to her of 3 February 2012.

- 32 Mr Booker agreed to provide input on the Timbercorp citrus projects.



Paragraphs 49 and 50 of Ms Bezencon's Affidavit

Compliance with the BB Olives Orders

- 33 I have reviewed Clarendon Lawyers' file in respect of the BB Olives Rights Proceeding. Clarendon Lawyers has filed the following documents in the BB Olives Rights Proceeding:
- (a) a Further List of Documents dated 7 May 2010;
 - (b) a Further List of Documents dated 7 September 2010;
 - (c) the 7th, 8th, 9th Defendants' Contentions of Fact and Law dated 7 October 2011;
 - (d) the Affidavit of Celia Jane Armstrong dated 30 August 2012;
 - (e) the Second Affidavit of Celia Jane Armstrong dated 30 August 2012; and
 - (f) the Third Affidavit of Celia Jane Armstrong dated 19 September 2012.
- 34 It appears from my review of the file that the documents described in paragraph 32 (a), (b) and (c) were not served on Ms Bezencon or the TGG Olives Committee Inc through oversight.
- 35 On 23 September 2012 I served documents described in paragraphs 32 (d), (e) and (f) on Mr May and Ms Bezencon by email. Now produced and shown to me marked **CJA-27** is a true copy of my email to Mr May and Ms Bezencon dated 23 September 2012.

Compliance with the Solora Orders

- 36 I have also reviewed the Clarendon Lawyers' file in respect of the Solora Rights Proceeding. Clarendon Lawyers has filed the following documents in the Solora Rights Proceeding:
- (a) the Affidavit of Celia Jane Armstrong dated 30 August 2012;
 - (b) the Second Affidavit of Celia Jane Armstrong dated 30 August 2012; and
 - (c) the Third Affidavit of Celia Jane Armstrong dated 19 September 2012.
- 37 On 21 September 2012 I served documents described in paragraphs 35 on Ms Bezencon by email. Now produced and shown to me marked **CJA-28** is a true copy of my email to Ms Bezencon dated 21 September 2012.
- 38 Also on 21 September 2012 I was copied into two emails from Ms Elyse Adams of Allens to Ms Bezencon concerning the provision to Ms Bezencon of all of the documents filed in the Solora Rights Proceeding. Now produced and shown to me marked **CJA-29** are true copies of the emails from Ms Adams to Ms Bezencon dated 21 September 2012.

Compliance with the Letter to Mr May

- 39 Now produced and shown to me marked **CJA-30** is a bundle of correspondence between Clarendon Lawyers and either or both of Mr May and Ms Bezencon.



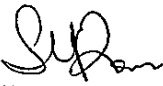
40 The settlement discussions that resulted in the Deed of Compromise were strictly confidential.

SWORN by CELIA JANE ARMSTRONG)

at Melbourne in the State of Victoria)

this 25th 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

**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:

25 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

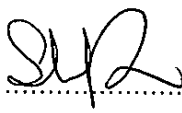
Solicitors Code: 101294

MELBOURNE VIC 3000

Ref: MJF:1100563

michael.fernon@clarendonlawyers.com.au

This is the exhibit marked "CJA-11" now produced and shown to **CELIA JANE ARMSTRONG** at the time of swearing her affidavit on 25 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-11

**Affidavit of Kerree A Bezencon dated 3 July 2009
and filed in SCV Proceeding No 7114 of 2009**

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

r2.4

LIST E

No 7144 of 2009

**IN THE MATTER OF TIMBERCORP SECURITIES LIMITED
(UNDER ADMINISTRATION)
ACN 092 311 469**

**TIMBERCORP SECURITIES LIMITED
(UNDER ADMINISTRATION) ACN 092 311 469
IN ITS CAPACITY AS RESPONSIBLE ENTITY OF EACH OF THE
MANAGED INVESTMENT SCHEMES LISTED IN SCHEDULE 1
First Plaintiff**

**MARK ANTHONY KORDA and LEANNE KYLE CHESSER
Second and Third Plaintiffs**

AFFIDAVIT OF KERREE A BEZENCON

Date of document:	Third day of July 2009
Filed on behalf of:	Kerree A Bezencon
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: MAB:0900205

I, Kerree Anne Bezencon, of 953 Don Road, Healesville in the State of Victoria, being a Certified Practising Accountant, make oath and say that:

1. I am a member of the 2004 Olive Project and 2004 Almond Project (**Schemes**).
2. I make this affidavit on my own behalf and except where I otherwise indicate, the matters deposed to in this affidavit are deposed to from my own personal knowledge of the facts.
3. Where I depose to matters from information and belief, I believe such matters to be true.
4. I make this affidavit in support of the application for the appointment of a temporary responsible entity to the Scheme.
5. I believe that the appointment is necessary to protect the interests of members of the Scheme as a whole.
6. I hold this belief because:
 - a. I am aware of the application made by Mark Anthony Korda and Leanne Kyle Chesser as administrators for a direction to Timbercorp Securities Limited (Under

Administration) ACN 092 311 469 in its capacity as responsible entity of the Scheme (TSL) to wind up the Scheme;

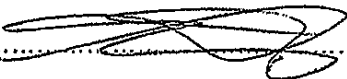
- b. it is my belief that if the Scheme is wound up, this will cause both the Head Lease and Sub Lease to terminate which, subject to any rights for relief against forfeiture, would result in the forfeiture of all members' interests in the Scheme; and
- c. I understand that Mark Korda is also an administrator of the other companies in the Timbercorp group of companies and believe that such companies may benefit from the wind-up of the schemes and accordingly Mark Korda has a conflict of interests that would prevent him from discharging his duty as an officer of TSL and would prevent him from causing TSL to discharge its obligations to act in the best interests of the members of the scheme.

SWORN by the said Kerree Anne Bezencon
at Melbourne in the State of Victoria
this third day of July 2009

)
)
)



Before me:.....



ANGELA JANE GIDLEY
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

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

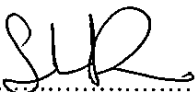
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to the attached Schedule)

Defendants

EXHIBIT NOTE

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Filed on behalf of:	the Fourth Defendant
Prepared by:	
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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*

Exhibit CJA-12

**Orders of Robson J dated 9 October 2012 and his
reasons for judgment dated 8 October 2012 in SCV
Proceeding No 9408 of 2009**

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

LIST E

No 9408 of 2009

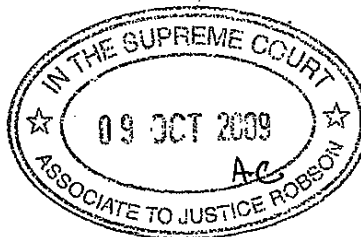
IN THE MATTER OF TIMBERCORP SECURITIES LIMITED
(IN LIQUIDATION)
ACN 092 311 469

TIMBERCORP SECURITIES LIMITED
(IN LIQUIDATION) ACN 092 311 469
IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE
MANAGED INVESTMENTS SCHEMES LISTED IN SCHEDULE 1
AND ORS ACCORDING TO THE SCHEDULE
Plaintiffs

ORDERS

Date of document: 9 October 2009
Filed on behalf of: the Plaintiffs

Prepared by:
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(Leon Zwier lwier@abl.com.au/
Bridgette Toy-Cronin btoycronin@abl.com.au)

JUDGE: Justice Robson

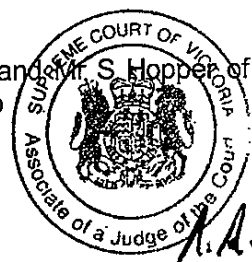
DATE MADE: 9 October 2009

ORIGINATING PROCESS: Originating Process of the Plaintiffs filed 5 October 2009 as amended by the Amended Originating Process filed on 6 October 2009

HOW OBTAINED: On hearing of the originating process on 6 October 2009.

ATTENDANCE: L Zwier and B Toy-Cronin for the Plaintiffs

Mr G Bigmore of Her Majesty's Counsel and Mr S Hopper of
Counsel for the Timbercorp Growers Group



Mr M Shand of Her Majesty's Counsel for Kerree Anne Bezencon

Mr I Waller of Senior Counsel and Mr S Hibble of Counsel for the Australian Securities and Investments Commission

Mr P Cawthorn of Senior Counsel and Mr R Craig of Counsel for Westpac Banking Corporation, BOS International Australia Limited and Australia and New Zealand Banking Group Limited

OTHER MATTERS:

Each of the Plaintiffs and Olam Orchards Australia Pty Limited and Olam International Limited have entered into a sale and purchase deed on 18 September 2009 (**SPD**) which forms Confidential Exhibit MAK-14 to the affidavit of Mark Anthony Korda sworn 5 October 2009 (**Affidavit**).

THE COURT DIRECTS THAT:

- 1 The Third and Fourth Plaintiffs (in their capacity as liquidators of the First Plaintiff) are justified in procuring the First Plaintiff as responsible entity of the managed investment schemes listed in Schedule 1 of this order (**Registered Schemes**) to enter into and perform the SPD and extinguishing all of the rights of Growers (investors in the schemes set out in schedules 1 and 2 of this order) in respect of the assets the subject of the SPD (**Grower Rights**).
- 2 The Third and Fourth Plaintiffs (in their capacity as liquidators of the Second Plaintiff) are justified in procuring the Second Plaintiff as manager of the unregistered managed investment scheme listed in Schedule 2 of this order to enter into and perform the SPD and extinguishing all of the Grower Rights.
- 3 The Third and Fourth Plaintiffs (in their capacity as liquidators of the First Plaintiff) are justified in making, doing and executing such documents or things to give effect to the extinguishment of all of the Grower Rights in order to perform the SPD.
- 4 The Third and Fourth Plaintiffs (in their capacity as liquidators of the Second Plaintiff) are justified in making, doing and executing such documents or things to give effect to the extinguishment of all of the Grower Rights in order to perform the SPD.



- 5 The Third and Fourth Plaintiffs (in their capacity as liquidators of the Second Plaintiff) are justified in disclaiming the Project Management Agreements and the Licence and Joint Venture Agreements (as those respective terms are defined in the Affidavit) and to the extent necessary have leave to do so pursuant to section 568(1A) of the Corporations Act 2001 (Cth).

THE COURT ORDERS, DECLARES AND DIRECTS THAT:

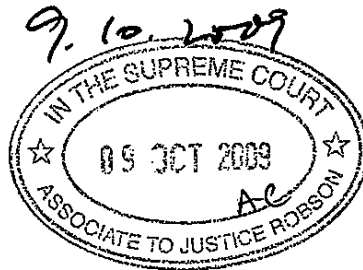
- 6 The Third and Fourth Plaintiffs in their capacity as liquidators of the First, Second, Fifth and Sixth Plaintiffs may enter into and perform:
- (a) the SPD; and
 - (b) any document referred to, in connection with, or necessary to give effect to the SPD.
- 7 Upon completion of any sale under the SPD the net proceeds of sale (after payment of selling costs and expenses, retentions (if any) and the costs and expenses of the liquidators of the First, Second, Fifth and Sixth Plaintiffs referable to the preservation and realisation of the assets the subject of the SPD, as approved by the committee of inspection of the Sixth Plaintiff and the Secured Creditors (as that term is defined in paragraph 13 of the Affidavit), or order of the Court) (**Net Proceeds**) be held by the Sixth Plaintiff in an interest bearing trust account with an Australian bank (as defined in section 9 of the Corporations Act) pending the hearing and determination by the Court of a proceeding (**Rights Proceeding**) to determine which person or persons have any rights to all or any part of the Net Proceeds (**Claimants**), and to be held on trust for the Claimants until further order of the Court.
- 8 Insofar as each of the Secured Creditors have any rights to the assets the subject of the SPD, whether under their securities over those assets or otherwise, nothing in the release of those securities upon completion of the SPD will prejudice those rights for the purposes of their claim to all or any part of the Net Proceeds.
- 9 Insofar as the Growers have any rights to the assets the subject of the SPD nothing in orders 1 to 5 above, or any action taken thereunder by the Third and Fourth Plaintiffs, will prejudice those rights for the purposes of their claim to all or any part of the Net Proceeds.



10 Exhibits MAK-9, MAK-10, MAK-13, MAK-14, MAK-23 and MAK-25 to the Affidavit be kept confidential.

11 Costs be reserved.

DATE AUTHENTICATED:



SCHEDULE OF PARTIES

TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION) (ACN 092 311 469)
IN ITS CAPACITY AS RESPONSIBLE ENTITY OF EACH OF THE
MANAGED INVESTMENTS SCHEMES LISTED IN SCHEDULE 1
First Plaintiff

ALMOND MANAGEMENT PTY LTD (IN LIQUIDATION) (ACN 094 468 845)
IN ITS CAPACITY AS MANAGER OF THE UNREGISTERED
MANAGED INVESTMENT SCHEME LISTED IN SCHEDULE 2
Second Plaintiff

MARK ANTHONY KORDA
Third Plaintiff

LEANNE KYLIE CHESSER
Fourth Plaintiff

TIMBERCORP LIMITED (IN LIQUIDATION) (ACN 055 185 067)
Fifth Plaintiff

ALMOND LAND PTY LTD (IN LIQUIDATION) (ACN 091 460 992)
Sixth Plaintiff



SCHEDULE 1

1. 2002 Timbercorp Almond Project (ARSN 099 611 935)
2. 2005 Timbercorp Almond Project (ARSN 112 935 092)
3. 2006 Timbercorp Almond Project (ARSN 118 387 974)
4. 2007 Timbercorp Almond Project (ARSN 122 511 040)



SCHEDULE 2

1. 2002 Timbercorp Almond Project (Private Offer) (Unregistered)



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

Not Restricted

COMMERCIAL COURT
CORPORATIONS LIST

No 9408 of 2009

IN THE MATTER OF TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)
(ACN 092 311 469)

TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)
(ACN 092 311 469) in its capacity as responsible entity
of certain managed investment of certain managed investment schemes;
ALMOND MANAGEMENT PTY LTD (IN LIQUIDATION) (ACN 094 468 845)
in its capacity as manager of an unregistered managed investment scheme;
MARK ANTHONY KORDA;
LEANNE KYLIE CHESSEY;
TIMBERCORP LIMITED (IN LIQUIDATION) (ACN 055 185 067) and
ALMOND LAND PTY LTD (IN LIQUIDATION)(ACN 091 460 9920) Plaintiffs

<u>JUDGE:</u>	ROBSON J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	6 October 2009
<u>DATE OF JUDGMENT:</u>	8 October 2009
<u>CASE MAY BE CITED AS:</u>	Re Timbercorp Securities Ltd (in liquidation) No 3
<u>MEDIUM NEUTRAL CITATION:</u>	[2009] VSC 510

CORPORATIONS - application by liquidators for directions - managed investment schemes - responsible entity in liquidation - sale by responsible entity of schemes' interest in almond orchards - grower members of the schemes and land owners of orchards each holding proprietary interests in the almond orchards to be sold - dispute between growers and land owners' bank mortgagees on the value of the growers' interests - liquidators wish to accept a sum offered by the bank mortgagees in satisfaction of the growers' proprietary interests - liquidators justified in agreeing to sell orchards - liquidators not justified in accepting the bank mortgagees' offer - liquidators justified in settling on basis that sale

moneys are held on trust pending determination of growers' proprietary interests and their proper share of the sale proceeds – appropriate basis for apportioning sale proceeds between growers and mortgagees - s 477(2)(b), s 511 and s 568(1)(a) of the *Corporations Act 2001*

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr L Zwier with Ms B Toy- Cronin	Arnold Bloch Leibler
For the Timbercorp Growers Group	Mr G T Bigmore QC with Mr S G Hopper	Clarendon Lawyers
For Keree Anne Bezencon	Mr M W Shand QC	Maurice Blackburn
For the Bank of Scotland, Westpac Banking Group and ANZ Banking Group	Mr P G Cawthorn SC with Mr R G Craig	Blake Dawson Waldron
For ASIC	Mr I Waller SC with Mr S J Hibble	ASIC

Cases cited

Barnes v Addy (1874) LR 9 Ch App 244

Hazelton Air Charter Pty Ltd (2002) 41 ACSR 472

Inwards v Baker [1965] 2 QB 29

Muschinski v Dodds (1985) 160 CLR 583

National Australia Bank v State of New South Wales [2009] FCA 1066

Wilcox v Richardson (1997) 43 NSWLR 4

HIS HONOUR:

THE PROCEEDINGS

- 1 I have only had a very short period of time to consider the many issues this matter raises. My reasons, therefore, may appear a little inelegant, but my conclusions are clear.
- 2 By an originating process dated 5 October 2009, the plaintiffs, Timbercorp Securities Ltd ("TSL") in its capacity as responsible entity of certain managed investment schemes, Almond Management Pty Ltd ("Almond Management") in its capacity as manager of an unregistered managed investment scheme, Mr Korda, Ms Chesser, Timbercorp Ltd ("TL") and Almond Land Pty Ltd ("Almond Land"), seek orders and directions under s 477(2)(b), s 511 and s 568(1)(a) of the *Corporations Act 2001*.
- 3 In particular, they seek orders and directions that Mr Korda and Ms Chesser, in their capacity as liquidators of TSL, are justified in procuring TSL, as the responsible entity of the managed investment schemes listed in schedule 1 of the proposed order, to enter into and perform the sale and purchase deed between each of the plaintiffs and Olam Orchards Australia Pty Ltd and Olam International Ltd. which forms the confidential exhibit MAK4 to Mr Calder's affidavit of 5 October, or a document substantially in that form, which they call the sale and purchase deed, to extinguish the grower's rights.
- 4 They also seek a direction that Mr Korda and Ms Chesser, in their capacity as liquidators of TSL, are justified in entering an agreement with Almond Land to accept \$6 million to extinguish the growers' rights in accordance with the terms of the bank offer as defined in their affidavit. They also seek similar orders in relation to the unregistered almond scheme.

THE MATERIAL FACTS

- 5 The four plaintiff companies are members of the Timbercorp Group of Companies. Mr Korda and Ms Chesser are the liquidators of the four plaintiff companies.

- 6 The Timbercorp Group of Companies carried on business promoting managed investment schemes, whereby investors (known as growers) invested in and participated in the growing of trees, almonds, olives and other horticultural products.
- 7 On 23 April 2009, the Timbercorp Group of Companies appointed administrators after they could not renegotiate large amounts of bank debt. The creditors then resolved to put each group company into voluntary liquidation. On 29 June 2009, Mr Korda and Ms Chesser were appointed the liquidators of TSL, Almond Management, TL and Almond Land.
- 8 TSL is currently the responsible entity of seven almond schemes which are registered managed investment schemes under the *Corporations Act 2001*. Almond Management also manages an unregistered almond scheme known as the '2002 private offer scheme'.
- 9 Mr Korda says that both TSL and Almond Management are hopelessly insolvent and are unable to manage the almond schemes. Although the *Corporations Act 2001* provides that the responsible entity of registered managed investment schemes can be removed and replaced, the members of the schemes (in this case "the growers") have not done so.
- 10 Mr Chris Garnaut, a grower, has been instrumental in establishing a group of growers known as the Timbercorp Growers Group ("TGG") and has been seeking to have another responsible entity appointed for the registered almond schemes but without success.
- 11 The major problem faced by the liquidators is that the relevant assets that constitute the relevant orchards are owned by different parties. Generally speaking, the land is owned by one Timbercorp company, whilst the growing rights are owned by the growers. The liquidators describe the bundle of assets that make up the relevant assets of the almond orchards as the 'almond assets'. The liquidators are of the view that the best way to realise the most money for the almond assets is to offer them for

sale as a whole and on an unencumbered basis. The liquidators were of the view that if the court ordered that the relevant registered almond schemes be wound up, then the liquidators would be able to enter into an arrangement with the holder of the other relevant almond assets to offer the almond assets for sale or recapitalisation on an unencumbered basis.

- 12 Earlier proceedings concerning Timbercorp have been pursued in the Federal Court of Australia as well as in this court. In substance, the Federal Court has been dealing with the tree schemes and this court has been dealing with the almond and olive schemes. Previously, Mr Korda and Ms Chesser sought a direction that they were justified in applying to the court to wind up the registered olive and almond schemes. The court gave directions that Mr Korda and Ms Chesser were justified in so applying. The application to wind up the registered almond and olive schemes (including registered almond schemes the subject of this application) came on for hearing before me from 15 July 2009 to 20 July 2009. The TGG opposed the winding up applications and cross claimed for the appointment of a temporary responsible entity.
- 13 The TGG is concerned that the winding up of the registered schemes may extinguish some of the growers' property rights. In particular, the TGG is concerned that the winding up of a scheme may have the effect of terminating the tenancy, cropping or akin rights that the relevant growers had over their relevant portion of the almond or olive groves.
- 14 On 20 July 2009, the winding up applications were adjourned by consent with orders that the liquidators cause TSL to call separate meetings of the almond and olive registered schemes to allow the growers to consider certain resolutions.
- 15 Certain resolutions were passed at the meetings along with purported amendments of the constitutions of the various managed investment schemes. By 17 August 2009, no one had made an unconditional and binding offer to take the role of replacement responsible entity of any of the registered almond schemes. Accordingly, on

18 August 2009, the liquidators reinstated their application to wind up the almond schemes. Mr Korda asserts that, as well as TSL being insolvent, the almond schemes themselves each have a cash flow deficiency. Mr Korda says that the liquidators are also concerned about the risk of severe wastage of the almond orchards if the almond assets are not sold or the schemes recapitalised in the near term.

- 16 As mentioned previously, a winding up of the schemes may allow the liquidators to offer the almond assets for sale or recapitalisation on an unencumbered basis. On the return of the application to wind up the schemes, the liquidators accepted that if they had the power to release or surrender the growers' rights under the registered schemes, they would be able to affect a sale or recapitalisation of the almond assets on an unencumbered basis without the schemes being wound up.
- 17 The difficulty that was identified at the hearing, and it was also canvassed at length in the July hearing, was how the purchase price for the almond assets would be allocated between that respective owners of the various assets that make up the almond assets. In practice, this means the allocation of the purchase price as between the growers of the one part and the banks who held securities over the land and other assets of the Timbercorp Group that were part of the almond assets of the other part.
- 18 The liquidators were acutely aware of this difficulty and encouraged the banks and the growers to agree on the division of the sale proceeds so that the sale of the almond assets could proceed.
- 19 As indicated above, the liquidators did not press their application to wind up the registered almond schemes but instead sought a direction that they would be justified in causing TSL to amend the constitutions of the 2001-2007 almond schemes to give TSL the explicit power to "assign, terminate, surrender or otherwise deal with any sub-leases, licence or joint venture agreement." I made the orders sought. Mr Korda made plain, however, that he would not exercise the power to extinguish the growers' rights in a sale or recapitalisation process without first seeking

directions from the court.

- 20 Subsequently, the liquidators caused the amendments to the almond scheme constitutions to be made.
- 21 On 4 August 2009, the liquidators advertised seeking expressions of interest for the possible purchase of the almond assets or the re-capitalisation of the almond schemes. A closing date for bids was fixed for 28 August 2009. The liquidators made available to interested parties access to an on-line data room which contained confidential information about the almond schemes.
- 22 The bidders were asked to apportion the purchase price between the land, water rights and cropping rights. The liquidators received seven bids for the almond assets. The bids have been disclosed on a confidential basis to the court and counsel for the parties appearing.
- 23 On 11 September 2009, the liquidators selected Olam Orchards as the preferred purchaser. The liquidators say that the terms and conditions of the Olam Orchards offer are “clearly the most favourable”. The liquidators have provided information about the financial strength of Olam and no issue arises about that. A sale and purchase deed (SPD) has been entered into between TL, TSL (in its capacity as responsible entity of the almond schemes and in its personal capacity), Almond Land, Almond Management, the liquidators, Olam Orchards and its parent company Olam International Limited.
- 24 Olam Orchard’s bid offers a total purchase price of approximately \$128 million consisting of \$81.6 million for permanent water rights and \$46 million for the other Almond Assets. Completion (as defined) will occur when the conditions precedents have been fulfilled in about 75 days.
- 25 It is a condition precedent of the SPD that by 9 October 2009, the court gives a direction that the liquidators are justified in entering into the SPD and extinguishing the growers’ rights. The liquidators say that if the court directs that they are justified

in doing so, they will not extinguish the growers' rights until shortly before completion.

26 Another condition on the almond sale is that the relevant lenders and Almond Land provide, at completion, releases of their charges over any of the almond assets and discharges of the mortgages over the relevant properties, and the permanent water rights included in the sale.

27 The securities relate to the following principal facilities:

(a) ANZ Almond Facility for \$45 million to Almond Land dated 26 September 2006 ("ANZ Almond Facility").

(b) Syndicated Loan Agreement to TL dated 15 December 2006 (as amended) for \$200 million ("Syndicate Facility"). BOSI Security Services Limited (formerly names BWA Custodians Limited) is the Security Trustee for the Syndicate Banks. The Obligors to the Syndicate Facility include Almond Land and Almond Management.

28 The liquidators believe that currently the ANZ Almond Facility is at least \$47 million and the Syndicate Facility is at least \$202 million.

29 The liquidators say that some of the securities were created within six months from the commencement of the Timbercorp Group's winding up. They say that they have not investigated the circumstances surrounding their creation or the financial position of each of the Timbercorp vendor companies at that time. They say that if the court grants the relief sought, settlement with the secured creditors is proposed to take place on a reservation of rights basis regarding the validity of the securities. They say that this is the only practical way in which they can complete the SPD and procure the releases of the securities from the secured creditors.

30 As a result of the disagreements between the growers and the secured creditors concerning the apportionment of the Olam sale proceeds during the sale or recapitalisation process, the liquidators sought to appoint a special purpose

liquidator to help facilitate the settlement of the disputes between the growers and the secured creditors and if necessary, provide a report to the court on the reasonableness of any offer that the liquidators may receive for the almond assets.

31 On 11 September 2009, the liquidators sought a direction from this court that TSL was justified in entering an agreement to appoint Ian Carson of PPB to fulfil the role of a special purpose liquidator in relation to the almond schemes. The liquidators say that they considered that they would be aided by appointing Ian Carson to assist with the conflicts between their roles as liquidators of TSL and Almond Land. In particular, the liquidators were faced with the possible conflict arising from them acting as liquidators of TSL, the responsible entity for the registered almond schemes, and as liquidators of Almond Land, which owned the land and other almond assets which were charged in favour of the banks. They were concerned that they would be negotiating with themselves over the allocation of the purchase price between the almond schemes and the Almond Assets owned by Almond Land.

32 On 14 September 2009, the hearing of that application took place. In the course of that hearing the liquidators' lawyer explained to the court how they envisaged the sale process taking place, including the making of this application. Mr Zwier explained Ian Carson's facilitative role in this process and the importance of the growers making a reasonable offer to the secured creditors.

33 I made the orders sought. Ian Carson accepted the appointment and retained Mallesons Stephen Jaques to advise him in relation to his appointment and discharging his function.

34 The liquidators have also made agreements with Select and Almond Land in relation to the care and maintenance of the orchards. Select has agreed to fund the maintenance of the orchards until 9 October, the date on which the immediate conditions precedent under the SPD have to be fulfilled.

35 The liquidators state that there are two critical issues relevant to determining the apportionment of the Olam sale proceeds between the secured creditors and the

almond growers. First, what are the proprietary interests of the growers in the almond assets and can those rights be determined by the winding up of the almond schemes or by disclaimer by virtue of the Timbercorp Group liquidations? The liquidators acknowledge that this issue raises complex legal issues. Secondly, what is the value of those proprietary interests and how should they be calculated? They say that these questions raise complex commercial considerations. As discussed below, in my opinion, they also raise legal issues that can be determined by well established legal principles of law and equity.

36 The liquidators say that to assist both Ian Carson and themselves in reaching their decision regarding the apportionment of the Olam sale proceeds, they asked TGG's solicitors to set out what they considered was the basis of the growers' claims and the portion of sale proceeds to which they considered the growers were entitled. They say that there was correspondence between the liquidators' solicitors and TGG's solicitors on this matter.

37 The liquidators say that they also asked the secured creditors to provide an analysis of the legal and commercial issues supporting their claim that they are entitled to receive all of the Olam sale proceeds. They say that Ian Carson also called on TGG to provide him with more detailed submissions on both the legal issues and the commercial issues, and TGG did so.

38 The liquidators say that for some considerable time, TGG and the secured creditors have been indirectly negotiating with one another, mainly through either Ian Carson or the liquidators and their respective lawyers.

39 The liquidators say that they have been told that at the most recent committee of inspection meeting, the growers offered to take \$50 million from the Olam sale proceeds as fair consideration for the consensual extinguishment of their rights. The liquidators say that the secured creditors rejected this offer.

40 The liquidators say that to achieve "an expeditious termination or surrender" of the sub-leases and relevant joint venture agreements, the secured creditors have made a

conditional written offer to Almond Land that the secured creditors will pay \$6 million to Almond Land, to be paid to TSL as responsible entity (for the benefit of the growers, including the relevant growers in the 2002 Private Offer Scheme). They say that the costs will be paid out before the \$6 million is paid to growers. This offer is contained in a letter of 30 September 2009 ("the bank offer"). The bank offer also contains a detailed position paper explaining why the growers have severe legal impediments to their claims to the Olam sale proceeds. The letter also includes a commercial analysis of the growers' proprietary interest, prepared by Ferrier Hodgson, which values those interests lower than the offer of the secured creditors.

41 The growers have not accepted the bank offer and no agreement has been reached regarding apportionment. The liquidators say that the bank offer will lapse if not accepted by 9 October 2009.

42 On Friday 2 October 2009, the liquidators requested that Ian Carson complete his report based on the Olam SPD and the current state of the negotiations. On 4 October 2009 (early Sunday morning), Ian Carson issued his report.

43 The liquidators say that Ian Carson was asked to assume the correctness of the legal advice of Arnold Block Leibler regarding the legal issues referred to above. The legal advice of Arnold Block Leibler included an opinion from Charles Scerri QC and Phillip Crutchfield of counsel.

44 The liquidators have resolved that they should accept the bank offer. In doing so they say that they have had regard to the Ian Carson report, the confidential legal advice of Arnold Block Leibler and the opinion of Charles Scerri QC and Philip Crutchfield.

45 The liquidators say that they have also had regard to:

- (a) the fact that Ian Carson's report has been prepared by an experienced independent insolvency practitioner whose sole focus has been TSL and who, unlike the liquidators, does not owe conflicting duties to other

members of the Timbercorp Group; and

- (b) the robust sale or recapitalisation process that they have conducted and that no other person has sought to recapitalise the almond schemes notwithstanding that the Timbercorp Group insolvency administrations have been running for a period in excess of 160 days.

46 They said that they have also considered that Olam Orchards, who is a well resourced, financially strong and natural buyer of the almond assets, may not be prepared to resubmit a bid for the almond assets if the SPD conditions precedent are not fulfilled. They say that they also regard Olam Orchard's conditions precedent as commercially sensible from a buyer's perspective.

47 I should interpolate here that the issue in this case is not the appropriateness of the conditions imposed by Olam Orchards but the dilemma faced by the liquidators in view of the banks' stance that they will not permit the sale to settle unless they are paid all but \$6 million of the proceeds without any meaningful determination of the property rights of the growers being made.

48 They say that:

- (a) the price that Olam Orchards will pay for the almond assets and the terms and conditions on which it will acquire the almond assets represent the best offer to be made following a competitive bidding process;
- (b) the real issue between the TGG and the secured creditors is confined to the apportionment of the Olam sale proceeds and not the sale price payable by, or the terms and conditions agreed with, Olam Orchards;
- (c) acceptance of the bank offer will be "without prejudice" to the validity of the securities held by the secured creditors over the almond assets;
- (d) the fact that, in order for TSL, on behalf of growers, to assert the

continued existence of growers' proprietary interests, TSL would be compelled to spend considerable time and money on expensive litigation in circumstances where it frankly does not have those funds and TSL's legal rights are, at best, uncertain;

- (e) the extinguishment of growers' rights is a serious step for the liquidators to take, particularly when not all the growers can be heard on these complex issues and the TGG oppose the liquidators? doing so;
- (f) the wasting nature of the almond assets and the damage that will be inflicted on the almond assets if the Olam SPD is not completed. That damage may exceed the amount of the bank offer. This threat to the almond assets, which are secured in favour of the secured creditors, may be regarded by growers as having commercial value greater than the bank offer;
- (g) in real terms, the almond schemes have ceased to operate in accordance with their constitutions and are now operating on a "hand to mouth" basis, with part of next year's crop already having been sold to fund necessary expenditure;
- (h) the fact that, even if almond growers have indicated that they wish to maintain their almond schemes, the almond growers have not funded an alternate responsible entity to do so;
- (i) the fact that, even if growers were asked to contribute to the ongoing costs of the almond schemes, unless all growers contributed the required amount, those growers that did contribute would be required to increase their contributions to cover any shortfall. They say that this is particularly relevant given that:
 - (i) Timbercorp Group entities are growers but will not be able to contribute;

- (ii) many growers funded their contributions through loans from Timbercorp Finance but will now need to source alternate funding; and
 - (iii) the growers are entitled to terminate their participation in the almond schemes given the insolvency of the relevant Timbercorp Group entities;
- (j) it is doubtful whether it would be in the growers' best interests to be asked to contribute further funding to the almond schemes, or to risk the proceeds from the 2009 crop (to which they would otherwise be entitled) to fund the almond schemes, in circumstances where there is no guarantee that the almonds schemes can or will continue;
- (k) the liquidators do not have the money to continue maintenance of the almond orchards and they cannot borrow it. Select will not maintain the almond orchards indefinitely through the crop sale mechanism currently in place. Wastage, and ultimately, tree death, will arise if the almond orchards are not maintained;
- (l) the recent failures of many high profile managed investment schemes and the global financial crisis and credit squeeze has made more high risk investments, such as these agribusinesses, less attractive in the market place generally;
- (m) the lengthy drought and its effect on returns to agribusinesses has highlighted the inherent risks and made investments in agribusinesses less attractive in the market place generally; and
- (n) unless the relevant parties consent to an extension, on 9 October 2009:
 - (i) the bank offer will expire;
 - (ii) the Olam SPD will terminate unless the immediate conditions

precedent are satisfied; and

(iii) the maintenance arrangement with Select under the crop sale agreements expires.

49 I have recited these factors at length to recognise the careful consideration that the liquidators have given to this issue and the relevant matters.

50 I do not propose to comment on these matters save to say that if there were to be litigation over the allocation of the proceeds between TSL as the responsible entity and the other interested parties, the costs of the liquidators may be able to be met out of the fund. I discuss this further below.

ALMOND LAND

51 The liquidators depose that Almond Land owes \$249 million to the secured creditors. The liquidators say that the economic interest in Almond Land is best advocated by the secured creditors. The liquidators state that they regard it to be in their economic interest to offer \$6 million to effect an orderly sale of the almond assets they claim are secured in their favour.

52 The liquidators state that by accepting the bank offer and completing the SPV, Almond Land:

- (a) maximises value to all its creditors;
- (b) avoids the requirement for them to disclaim the sub-leases and certain joint venture agreements and litigation that may ensue if some growers seek to challenge those disclaimers or seek relief from forfeiture;
- (c) avoids the spectre of prolonged expensive litigation with TSL, secured creditors and growers;
- (d) avoids damage to its property arising from cessation of maintenance of the almond orchards;

- (e) achieves certainty of outcome; and
- (f) reserves its rights to challenge the securities.

TSL

53 As liquidators of TSL, the liquidators have decided to support the sale to Olam, and in the absence of any higher offer they have also decided to accept the bank offer as it is currently the best option available to TSL for the following reasons, namely:

- (a) the bank offer exceeds the value of the growers' interests in the almond schemes according to Ian Carson's report;
- (b) based on their legal advice and their own assessment of the commercial value of the growers' interests in the almond schemes, they also believe that the bank offer exceeds the value of the growers' interests in the almond schemes;
- (c) the growers will be relieved of any further financial obligations to contribute to the almond schemes and will share rateably in the 2009 crop proceeds of about \$33 million, together with the growers in the other almond schemes;
- (d) they place less weight on both the TGG valuation reports and the secured creditors' Ferrier Hodgson report as they were prepared as advocacy positions;
- (e) leaving aside the commercial value of the growers' proprietary interests, the proprietary interests of the growers can be disclaimed or terminated by Almond Land or Almond Management or may be terminated on the winding up of the almond schemes;
- (f) if TSL, on behalf of the growers, sought relief from the termination or sought to set aside the disclaimers, TSL would be required to commence and pursue expensive litigation and there is uncertainty as to whether

TSL would succeed. TSL does not itself have the funds necessary to do so and, based on the Arnold Block Leibler advice, it is highly unlikely that TSL could obtain litigation funding to do so;

- (g) if growers wished to seek the relief themselves (assuming that they had the necessary funds to do so), their likelihood of success may be adversely affected if the percentage of growers seeking that relief was small. The percentage of growers who could or would seek that relief will be impacted by the fact that the Timbercorp Group entities own almond lots and that Timbercorp Finance financed growers to acquire their almond lots;
- (h) they have conducted a robust recapitalisation and sale process and accepted the best offer available following a competitive bidding process and, given this, they believe that the sale to Olam Orchards should not be jeopardised;
- (i) the satisfaction of the conditions precedent, the implementation of maintenance arrangements to replace the crop sale arrangements and the bank offer must all be resolved by 9 October 2009; and
- (j) they have also provided the forum to give all stakeholders, including the growers, the opportunity to put forward their position and to negotiate for what they consider is the best outcome.

TGG CONTENTIONS

54 TGG put forward several submissions that amplifies the legal issues referred to by the liquidators. I do not seek to summarise all their submissions but I have summarised parts of them below.

55 The banks acknowledge in a deed of covenant that they take their rights subject to the growers' interests. The relevant schemes are divided into two categories:

- (a) the 2002 scheme in which the growers entered into a licence and joint

venture agreement; and

- (b) the 2005-2007 schemes in which the growers were granted a sub-lease of their almond lots.

56 TGG contends that the banks take their rights subject to the growers' interests in the 2002 schemes because the growers invested funds into the scheme which were used to improve the land in the expectation that they would be entitled to continue to use and enjoy the land with the benefit of the almond trees, the capital works and the water licences. TGG says that the banks were on notice of their client's equity and are bound by it under the principles in *Inwards v Baker*.¹

57 TGG submits that the banks take their rights subject to the growers' rights under the 2005-2007 schemes because:

- (a) the growers are tenants in possession under s 42(2)(e) of the *Transfer of Land Act 1958* (Vic);
- (b) they have been granted a sub-lease of the almond lots as defined in the sub-leases. The almond lots include 'the Almond Trees, the Capital Works and the Water Licences attributable to the Project'. TGG submits that clause 2.2(a) of the sub-lease should be read down to only include a reservation to Almond Land of the reversion in those assets;
- (c) if the sub-lease has been terminated, they have rights to seek an order for relief against forfeiture under s 146(4) of the *Property Law Act 1958* (Vic);
- (d) the sub-leases will survive the surrender or merger of the head lease into the freehold under s 139 of the *Property Law Act 1958* (Vic);
- (e) if the liquidators were to disclaim the head leases, then the head leases will merge into the freehold and their sub-leases survive the disclaimer

¹ [1965] 2 QB 29.

under s 139 of the *Property Law Act* 1958 (Vic);²

- (f) alternatively, the growers can apply to have the disclaimer set aside under s 568B;
- (g) the water rights, capital works and almond trees form appurtenances to the head leases and sub-leases necessary and convenient for the almond lot operations permitted by clause 8.1 and required by clause 8.2 and any interference with them by the mortgagee constitutes a derogation from the grant;³ and
- (h) the head leases contain clauses to the following effect (clause 9.3):

Upon this Lease terminating for whatever reason, the Lessor irrevocably authorises and consents to the granting or continuation (or both) by the Growers of a right to occupy or use the Land granted under the Sub-leases (Wangera), on the same terms and conditions as the Growers are granted sub-leases, whether before or after the execution of this Lease, and with the Lessor accepting the obligations of the Lessee to the Growers under Sub-leases (Wangera).

- (i) TSL is the responsible entity and holds the interest in the lease on trust for the growers (s 601FC(2) of the *Corporations Act*). TGG submits that it is obliged to act on its rights under clause 9.3 to ensure that a lease will be granted to the growers if the head lease is terminated. Consequently, the subleases bind Almond Land even if the lease to TSL is terminated.

58 TGG submits that further, the banks take their interests subject to the growers' rights under all schemes because:

- (a) the water rights under the water licences are held on trust for them under clauses 3.2(a)(i) of the sub-leases and 3.3(a) of the licences;
- (b) the investors' interests in the water licences, the capital works and the almond trees are scheme property held on trust for them under

² *National Australia Bank v State of New South Wales* [2009] FCA 1066,26 (Rares J).

³ See, eg, *Wilcox v Richardson* (1997) 43 NSWLR 4.

s 601FC(2) of the *Corporations Act 2001*;

- (c) there is no power in the scheme constitution to encumber those assets to borrow or raise money for the scheme and any purported mortgage over those assets is in breach of s 601GA(3) of the *Corporations Act 2001* and of no effect under s 601GA(3) of the *Corporations Act 2001*;
- (d) accordingly, any attempt to encumber their beneficial interest in those assets is a breach of either or both of those trusts and the *Corporations Act 2001*;
- (e) the banks are presumed to know the provisions of the *Corporations Act 2001*;
- (f) the banks acknowledged in their loan documents, and in particular their deeds of covenant, the interest of the investors;
- (g) accordingly, each bank has actual or constructive knowledge that any attempt to grant a mortgage or other security over the water licences, capital works and the almond trees was in breach of the *Corporations Act* and in breach of trust. If the banks hold such a mortgage or other security, then it is subject to a constructive trust in favour of the TGG under the principles in *Barnes v Addy*;⁴ and
- (h) alternatively, the grant of the sub-leases and licences and the associated rights to use and enjoy the capital works, the almond trees and the water licences constituted a promise or representation to the growers that they would be entitled to the use and enjoyment of those assets for the balance of the term of their sub-leases or licences respectively. In reliance on those representations, the growers entered the scheme. The banks were on notice of, consented to and acquiesced in those promises or representations and are estopped from denying the growers' interests.

⁴ (1874) LR 9 Ch App 244.

59 Further, TGG contends that the mortgages over land and the mortgages over water were executed on 30 December 2008 and registered in January 2009. The administration commenced on 23 April 2009 and that is the relation back date. TGG submits the mortgages may be voidable at the option of the liquidators.

METHODOLOGY OF MESSRS KORDA AND CARSON

60 TGG contends that the methodology proposed by Messrs Korda and Carson is flawed. They submit that:

- (a) it accepts that the growers have property rights, yet attributes a value of only \$6 million out of a proposed purchase price of \$128 million to those rights, which should immediately arouse suspicion;
- (b) a discounted cash flow method fails to consider the value of the growers' rights in an open market. It appears that the growers' rights have been attributed a value of more than \$6 million. For example:
 - (i) there is a buyer in the market willing to pay \$128 million for the almond assets;
 - (ii) that buyer is willing to ascribe \$81.6 million to the water rights. That is not accepted as a proper method for valuing the water rights, as the buyer may have its own reasons for allocating the purchase price in that manner;
- (c) in any event, the growers have a lease over the water rights or the right to use them for the balance of their lease or licence terms, which can be as long as 20 years; and
- (d) no buyer would pay \$81.6 million for a reversionary interest in those water rights, so a substantial part of that sum must have been paid for the growers' rights;

- (e) further, the buyer has attributed \$46 million to the other almond assets.⁵ The value of the shares could be easily ascertained⁶ leaving the balance of the \$46 million being the purchase price for the properties. The growers have rights to exclusive possession of that land under the sub-leases or to exploit almost all of the commercial rights on that land for a period of around 20 years. Consequently, a significant portion of that sum must be being paid for the growers' rights;
- (f) it fails to consider any comparable sales;
- (g) it does not offer any independent apportionment of the purchase price. It uses a discounted cash flow method which is not appropriate in these circumstances. The report is not a determination of the market value of the growers rights, but a report to apportion part of the purchase price to the growers. A discounted cash flow cannot achieve this;
- (h) it recognises the following concession by the liquidators' legal advisers:⁷
- ...the Arnold Block Leibler Advice recognises the existence of some difficult legal issues and concludes that the legal uncertainties provide some scope for argument on the part of the Growers;
- (i) it recognises that ABL's advice relies heavily on the assumption that the growers' interests can be disclaimed and expresses reservations about the correctness of that view in light of advice from Carson's advisors;⁸
- (j) the liquidators cannot disclaim the growers' rights because:
- (i) if the liquidators were to disclaim the head lease, the head lease would merge into the freehold⁹ and the sub-leases would survive under s 139 of the *Property Law Act 1958* (Vic);

⁵ Korda at 59.

⁶ Korda at 49(c) and (d).

⁷ P 6 and 20.

⁸ Ibid.

⁹ *National Australia Bank v State of New South Wales* [2009] FCA 1066.

(ii) the licence and joint venture agreements have an unusual structure in which the landowner leases the land to TSL, who sub-leases it back to the landowner. The landowner then grants the licence to the grower.¹⁰ Disclaimer of the lease or the sub-lease in the 2002 schemes would not affect the licence granted by the landowner to the growers; and

(iii) TSL is the responsible entity of the schemes and the powers in the constitution must be exercised for the benefit of the growers;

(k) it records that the Arnold Block Leibler advice notes that the growers' interests are presently liable to be terminated for default.¹¹ It does not identify the basis on which this is put and there is no evidence of rental arrears, outstanding invoices or other defaults by the growers;

(l) yet Carson is instructed to rely on ABL's legal advice and assume that it is correct;¹²

(m) a copy of that advice has not been annexed to Carson's report and has not been provided to the growers;

(n) the advice on which he purports to rely is identified on p 14. The first of those is dated 17 September 2009, yet the letter instructing him to rely on that advice is dated 3 September 2009 (see appendix 2). No earlier advice is referred to by Carson;

(o) it appears that Mr Carson was not given a copy of the banks' deeds of covenant;¹³

(p) as Mr Carson attributes no value to the growers' water rights, it appears that Arnold Block Leibler is of the view that the growers have no water

¹⁰ Fernon at 12 to 15.

¹¹ P 6 and 20.

¹² P 8.

¹³ Appendix 3.

rights. This is not consistent with the grant in the sub-leases or the licence and joint venture agreements;

- (q) it does not consider Mr Lennie's spreadsheet;¹⁴
- (r) no reference is made to the growers' rights under *Inwards v Baker*,¹⁵ their rights held on trust by the responsible entity and under *Barnes v Addy*,¹⁶ their proprietary estoppel or their right to a new lease under clause 9.3 of the head lease;¹⁷ and
- (s) it declines to consider whether the banks' securities are void as against the Liquidator.¹⁸

61 TGG contend that Mr Carson's report acknowledged that he was bound to accept the Arnold Block Leibler advice. They say that he noted, however, that the Arnold Block Leibler advice relies heavily on an assumption that the growers' interests can, in effect, be disclaimed by the liquidators of almond land. They submit that he says that he has reservations about the correctness of that view, based upon his own legal advice. TGG submits, however, that on the basis of the correctness of the Arnold Block Leibler advice, Mr Carson believes that \$6 million represents an offer that he would accept if the liquidator of TSL provided that he was satisfied that the offer is the product of a robust negotiation around the numerous, difficult issues.

62 I will not canvass all the arguments put forward by TGG. It is sufficient to say that they are detailed and amply demonstrate that there are real issues to be resolved as the liquidators concede. There are many complex legal issues that would need to be resolved to precisely identify the proprietary interest of the growers.

KERREE ANNE BEZENCON

63 Ms Bezencon appears on the applications represented by Mr Shand QC.

¹⁴ Contained in exhibit OSL-1 to Mr Lennie's affidavit.

¹⁵ [1965] 2 QB 29.

¹⁶ (1874) LR 9 Ch App 244.

¹⁷ See pp 10-11.

¹⁸ P 20.

Ms Bezencon is a grower, accountant and the chair of the Timbercorp Growers' Almond Committee Inc. In substance, she opposes the liquidators' application. She complains about the bidding process and the provision of information to her by the liquidators. She seeks the appointment of Huntley Management Limited as an interim responsible entity of the schemes. She also deposes to a possible higher offer for the almond orchards.

64 The proposal of Huntley Management Limited to act as a temporary responsible entity was again subject to conditions and was not an unconditional offer. It was not one that the court was in a position to accept. I can understand the attempts by the growers to seek to extract as much as possible for their investment. The evidence establishes that the liquidators conducted a proper sale process that elicited seven bids. I have seen the bids. In my view the liquidators' are justified in accepting the Olam Orchards bid. The well known expression "a bird in the hand is worth two in the bush" may well be apposite.

65 To lose the Olam Orchards bid on the basis of a chance of a higher bid is not a responsible or reasonable step to take in view of the legitimate tender process undertaken by the liquidators.

66 In my view the court should and will do all that it reasonably can to assist the liquidators to complete the sale of the almond orchards to Olam Orchards subject to my decision on the \$6 million offer.

MR CARSON'S REPORT

67 Mr Carson's report accepted that he was bound to accept the Arnold Bloch Leibler advice. He noted, however, that the Arnold Bloch Leibler advice relies heavily on an assumption that the growers' interests can in effect be disclaimed by the liquidators of Almond Land. He says that he has reservations about the correctness of that view, based upon his own legal advice.

68 However, on the basis of the correctness of the Arnold Bloch Leibler advice, he believes that \$6 million represents an offer that he would accept if the liquidator of

TSL provided that he was satisfied that the offer is the product of a robust negotiation around the numerous difficult tasks.

69 In my opinion, his views are heavily qualified by the observations he makes about the soundness of Arnold Bloch Leibler's advice.

ASIC

70 ASIC appears on the application as *amicus curiae*. The court expresses its appreciation of ASIC's attendance. ASIC submits that it is unable to offer any material assistance to the court in this matter. ASIC is of the view that the issues before me are essentially commercial ones for the liquidators.

RE HAZELTON AIR CHARTER PTY LTD¹⁹

71 Mr Zwier drew to my attention *Re Hazelton Air Charter Pty Ltd*,²⁰ a decision of the Federal Court of Australia of Justice Goldberg. The case, in my opinion, clarifies the difficulties faced by the liquidators in this case and also provides the solution to the problem. The case involved the Ansett Group collapse where Mr Korda and his partner Mr Mentha were the administrators of the Ansett Group. I will briefly summarise the issues. The Hazelton Group had been taken over by the Ansett Group before the Ansett Group collapsed, leading also to the collapse of the Hazelton Group. The Ansett Group was owned by Air New Zealand. Prior to the collapse, Air New Zealand had given a letter of comfort to the Ansett and Hazelton Groups, stating it would provide moneys to enable the Ansett and Hazelton Groups to meet their debts, although their letter did not constitute a binding contract to do so.

72 Claims were made against the Air New Zealand directors and the upshot was that Air New Zealand paid \$150 million to meet the claims of the Hazelton Group and the Ansett Group against the companies and the directors that may have arisen from, inter alia, issuing the letter of comfort.

¹⁹ (2002) 41 ACSR 472.

²⁰ Ibid.

73 The Hazelton Group and the Ansett Group (both under separate administrations) each accepted the \$150 million and received court approval to do so, but at the time they made no agreement as to the allocation of the \$150 million between themselves. That was left to be decided subsequently. The respective administrators could not agree on the allocation of the \$150 million and they initiated proceedings in court where they put forward to the judge bases upon which the \$150 million could be allocated. In particular, they submitted that as the promise was to meet the liabilities of the respective companies, the money should be divided in proportion to their total liabilities or alternatively, should be divided in proportion to the liabilities that they owed to their workers. There were all sorts of formulas put that, on their face, might seem fair and reasonable.

74 Goldberg J said that a fair and reasonable approach was not correct. He said that the allocation should be done based on well established principles of law and equity. I will quote what he said because it has great relevance to this case.

75 He said:

30 The various bases advanced by the Ansett administrators and the Hazelton administrator for apportionment (other than a comparison of the claims released under the Letter of Comfort) have an element of fairness and appropriateness about them, but they are not predicated upon any legal or equitable principle. Nor can they be established by reference to the intention of the parties. I am not satisfied that it was the common intention of the parties that the fund be apportioned on any of the bases propounded by the parties. The various bases propounded provide convenient methods for the distribution of the fund, but they are not based on any principle which identifies or measures the extent of the interest of each of the Ansett group and the Hazelton group in the fund at the time it was created and impressed with the relevant trust in favour of the Hazelton group. It is not for me to reach a fair, appropriate, equitable or just conclusion as to how the fund of \$150m is to be apportioned. That may be a consequence or result of my resolution of the matter. Rather, my task is to determine, by reference to appropriate principles of law and equity, what was the extent and measure of the interest in the fund of the two groups at the time at which it was agreed to create the fund, namely the time of the execution of the Memorandum.

31 Fairness or appropriateness is an insufficient basis on which to determine the interest of the Hazelton group in the fund of \$150m. In *Muschinski v*

Dodds²¹ Brennan J said at 608:

The flexible remedy of the constructive trust is not so formless as to place proprietary rights in the discretionary disposition of a court acting according to vague notions of what is fair.

Deane J said at 615-616:

The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles: ...

...

Under the law of this country - as, I venture to think, under the present law of England ... proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion ... subjective views about which party "ought to win" ... and "the formless void of individual moral opinion" ...

32 I consider that the proper principle to be applied to determine the extent of the respective interests of the two groups in the fund and the manner of its apportionment between them is to determine what was bargained away or given up, by each group in exchange for the receipt of the \$150m and then to place a value on what each group bargained away or gave up. In this way it is possible to identify the relative value of what was relinquished in exchange for an interest in the fund of \$150m.

33 What occurred, by the execution of the Memorandum, was that the Air New Zealand group and the directors procured the payment of \$150m to the Ansett administrators, albeit on behalf of themselves and the Hazelton administrator, in exchange for the Ansett administrators and the Ansett group and the Hazelton administrator and the Hazelton group each giving up something of value. Each of them gave up such claims as they had against the Air New Zealand group and the directors arising out of, or relating directly or indirectly, to the Letter of Comfort. The giving up of those rights was confirmed by the emphatic language of cl 12A (par 12 above).

34 Prior to the execution of the Memorandum each group had a claim or a potential claim against Air New Zealand Limited under the Letter of Comfort. The claim of each group, which had a value, was exchanged for an interest in the fund of \$150m which is to be measured by the relativity of the claims of the two groups which were foregone.

35 In the absence of any agreement as to the apportionment of the \$150m between the Ansett group and the Hazelton group, I consider that the measure of their respective proprietary interests in the fund of \$150m is to be determined by reference to the relative proportions of the value of the rights or claims which each of them bargained away and gave up in exchange for the receipt of the \$150m. Each of them had a share in the fund of \$150m

²¹ (1965) 160 CLR 583.

proportionate to the value of what they had bargained away.²²

76 Then also at paragraph 47 he said again:

Against this background, the maximum "equity is equality" is to be applied not by reference to the number of companies in each group, three in the case of the Hazelton group and 41 in the case of the Ansett group, but rather by reference to the proportionate share of the fund measured by the extent and value of the claims or rights given up in exchange for an interest in the fund.²³

77 As the evidence in this case indicates, there is uncertainty at this stage as to precisely what property rights of the growers are to be transferred or surrendered as part of the consideration for the payment of the purchase price of approximately \$128 million. Until those rights are identified it is not possible according to law to fairly assess the value of the rights being surrendered on behalf of the growers.

78 Despite the matters raised by the liquidators that I have referred to at length, in my view, it is not appropriate for the liquidators to accept the bank offer merely because the banks assert that they will not allow their securities over the property to be sold as part of the almond assets.

79 The banks are entitled to the full extent and benefit of their charges and securities. The banks are under no obligation to give up or surrender any of their security rights if they so chose. On the other hand, subject to any agreement that is made between the parties, if the sale proceeds, the banks are only entitled to that portion of the sale proceeds that represents the property over which they hold securities.

80 In my opinion, the liquidators are not justified in entering into the agreement to accept \$6 million (less some undefined costs) in full satisfaction for the property rights transferred or surrendered by the growers' to enable Olam Orchards to obtain clear and unencumbered title and rights to the almond assets. As indicated, there are well recognised legal principles for determining the rights of several property owners whose property is lost or converted into a common fund. The fund, if it is created, is not to be allocated between the property owners on the basis of

²² (2002) 41 ACSR 472 at [30]-[35].

²³ Ibid [47].

bargaining power. The fund is not to be allocated on arbitrary measures that may appear to be a fair and reasonable division of the fund. Rather, as the authorities establish, the fund is to be divided “by reference to the proportionate share of the fund measured by the extent and value of the claims or rights given up in exchange for an interest in the fund.”²⁴

81 Accordingly, the amount owed to the Banks appears to be of residual relevance. The banks can obtain payment for only so much of the property as they have a charge over. The key issue is what proportion of the fund represents the property over which they hold security.

82 Subject to any further submissions of counsel, I propose to make the following orders and directions.

83 The liquidators (in their capacity as liquidators of TSL) are justified in procuring TSL (as the responsible entity of the managed investment schemes listed in schedule 1 to this order) to enter into and perform the sale and purchase deed between each of TSL (as responsible entity of the managed investment schemes listed in schedule 1 to this order), Almond Management (in its capacity as manager of the unregistered managed investment scheme listed in schedule two to this order), the liquidators, TL and Almond Land and Olam Orchards Australia Pty Ltd and Olam International Limited. The sale and purchase deed is in the form of the confidential exhibit MAK-14 to the affidavit of Mark Anthony Korda sworn 5 October 2009 (the Affidavit) as filed herein, or documents substantially in that form (the Sale and Purchase Deed), and extinguishes and /or transfers the Growers’ rights as provided therein.

84 The liquidators (in their capacity as liquidators of Almond Management) are justified in disclaiming the Project and Management Agreement (PMA) as defined in the Affidavit in respect of the unregistered managed investment scheme listed in schedule 2 of this order (the Unregistered Almond Scheme) and in entering into and performing the Sale and Purchase Deed and extinguishing and/ or transferring the

²⁴ *Re Hazelton Air Charter Pty Ltd* (2002) 41 ACSR 472 at [47] per Goldberg J.

Growers' rights as provided therein.

85 The liquidators (in their capacity as liquidators of TSL) are not justified in entering into an agreement with Almond Land to accept \$6 million to extinguish the Growers' rights in accordance with the terms of the Bank Offer as defined in the Affidavit.

86 The liquidators (in their capacity as liquidators of TL) are not justified in entering into an agreement with Almond Land to accept \$6 million to extinguish the Growers' rights in accordance with the terms of the Bank Offer as defined in the Affidavit.

87 The liquidators (in their capacity as liquidators of TSL, TL, Almond Management and Almond Land) are justified in instituting or participating in proceedings to determine the extent and measure of the interest in the fund constituted by the proceeds of sale of the Almond Assets of some \$128 million of TSL (as the responsible entity of the managed investment schemes listed in schedule 1 to this order), Almond Management (as the manager of the unregistered managed investment scheme listed in schedule 2 to this order), TC, Almond Land and any other person whose property rights are to be extinguished, sold or transferred to Olam Orchards Australia Pty Ltd under the Sale and Purchase Deed and to hold the said fund in trust for those persons pending the hearing and determination of such proceeding or further order of this court.

88 These orders are long and complicated. I want to make clear what the position is in lay terms. The ball is in the banks' court. If they agree, the sale can go ahead, but if the sale goes ahead the proceeds must be held in trust until the growers' proprietary rights to those moneys are established or agreed on.

89 Subsequently, after further submissions on 9 October 2009, orders were made with the agreement of the banks and TGG. Ms Bezencon agreed to the orders other than costs. The orders were as follows:

THE COURT DIRECTS THAT:

- 1 The Third and Fourth Plaintiffs (in their capacity as liquidators of the First Plaintiff) are justified in procuring the First Plaintiff as responsible entity of the managed investment schemes listed in Schedule 1 of this order (Registered Schemes) to enter into and perform the SPD and extinguishing all of the rights of Growers (investors in the schemes set out in schedules 1 and 2 of this order) in respect of the assets the subject of the SPD (Grower Rights).
- 2 The Third and Fourth Plaintiffs (in their capacity as liquidators of the Second Plaintiff) are justified in procuring the Second Plaintiff as manager of the unregistered managed investment scheme listed in Schedule 2 of this order to enter into and perform the SPD and extinguishing all of the Grower Rights.
- 3 The Third and Fourth Plaintiffs (in their capacity as liquidators of the First Plaintiff) are justified in making, doing and executing such documents or things to give effect to the extinguishment of all of the Grower Rights in order to perform the SPD.
- 4 The Third and Fourth Plaintiffs (in their capacity as liquidators of the Second Plaintiff) are justified in making, doing and executing such documents or things to give effect to the extinguishment of all of the Grower Rights in order to perform the SPD.
- 5 The Third and Fourth Plaintiffs (in their capacity as liquidators of the Second Plaintiff) are justified in disclaiming the Project Management Agreements and the Licence and Joint Venture Agreements (as those respective terms are defined in the Affidavit) and to the extent necessary have leave to do so pursuant to section 568(1A) of the Corporations Act 2001 (Cth).

THE COURT ORDERS, DECLARES AND DIRECTS THAT:

- 6 The Third and Fourth Plaintiffs in their capacity as liquidators of the First, Second, Fifth and Sixth Plaintiffs may enter into and perform: the SPD; and any document referred to, in connection with, or necessary to give effect to the SPD.

- 7 Upon completion of any sale under the SPD the net proceeds of sale (after payment of selling costs and expenses, retentions (if any) and the costs and expenses of the liquidators of the First, Second, Fifth and Sixth Plaintiffs referable to the preservation and realisation of the assets the subject of the SPD, as approved by the committee of inspection of the Sixth Plaintiff and the Secured Creditors (as that term is defined in paragraph 13 of the Affidavit), or order of the Court) (Net Proceeds) be held by the Sixth Plaintiff in an interest bearing trust account with an Australian bank (as defined in section 9 of the Corporations Act) pending the hearing and determination by the Court of a proceeding (Rights Proceeding) to determine which person or persons have any rights to all or any part of the Net Proceeds (Claimants), and to be held on trust for the Claimants until further order of the Court.
- 8 Insofar as each of the Secured Creditors have any rights to the assets the subject of the SPD, whether under their securities over those assets or otherwise, nothing in the release of those securities upon completion of the SPD will prejudice those rights for the purposes of their claim to all or any part of the Net Proceeds.
- 9 Insofar as the Growers have any rights to the assets the subject of the SPD nothing in orders 1 to 5 above, or any action taken thereunder by the Third and Fourth Plaintiffs, will prejudice those rights for the purposes of their claim to all or any part of the Net Proceeds.]

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

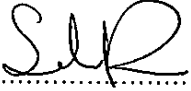
OIM#2 PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691
997) as trustee for TIMBERCORP ORCHARD TRUST #2 & ORS (according
to the attached Schedule)

Defendants

EXHIBIT NOTE

Date of document:	25 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-13" now produced and shown to **CELIA JANE ARMSTRONG** at the time of swearing her affidavit on 25 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-13

**Summons dated 17 December 2009 filed on behalf
of the TGG Almond Committee Inc in SCV
Proceeding No S CI 2009 10699**

FORM 46A

Rule 46.04(1)

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

No S CI 2009 10699

List E

BETWEEN:

BOSI SECURITY SERVICES LIMITED (A.C.N. 009 413 852) as trustee for
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
(A.C.N. 005 357 522) and BOS INTERNATIONAL (AUSTRALIA) LIMITED
(A.C.N. 066 601 250) and WESTPAC BANKING CORPORATION
(A.C.N. 007 457 141)

Plaintiff

and

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
(A.C.N. 005 357 522) & ORS (according to the attached Schedule)

Defendants

SUMMONS

Date of Document:
Filed on behalf of:
Prepared by:
MAURICE BLACKBURN
Lawyers
Level 10, 456 Lonsdale Street
MELBOURNE VIC 3000

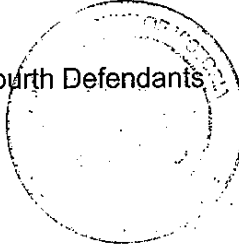
17 December 2009
The TGG Almond Committee Inc

Solicitors' Code: 564
Tel: (03) 9605 2700
Fax: (03) 9258 9610
Ref: BM/3008429

To: The Plaintiff
By its solicitors
Blake Dawson
Level 26 / 181 William Street
MELBOURNE VIC 3000

The First Defendant
By its solicitors
Allens Arthur Robinson
Level 27, 530 Collins Street
MELBOURNE VIC 3000

The Second, Third and Fourth Defendants
By their solicitors
Arnold Bloch Leibler
Level 21
333 Collins Street
MELBOURNE VIC 3000



Graham Goldenberg, Christopher Mark Little, Constantine Moshopolous
and David Butterfield
By their solicitors
Clarendon Lawyers
Level 17, 525 Collins Street
Melbourne VIC 3000

You are summoned to attend before the Court on the hearing of an application by The TGG Almond Committee Inc for orders that:

1. Pursuant to Rule 16.01(2), The TGG Almond Committee Inc be appointed in this proceeding to represent all grower investors in the following managed investment schemes:
 - (a) 2002 Timbercorp Almond Project (ARSN 099 611 935);
 - (b) 2002 Timbercorp Almond Project (Private Offer) (Unregistered);
 - (c) 2005 Timbercorp Almond Project (ARSN 112 935 092);
 - (d) 2006 Timbercorp Almond Project (ARSN 118 387 974); and
 - (e) 2007 Timbercorp Almond Project (ARSN 122 511 040).
2. The TGG Almond Committee Inc be joined as the fifth defendant in this proceeding.
3. The costs of The TGG Almond Committee Inc, of and incidental to this proceeding, be paid out of the proceeds of sale held on trust by the second defendant pursuant to the orders of this Honourable Court made 9 October 2009 in matter no. 9408 of 2009.
4. Such further or other orders as the Court thinks fit.

Date: 17 December 2009


MAURICE BLACKBURN
Solicitors for the Plaintiff

This interlocutory application will be heard by The Honourable Justice Davies at the Supreme Court of Victoria, Court 2, 450 Little Bourke Street Melbourne on 18 December 2009 at 10 am or so soon afterwards as the business of the Court allows.

Filed: 17 DEC 2009

This summons was filed by Maurice Blackburn of Level 10, 456 Lonsdale Street, Melbourne, 300, solicitors for TheTGG Almond Committee Inc

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:	25 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-14" now produced and shown to CELIA JANE ARMSTRONG at the time of swearing her affidavit on 25 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-14

**Orders of Davies J dated 22 December 2009 in SCV
Proceeding No S CI 2009 10699**

LIST E
S CI 2009 10699

BOSI SECURITY SERVICES LIMITED AS TRUSTEE
FOR AUSTRALIA AND NEW ZEALAND BANKING
GROUP LIMITED AND BQS INTERNATIONAL
(AUSTRALIA) LIMITED AND WESTPAC BANKING
CORPORATION

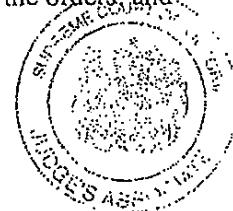
GENERAL FORM OF ORDER

OTHER MATTERS:

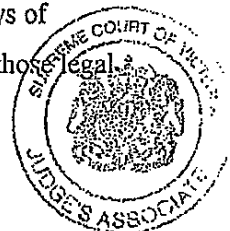
None

THE COURT ORDERS THAT:

1. Pursuant to rule 45.05 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) the requirements of Rules 5.03(1) and 8.02 are dispensed with.
2. Pursuant to rule 45.05 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) the Plaintiff has leave to proceed by originating motion in Form 5C.
3. Pursuant to rule 16.01(2) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic):
 - (a) Graham Goldenberg is appointed as the representative of the Growers in the 2002 Timbercorp Almond Project (ARSN 099 611 935);
 - (b) Christopher Mark Littley is appointed as the representative of the Growers in the 2005 Timbercorp Almond Project (ARSN 112 935 092);
 - (c) Constantine Moshopoulos is appointed as the representative of the Growers in the 2006 Timbercorp Almond Project (ARSN 118 387 974);
 - (d) David Butterfield is appointed as the representative of the Growers in the 2007 Timbercorp Almond Project (ARSN 122 511 040); and
 - (e) David Butterfield is appointed as the representative of the Growers in the unregistered managed investment scheme known as the 2002 Timbercorp Almond Project (Private Offer No 1).
4. The persons appointed pursuant to paragraph 3 above, are joined as the Fifth, Sixth, Seventh and Eighth Defendants in the proceeding pursuant to rule 9.02 and/or rule 9.06(b) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).
5. The Plaintiff is granted leave to file and serve an amended originating motion on the Defendants on or before 4:00pm 23 December 2009:
 - (a) incorporating a declaration as to what, if any, right the Growers represented by the Fifth, Sixth, Seventh and Eighth Defendants have to the sale proceeds held on trust by the Second Defendant pursuant to paragraph 7 of the orders; and



- (b) amending paragraph 5 of the originating motion to read "A declaration as to how the sale proceeds held on trust by the second defendant pursuant to paragraph 7 of the Orders ought to be distributed between the plaintiff and the first, fifth, sixth, seventh and eighth defendants."
6. The parties file and serve a list of documents on which they intend to rely in relation to the issue of what right, if any, they have to the net sale proceeds (the Funds) to be held on trust by the second defendant pursuant to paragraph 7 of the orders (the Rights Issue) on or before 4:00pm on 12 February 2010.
7. The parties file and serve on or before 4:00pm on 19 February 2010:
- (a) written contentions of fact and law addressing the Rights Issue (the Rights Contentions);
- (b) any affidavit material upon which they wish to rely in relation to the Rights Issue.
8. The parties file and serve on or before 4:00pm on 5 March 2010:
- (a) written contentions of fact and law in reply to the Rights Contentions;
- (b) any affidavit material upon which they wish to rely by way of reply in relation to the Rights Issue.
9. Each party serve a copy of the documents referred to in paragraphs 6, 7 and 8 upon TGG Almond Committee Inc and any other document filed in the proceeding from the date of this order at the same time as the document is served upon a party to the proceeding.
10. The Liquidators of the Second Defendant pay from the Funds to Clarendon Lawyers, the solicitors for the Fifth, Sixth, Seventh and Eighth defendants, the legal costs and disbursements incurred in this proceeding by the Fifth, Sixth, Seventh and Eighth Defendants in complying with paragraphs 6, 7, 8 and 9 of this order on a solicitor and client basis pursuant to rule 63.32(2)(a) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) up to a maximum of \$100,000 within 14 days of presentation to the Liquidator by Clarendon Lawyers of a tax invoice for those legal costs.



costs and disbursements, such tax invoices rendered by Clarendon Lawyers with such frequency as it sees fit.

11. The proceeding is listed for further directions at 10:00am on 12 March 2010.
12. Costs of today are reserved.
13. Liberty to apply.

DATE AUTHENTICATED: 4 December 2010



SCHEDULE OF PARTIES

S CI 2009 10699

BETWEEN:

BOSI SECURITY SERVICES LIMITED (ACN 009 413 852) as trustee for AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522) and WESTPAC BANKING CORPORATION (ACN 007 457 141) Plaintiff

- and -

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

ALMOND LAND PTY LTD (IN LIQ) (ACN 091 460 392) Second Defendant

MARK ANTHONY KORDA (in his capacity as liquidator of Almond Land Pty Ltd (in liq)) Third Defendant

LEANNE KYLIE CHESSER (in her capacity as liquidator of Almond Land Pty Ltd (in liq)) 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:
Filed on behalf of:
Prepared by:
Clarendon Lawyers
Level 17, Rialto North Tower
525 Collins Street
MELBOURNE VIC 3000

25 September 2012
the Fourth Defendant

Tel: 03 8681 4400
Fax: 03 8681 4499
Solicitors Code: 101294
Ref: MJF:1100563

michael.fernon@clarendonlawyers.com.au

This is the exhibit marked "CJA-15" now produced and shown to **CELIA JANE ARMSTRONG** at the time of swearing her affidavit on 25 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-15

**Bundle of correspondence from Clarendon Lawyers
to Ms Bezencon regarding service of documents in
SCV Proceeding No S CI 2009 10699**

Celia Armstrong

From: Katie Desmond
Sent: Friday, 26 February 2010 5:26 PM
To: IR_Zwier, L; Ross.McClymont@blakedawson.com; Hinchey, Clint; tmay@herbertgeer.com.au; kerree@siger.com.au; NPaterson@mbcommercial.com.au
Cc: Lucy Kirwan; chris.fenwick@blakedawson.com; Whittle, Matthew; Celia Armstrong; Michael Fernon
Subject: Timbercorp: S CI 10699 of 2009
Attachments: TGG Contentions of Law and Fact 260210.pdf; L to Parties 260210.pdf; GAR001_0900665_091.pdf; GAR001_0900665_092.pdf; GAR001_0900665_093.pdf

Dear all,

Please see letter attached.

Kind regards

Katie Desmond | Lawyer

Clarendon Lawyers | Level 17, Rialto North Tower, 525 Collins Street, Melbourne 3000
T + 61 3 8681 4429 | F + 61 3 8681 4499 | M + 61 402 240 800
www.clarendonlawyers.com.au

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ABN 43 704 593 249

26 February 2010

Our Ref: MJF:MJF:0900665

Leon Zwier
Arnold Bloch Leibler
Level 23
333 Collins Street
MELBOURNE VIC 3000

Ross McClymont
Blake Dawson
Level 26
181 William Street
MELBOURNE VIC 3000

Clint Hinchey
Allens Arthur Robinson
Level 27
530 Collins Street
MELBOURNE VIC 3000

Kerree Bezencon
TGG Almond Committee Inc
By email:

Neale Paterson
Maurice Blackburn
Level 10
456 Lonsdale Street
MELBOURNE VIC 3000

Tom May
Herbert Geer
Level 20
385 Bourke Street
MELBOURNE VIC 3000

Dear Sirs/Madam

Timbercorp Almonds Apportionment - Supreme Court Proceeding SCI 10699 of 2009

We refer to the Orders made by Justice Davies on 22 December 2009 and 19 February 2010.

We now enclose by way of service the Contentions of Fact and Law for the Fifth to Eighth Defendants (**Rights Contentions**).

The Rights Contentions will be filed with the Court on Monday, 1 March 2010.

Yours faithfully,

Michael Fernon
Director

Enc
Direct Tel: 03 8681 4419
Email: michael.fernon@clarendonlawyers.com.au

Celia Armstrong

From: Celia Armstrong
Sent: Wednesday, 17 March 2010 4:21 PM
To: Leon Zwier; Hinchey, Clint; Ross.McClymont@blakedawson.com;
tmay@herbertgeer.com.au; kerree@siger.com.au; NPaterson@mbcommercial.com.au
Cc: Lucy Kirwan; Whittle, Matthew; chris.fenwick@blakedawson.com; Billy Dwyer
Subject: Timbercorp Almonds Apportionment S CI 2009 10699
Attachments: Growers Contentions in Reply 17 March 2010.pdf; Ltr of service 17 March 2010.pdf

All

Please see the attached letter and enclosure.

Regards

Celia Armstrong | Senior Associate

Clarendon Lawyers | Level 17, Rialto North Tower, 525 Collins Street, Melbourne 3000
T + 61 3 8681 4411 | F + 61 3 8681 4499 | M + 61 431 658 651
www.clarendonlawyers.com.au

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Victoria 3000 Australia

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www.clarendonlawyers.com.au
ABN 43 704 593 249

17 March 2010

Our Ref: MJF:CJA:0900665

Leon Zwier
Arnold Bloch Leibler
Level 23
333 Collins Street
MELBOURNE VIC 3000

Ross McClymont
Blake Dawson
Level 26
181 William Street
MELBOURNE VIC 3000

Clint Hinchin
Allens Arthur Robinson
Level 27
530 Collins Street
MELBOURNE VIC 3000

Kerree Bezencon
TGG Almond Committee Inc
By email:

Neale Paterson
Maurice Blackburn
Level 10
456 Lonsdale Street
MELBOURNE VIC 3000

Tom May
Herbert Geer
Level 20
385 Bourke Street
MELBOURNE VIC 3000

Dear Sirs/Madam

Timbercorp Almonds Apportionment - Supreme Court Proceeding SCI 10699 of 2009

We refer to the Orders made by Justice Davies on 22 December 2009 (as varied by consent).

We now **enclose** by way of service the Growers' Contentions of Fact and Law in Reply dated 17 March 2010 which were filed with the Court earlier today.

Yours faithfully

Michael Fernon
Director

Enc
Direct Tel: 03 8681 4419
Email: michael.fernon@clarendonlawyers.com.au

Celia Armstrong

From: Celia Armstrong
Sent: Wednesday, 17 March 2010 5:47 PM
To: Leon Zwier; Ross.McClymont@blakedawson.com; Hinchey, Clint; tmay@herbertgeer.com.au; kerree@siger.com.au; NPaterson@mbcommercial.com.au
Cc: Lucy Kirwan; Whittle, Matthew; chris.fenwick@blakedawson.com; Michael Fernon; Billy Dwyer
Subject: Timbercorp Almonds Apportionment S CI 2009 10699
Attachments: Ltr of service 2 17 March 2010.pdf; Third Affidavit of MFJ 17 March 2010 with exhibits.pdf

All

Please see the attached letter and enclosure.

Regards

Celia Armstrong | Senior Associate

Clarendon Lawyers | Level 17, Rialto North Tower, 525 Collins Street, Melbourne 3000
T + 61 3 8681 4411 | **F** + 61 3 8681 4499 | **M** + 61 431 658 651
www.clarendonlawyers.com.au

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Level 17 Rialto North Tower
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17 March 2010

Our Ref: MJF:CJA:0900665

Leon Zwier
Arnold Bloch Leibler
Level 23
333 Collins Street
MELBOURNE VIC 3000

Ross McClymont
Blake Dawson
Level 26
181 William Street
MELBOURNE VIC 3000

Clint Hinchin
Allens Arthur Robinson
Level 27
530 Collins Street
MELBOURNE VIC 3000

Kerree Bezencon
TGG Almond Committee Inc
By email:

Neale Paterson
Maurice Blackburn
Level 10
456 Lonsdale Street
MELBOURNE VIC 3000

Tom May
Herbert Geer
Level 20
385 Bourke Street
MELBOURNE VIC 3000

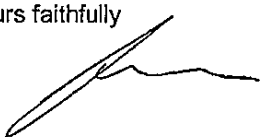
Dear Sirs/Madam

Timbercorp Almonds Apportionment - Supreme Court Proceeding SCI 10699 of 2009

We refer to the above proceeding.

We now **enclose** by way of service the Third Affidavit of Michael Joseph Fernon dated 17 March 2010 together with exhibits "MJF-19" to "MJF-29". This affidavit will be filed with the Court tomorrow.

Yours faithfully



Michael Fernon
Director

Enc
Direct Tel: 03 8681 4419
Email: michael.fernon@clarendonlawyers.com.au

Celia Armstrong

From: Celia Armstrong
Sent: Tuesday, 20 April 2010 6:31 PM
To: lzwier@abl.com.au; ross.mcclymont@blakedawson.com.au; clint.hinchen@aar.com.au; tmay@herbertgeer.com.au; kerree@siger.com.au; NPaterson@mbcommercial.com.au
Cc: lkirwan@abl.com.au; matthew.whittle@aar.com.au; chris.fenwick@blakedawson.com; Michael Fernon; Billy Dwyer
Subject: Timbercorp Almonds Apportionment S CI 2009 10699
Attachments: Letter of service 20 April 2010.pdf; Growers Rebuttal Contentions 20 April 2010.pdf

Dear All

Please see attached.

Kind regards

Celia Armstrong | Senior Associate

Clarendon Lawyers | Level 17, Rialto North Tower, 525 Collins Street, Melbourne 3000
T + 61 3 8681 4411 | **F** + 61 3 8681 4499 | **M** + 61 431 658 651
www.clarendonlawyers.com.au

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ABN 43 704 593 249

20 April 2010

Our Ref: MJF:MJF:0900665

Leon Zwier
Arnold Bloch Leibler
Level 23
333 Collins Street
MELBOURNE VIC 3000

Ross McClymont
Blake Dawson
Level 26
181 William Street
MELBOURNE VIC 3000

Clint Hinchin
Allens Arthur Robinson
Level 27
530 Collins Street
MELBOURNE VIC 3000

Kerree Bezencon
TGG Almond Committee Inc
By email:

Neale Paterson
Maurice Blackburn
Level 10
456 Lonsdale Street
MELBOURNE VIC 3000

Tom May
Herbert Geer
Level 20
385 Bourke Street
MELBOURNE VIC 3000

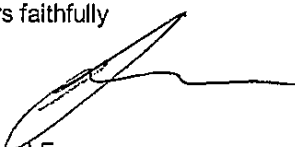
Dear Sirs/Madam

Timbercorp Almonds Apportionment - Supreme Court Proceeding SCI 10699 of 2009

We refer to the Orders made by the Honourable Justice Davies on 22 March 2010.

Please find enclosed by way of service, the Rebuttal Contentions of Fact and Law of the Fifth to Eighth Defendants. Given the time, we will attend to filing tomorrow.

Yours faithfully



Michael Fernon
Director

Enc
Direct Tel: 03 8681 4419
Email: michael.fernon@clarendonlawyers.com.au

Celia Armstrong

From: Celia Armstrong
Sent: Wednesday, 4 August 2010 12:25 PM
To: matthew.whittle@aar.com.au; chris.fenwick@blakedawson.com; Bridget Slocum; tmay@herbertgeer.com.au; kerree@siger.com.au; NPaterson@mbcommercial.com.au
Cc: lzwier@abl.com.au; ross.mcclymont@blakedawson.com; clint.hinchen@aar.com.au; Michael Fernon; Billy Dwyer
Subject: Timbercorp Almonds Apportionment - S CI 2009 10699 Email 1 of 2
Attachments: Affidavit of J Knox 2 August 2010.pdf; Affidavit of S Lynch 4 August 2010.pdf; Valuation List 4 August 2010.pdf; Ltr of service 4 August 2010.pdf
Categories: Red Category

All

Please see attached letter and enclosures.

Enclosures (a) – (c) are attached to this email. Enclosure (d) will follow in a separate email.

Regards

Celia Armstrong | Senior Associate

Clarendon Lawyers | Level 17, Rialto North Tower, 525 Collins Street, Melbourne 3000
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525 Collins Street Melbourne
Victoria 3000 Australia

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ABN 43 704 593 249

4 August 2010

Our Ref: MJF:MJF:0900665

Leon Zwier
Arnold Bloch Leibler
Level 23
333 Collins Street
MELBOURNE VIC 3000

Ross McClymont
Blake Dawson
Level 26
181 William Street
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Kerree Bezencon
TGG Almond Committee Inc

Neale Paterson
Maurice Blackburn
Level 10
456 Lonsdale Street
MELBOURNE VIC 3000

Tom May
Herbert Geer
Level 20
385 Bourke Street
MELBOURNE VIC 3000

Dear Sirs/Madam

Timbercorp Almonds Apportionment - Supreme Court Proceeding SCI 10699 of 2009

We refer to the orders made in the abovementioned proceeding on 23 April 2010.

We now enclose by way of service the following documents filed with the Court earlier today:

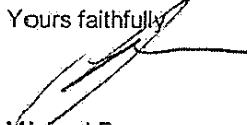
- (a) Affidavit of John Huntley Knox dated 2 August 2010;
- (b) Affidavit of Stephen Lynch dated 4 August 2010; and
- (c) Fifth to Eighth Defendants Valuation List of Documents dated 4 August 2010.

We also now enclose the:

- (d) unsworn Affidavit of Robert Grey Chaffey-Barnden.

We will serve you with a sworn copy of Mr Barnden's affidavit in due course.

Yours faithfully



Michael Fernon
Director

Enc.

Direct Tel: 03 8681 4419
Email: michael.fernon@clarendonlawyers.com.au

GAR001_0900665_215.DOC

Celia Armstrong

From: Celia Armstrong
Sent: Thursday, 5 August 2010 3:17 PM
To: matthew.whittle@aar.com.au; chris.fenwick@blakedawson.com; Bridget Slocum; tmay@herbertgeer.com.au; kerree@siger.com.au; NPaterson@mbcommercial.com.au
Cc: lzwier@abl.com.au; ross.mcclymont@blakedawson.com; clint.hinchen@aar.com.au; Michael Fernon; Billy Dwyer
Subject: Timbercorp Almonds Apportionment - S CI 2009 10699 Email 1 of 2
Attachments: Ltr of service 5 August 2010.pdf; Affidavit of G Barnden 4 August 2010 part 1.pdf
Categories: Red Category

All

Please see attached letter.

The enclosure is too large to send in one email. It has been split into two parts. Part 1 is attached to this email and part 2 will follow in a subsequent email.

Regards

Celia Armstrong | Senior Associate

Clarendon Lawyers | Level 17, Rialto North Tower, 525 Collins Street, Melbourne 3000
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5 August 2010

Our Ref: MJF: MJF:0900665

Leon Zwier
Arnold Bloch Leibler
Level 23
333 Collins Street
MELBOURNE VIC 3000

Ross McClymont
Blake Dawson
Level 26
181 William Street
MELBOURNE VIC 3000

Clint Hinchey
Allens Arthur Robinson
Level 27
530 Collins Street
MELBOURNE VIC 3000

Kerree Bezencon
TGG Almond Committee Inc

Neale Paterson
Maurice Blackburn
Level 10
456 Lonsdale Street
MELBOURNE VIC 3000

Tom May
Herbert Geer
Level 20
385 Bourke Street
MELBOURNE VIC 3000

Dear Sirs/Madam

Timbercorp Almonds Apportionment - Supreme Court Proceeding SCI 10699 of 2009

We refer to the orders made in the abovementioned proceeding on 23 April 2010 and to our letter of yesterday.

We now enclose by way of service the Affidavit of Robert Grey Chaffey Barnden dated 4 August 2010 (together with exhibits RGCB-1 to RGCB-3) which was filed with the Court earlier today.

Yours faithfully

Michael Fernon
Director

Enc.

Direct Tel: 03 8681 4419
Email: michael.fernon@clarendonlawyers.com.au



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9 December 2010

Our Ref: CJA:MJF:0900665

Kerree Bezencon
TGG Almond Committee Inc
953 Don Road
HEALESVILLE VIC 3777
BY EXPRESS POST



Dear Kerree

Timbercorp Almonds Apportionment - Supreme Court Proceeding SCI 10699 of 2009

We refer to the above matter and now enclose by way of service the Second Affidavit of Stephen Lynch dated 8 December 2010 together with exhibits SL-4 to SL-9 which was filed with the Court yesterday.

Yours faithfully

Michael Fernon
Director

Enc

Direct Tel: 03 8681 4419
Email: michael.fernon@clarendonlawyers.com.au

5 October 2010

Our Ref: CJA:MJF:0900665

Kerree Bezencon
TGG Almond Committee Inc
953 Don Road
HEALESVILLE VIC 3777



Dear Ms Bezencon

Timbercorp Almonds Apportionment - Supreme Court Proceeding SCI 2009 10699

We refer to the above proceeding and now enclose by way of service the Second Affidavit of Robert Grey Chaffey Barnden dated 1 October 2010 (together with exhibits RGCB-4 to RGCB-6) which was filed with the Court earlier today.

Yours faithfully


Michael Fernon
Director

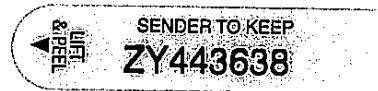
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Direct Tel: 03 8681 4419
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23 December 2010

Our Ref: CJA:MJF:0900665

Kerree Bezencon
TGG Almond Committee Inc
953 Don Road
HEALESVILLE VIC 3777
BY EXPRESS POST



Dear Kerree

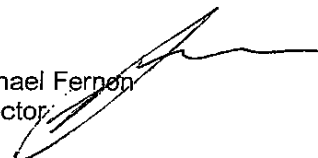
Timbercorp Almonds Apportionment - Supreme Court Proceeding SCI 10699 of 2009

We refer to the Orders made by the Honourable Justice Davies on 20 December 2010.

Please now find enclosed by way of service the following documents filed with the Supreme Court earlier today:

1. Outline of evidence – John Huntley Knox dated 23 December 2010.
2. Contentions of Fact in Law for the Fifth to Eighth Defendants – valuation issue, dated 23 December 2010.
3. Affidavit of Stephen Lynch with exhibits SL-10 to SL-12 sworn 23 December 2010.

Yours faithfully



Michael Fernon
Director

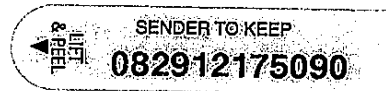
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Direct Tel: 03 8681 4419
Email: michael.fernon@clarendonlawyers.com.au

21 January 2011

Our Ref: CJA:MJF:0900665

Kerree Bezencon
TGG Almond Committee Inc
953 Don Road
HEALESVILLE VIC 3777
BY EXPRESS POST



Dear Kerree

Timbercorp Almonds Apportionment - Supreme Court Proceeding SCI 10699 of 2009

We refer to the Orders made by the Honourable Justice Davies on 20 December 2010.

Please now find enclosed by way of service the following documents filed with the Supreme Court earlier today:

1. The Affidavit of Graham Goldenberg dated 20 January 2011.
2. The Affidavit of Constantine Moshopoulos dated 20 January 2011.

Yours faithfully



pp Michael Fernon
Director

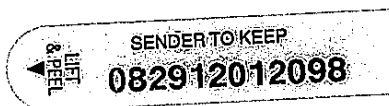
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Direct Tel: 03 8681 4419
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25 January 2011

Our Ref: CJA:MJF:0900665

Kerree Bezencon
TGG Almond Committee Inc
953 Don Road
HEALESVILLE VIC 3777
BY EXPRESS POST



Dear Kerree

Timbercorp Almonds Apportionment - Supreme Court Proceeding SCI 10699 of 2009

We refer to the Orders made by the Honourable Justice Davies on 20 December 2010.

Please now find enclosed by way of service the Affidavit of John Huntley Knox with Exhibits JHK-5 to JHK-16 dated 24 January 2011, filed with the Supreme Court earlier today:

Yours faithfully


Michael Fernon
Director

Enc

Direct Tel: 03 8681 4419
Email: michael.fernon@clarendonlawyers.com.au

3 February 2011

Our Ref: CJA:MJF:0900665

Kerree Bezencon
TGG Almond Committee Inc
953 Don Road
HEALESVILLE VIC 3777
BY EXPRESS POST



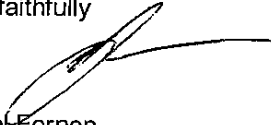
Dear Kerree

Timbercorp Almonds Apportionment - Supreme Court Proceeding SCI 10699 of 2009

We refer to the Orders made by the Honourable Justice Davies on 20 December 2010.

Please now find enclosed by way of service the Affidavit of Owen Stuart Lennie with Exhibits OSL-1 to OSL-27 dated 2 February 2011, filed with the Supreme Court earlier today.

Yours faithfully


Michael Fernon
Director

Enc

Direct Tel: 03 8681 4419
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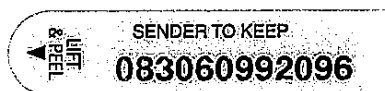
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4 February 2011

Our Ref: CJA:MJF:0900665

Kerree Bezencon
TGG Almond Committee Inc
953 Don Road
HEALESVILLE VIC 3777
BY EXPRESS POST



Dear Kerree

Timbercorp Almonds Apportionment - Supreme Court Proceeding SCI 10699 of 2009

We refer to the Orders made by the Honourable Justice Davies on 20 December 2010.

Please now find enclosed by way of service the Affidavit of Michael Joseph Fernon with Exhibit MJF-30 dated 4 February 2011.

Yours faithfully


Michael Fernon
Director

Enc

Direct Tel: 03 8681 4419
Email: michael.fernon@clarendonlawyers.com.au

7 February 2011

Our Ref: CJA:MJF:0900665

Kerree Bezencon
TGG Almond Committee Inc
953 Don Road
HEALESVILLE VIC 3777
BY EXPRESS POST

Dear Kerree

Timbercorp Almonds Apportionment - Supreme Court Proceeding SCI 10699 of 2009

We refer to the Orders made by the Honourable Justice Davies on 20 December 2010.

Please now find enclosed by way of service the Affidavit of Robert Garton-Smith with Exhibits RGS-1 to RGS-23 dated 4 February 2011 which was filed with the Supreme Court today.

Yours faithfully


Michael Fernon
Director

Enc

Direct Tel: 03 8681 4419
Email: michael.fernon@clarendonlawyers.com.au

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Kerree Bezencon
TGG Almond Committee Inc
953 Don Road
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BY EXPRESS POST

Dear Kerree

Timbercorp Almonds Apportionment - Supreme Court Proceeding SCI 10699 of 2009

We refer to the above matter and now enclose by way of service the following affidavits which were filed with the Supreme Court today:

1. Affidavit of Mark Albert Bland and exhibits MAB-1 to MAB-9 dated 10 February 2011; and
2. Third Affidavit of Robert Grey Chaffey Barnden and exhibits RGCB-7 to RGCB-21 dated 10 February 2011.

Yours faithfully



Michael Fernon
Director

Enc

Direct Tel: 03 8681 4419
Email: michael.fernon@clarendonlawyers.com.au

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:	25 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-16" now produced and shown to CELIA JANE ARMSTRONG at the time of swearing her affidavit on 25 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-16

**Judgement of Davies J dated 26 February 2010 in
SCV Proceeding No 389 of 2010**

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

Not Restricted

LIST E
No. 398 of 2010

IN THE MATTER of TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)
(ACN 092 311 469)

TIMBERCORP SECURITIES LIMITED
(IN LIQUIDATION)(ACN 092 311 469)
IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE
2005 TIMBERCORP CITRUS PROJECT
(ARSN 114 091 299)

First Plaintiff

MARK ANTHONY KORDA

Second Plaintiff

LEANNE KYLIE CHESSER

Third Plaintiff

<u>JUDGE:</u>	DAVIES J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	16 – 17, 22, 24 February 2010
<u>DATE OF JUDGMENT:</u>	26 February 2010
<u>CASE MAY BE CITED AS:</u>	Re Timbercorp Securities Limited (In liq) (ACN 092 311 469)
<u>MEDIUM NEUTRAL CITATION:</u>	[2010] VSC 050

CORPORATIONS – Application by liquidators for judicial advice and directions – Managed investment schemes – Responsible entity in liquidation – Sale of land on which citrus schemes conducted – Sale to be completed unencumbered by Growers’ rights to use and enjoy the land – Scheme constitution amended to include the power in the responsible entity to terminate the Growers’ licenses with respect to the use of the land – Whether liquidators justified in procuring the extinguishment of Growers’ rights – Net proceeds to be held on trust pending determination of persons entitled to receive the proceeds – S 511 of the *Corporations Act 2001* (Cth).

STATUTORY INTERPRETATION – Power to amend a scheme constitution – Requirements for a responsible entity to amend a constitution unilaterally – S 601GC of the *Corporations Act 2001* (Cth).

CORPORATIONS – Unilateral action by responsible entity to amend scheme constitution –

Whether responsible authority considered whether the amendment "adversely affected members' rights" – Whether consideration reasonably based.

LIQUIDATORS – Duties as a liquidator of a company which is the responsible entity of a managed investment scheme – Whether conflict of interest – Whether breach of fiduciary duty.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiffs	Mr. L Zwier	Arnold Bloch Leibler
For the Timbercorp Growers Group	Mr. S G Hopper	Clarendon Lawyers
For the Receivers	Ms. W A Harris	Allens Arthur Robinson
For the Timbercorp Growers Group Citrus Inc	Mr. D Shavin QC with Mr. D C Gration	Herbert Geer

HER HONOUR:

- 1 This is an application for directions from the Court pursuant to s 511 of the *Corporations Act 2001* ("the Act") by the second and third named plaintiffs ("the liquidators") in their capacity as liquidators of the first named plaintiff ("TSL"). TSL is the responsible entity of the 2005 Timbercorp Citrus Project ("the Citrus Scheme"), a registered managed investment scheme under Part 5C of the *Corporations Act 2001* ("the Act") for the cultivation of citrus trees and the harvesting and processing of citrus. TSL cannot perform its obligations as the responsible entity of the Citrus Scheme because it is hopelessly insolvent and unable to continue to fund the operations of the scheme, which has placed the citrus orchards at risk of wasting. The liquidators seek a direction to the effect that they would be justified in procuring TSL to exercise its power under the Citrus Scheme Constitution ("the Constitution") to extinguish the rights that TSL granted to the members of the scheme ("the growers") under licence with respect to the use of a property ("the Solora property") on which the citrus operations are conducted. If the direction is made, the liquidators have proposed that TSL would use the power contained in cl 11(fa) of the Constitution:

to assign, terminate, surrender or otherwise deal with any Licence Agreement¹

The liquidators have formed the view that it is appropriate for TSL to exercise that power.

2 The Court's power to give the direction sought was not disputed in the hearing before me and is undoubted² but the making of the direction was opposed by a grower entity, Siger Super Services Pty Ltd as trustee for the Kereg Trust and a growers' group, the TGG Citrus Committee Inc (collectively, "the grower parties") which applied for joinder as parties and for a declaration that the power contained in cl 11(fa) of the Constitution is invalid and ineffective. The joinder of the grower parties was not opposed and, in my opinion, is necessary to ensure that all questions are effectually and completely determined and adjudicated upon.³

3 For the grower parties, it was argued that there is no valid and effective power in the Constitution to terminate the licences because of the manner in which cl 11(fa) was inserted. It was not in the original constitution but inserted as an amendment effected by deed. It was argued that the nature of the amendment required a special resolution of the members of the Citrus Scheme. The argument raised for consideration the application of s 601GC(1) of the Act which provides that:

- (1) The constitution of the registered scheme may be modified, or repealed and replaced with a new constitution:
 - (a) by special resolution of the members of the scheme; or
 - (b) by the responsible entity if the responsible entity reasonably considers the change will not adversely affect members' rights.

Mr Shavin QC on behalf of the grower parties contended that the evidence showed that liquidators did not consider whether the amendment would affect members' rights but, rather, directed their consideration to whether the amendment would affect the members' commercial interests and, thus, failed to form the requisite state

¹ Further Amendment Deed for the 2005 Timbercorp Citrus Project ARSN 114 091 299, made 28 January 2010, cl. 2.

² *Re Ansett Australia v Mentha* (2001) 39 ACSR 355; *Re Pasmenco Ltd & Ors* [2004] FCA 656; *Dean-Willcocks v Soluble Solution Hydroponics Pty Ltd* (1997) 42 NSWLR 209.

³ *Supreme Court (General Civil Procedure) Rules 2005* r 9.06.

of mind. He further contended that the requisite state of mind, if held, was not one that was reasonable as, on any objective view, the amendment “adversely” affected members’ rights because the security of tenure that the growers had under the terms of their licences was “degraded” to a licence terminable at will by reason of the amendment.

4 Mr Shavin QC also argued that the liquidators would be in breach of their fiduciary duties to the growers if they procured TSL to exercise the power contained in cl 11(fa). It was submitted that the liquidators have serious conflicts of interests, giving rise to the need for the liquidators to obtain the informed consent of the growers to the extinguishment of their rights before they can cause TSL to terminate their licence agreements.

5 I have formed the view that the directions sought should be given and that the relief sought by the grower parties should be refused. I now set out my reasons.

A. Constitutional amendment: s 601GC(1)(b)

6 I do not accept the submission on behalf of the grower parties that the constitutional amendment is invalid and of no effect. In my opinion, the evidence before the court showed that the liquidators addressed the question that s 601GC(1)(b) formulates and that they considered that the insertion of cl 11(fa) into the Constitution would not adversely affect members’ rights. I also consider that there was a reasonable basis for that view.

7 The analysis first requires a consideration of the proper construction of the amendment power under s 601GC(1)(b). In *ING Funds Management Limited v ANZ Nominees Limited*⁴ Barrett J, in obiter, observed that three requirements must be satisfied for a constitutional amendment effected under that provision to be valid. According to His Honour, the first component involves an assessment of how the responsible entity viewed “members’ rights” before the modification and the impact that the modification would have on those rights. The second component requires

⁴ [2009] NSWSC 243.

that the responsible entity consider that, according to a comparison of “members’ rights” before the modification with the changed rights that would exist after the event, there would be no “adverse” affectation of those rights. The third component requires that the opinion formed by the responsible entity as to the absence of adverse affectation be seen to be something that the responsible entity “reasonably considers”.⁵ His Honour concluded that the question is not a general question whether members will be “worse off” if the change is made, nor a general question of prejudice or disadvantage:

It is a specific question that goes wholly and exclusively to the much narrower matter of members’ rights. Their interests are...another thing altogether. So is the value of their rights.⁶

Barrett J had earlier observed that a distinction is drawn in the Act between “rights” and “interests” and expressed his view that the task of the responsible entity seeking to amend a Constitution in reliance on s 601GC(1)(b):

... is first to ascertain the rights of members created by the constitution, as they exist immediately before the modification.⁷

I generally agree with the views of Barrett J about the approach to s 601GC(1)(b).

8 Before the amendment to the Constitution, the events for termination of the licence agreements were provided for in the licence agreements that TSL was obliged to enter into with the growers upon accepting their applications to become a member of the Citrus Scheme.⁸ Under those licence agreements, termination was the earlier of –

- the expiry or termination of the sublease of the Solara property granted to TSL by Timbercorp Limited (“TL”), a related company;
- the termination of the particular grower’s interest in the Citrus Scheme;
- 29 June 2027; and

⁵ Ibid [84] – [88].

⁶ Ibid [101].

⁷ Ibid [96].

⁸ 2005 Citrus Project Constitution, cls 8.7, 9 and the definition of “licence agreement” in cl 1.

- the termination of the Citrus Scheme.⁹

The Constitution provided for the termination of the Citrus Scheme on completion of the scheme operations or on the winding up of the Citrus Scheme.¹⁰ Relevantly, there was no provision for TSL to terminate the licence agreements at will. However, the circumstance that “the purpose of the [Citrus scheme] ... cannot be accomplished”¹¹ is a trigger under the Constitution for the formal winding up of the Citrus Scheme and an event of early termination provided for in the licence agreement. The question, therefore, is whether the liquidators considered whether the conferral of power on TSL under the Constitution to terminate, surrender, assign or otherwise deal with the licence agreements was a change to the Constitution that would “adversely affect” the growers’ rights conferred under their licence agreements.

9 Mr Korda, the second-named plaintiff, frankly admitted in cross-examination that he and the third-named plaintiff had not undertaken an analysis of the Constitution and its constituent documents to identify the growers’ rights and the impact on those rights of the proposed amendment. He also frankly stated that the context in which the decision was made was the insolvency of TSL, its lack of funds to enable it to continue to manage the scheme and the risk of the scheme assets wasting in the absence of proper maintenance. The liquidators regarded the amendment as a step in facilitating the sale process of the Citrus Scheme to be exercised, if appropriate, subject to the direction of the court.

10 Mr Shavin QC submitted that the liquidators had not attempted the task identified by Barrett J in *ING Funds Management Limited*¹² as the prerequisite to any determination under s 601GC(1)(b) of the Act. He argued that the liquidators addressed themselves to the wrong question because the evidence showed that they considered the commercial interests of the growers in favour of making the amendment, which is not the criterion for the exercise of the power under s

⁹ See License Agreement, Solara Estate, 2005 Timbercorp Citrus Project cl 4.1.

¹⁰ 2005 Citrus Project Constitution, cl 26.1 and cl 26.2.

¹¹ 2005 Citrus Project Constitution cl 26.2(b).

¹² [2009] NSWSC 243.

601GC(1)(b) of the Act.

- 11 In *ING Funds Management Limited*¹³ the distinction between “rights” and “interests” became material to His Honour’s decision but the facts of that case are very different from those with which I am concerned. In that case, the responsible entity modified the constitution of two schemes to suspend the rights of members of those schemes to require redemption of their units. His Honour concluded that the modification changed members’ rights by denying immediate efficacy to redemption requests. His Honour found on the evidence that the ING Funds Management Board, in deciding to create the suspension, was preoccupied “with preserving value for members”¹⁴ and although the Board passed a resolution that the amendment would not adversely affect members’ rights, His Honour found that the evidence was “entirely lacking” on the considerations that the Board undertook in the process of making that determination and the thinking that led to that conclusion.¹⁵
- 12 In contrast, the evidence before the Court here, in my view, plainly shows that the liquidators gave due consideration to the affect on “members’ rights” of the proposed constitutional amendment, before they made it. The process followed by the liquidators was the same as the process that they had instigated on three other occasions in relation to the forestry, almond and olive schemes of which TSL is also the responsible entity, in contemplation of enabling assets to be sold unencumbered by the growers’ sub-leases and licences. The very step that was taken on those occasions was amendment to the constitutions of the relevant managed investment schemes so that the liquidators could proceed with the informal winding up of those schemes, necessitated by the inability of TSL to fulfil its obligations as responsible entity. The evidence before me included the steps that the liquidators had taken, and critically, the explanation for the taking of those steps, to effect the informal winding up of the forestry, almond and olive schemes. There was no argument before me that the liquidators had not fairly set out in that evidence what they had done to secure

¹³ Ibid.

¹⁴ Ibid [114].

¹⁵ Ibid [118].

that outcome. Significantly, their evidence was that they are employing the same strategy here because the original scheme arrangements have broken down due to the insolvency of TSL and other companies in the Timbercorp group and the inability of TSL to fund the continued operations of the Citrus Scheme.

- 13 It may be accepted that the purpose of developing that strategy has been to maximise the return to all stakeholders, including the growers and to circumvent significant loss from the wasting of the orchards which TSL has no funds to continue to manage, and thereby in consequence to seek to protect the commercial interests of the growers, but the strategy is to be effected through the informal winding up of the Citrus Scheme. The evidence, in my view, plainly showed that the considerations of the liquidators that led to the decision to insert into the Constitution the power to enable TSL to terminate the growers' licence agreements concerned the necessity to put TSL into the position to be able to terminate the growers' licence agreements so that the Citrus Scheme can be wound up, if that is the appropriate course to take.¹⁶

- 14 I am satisfied on the basis of the evidence before me that the liquidators turned their mind to the impact on members' rights, rather than their commercial interests as such. In so finding, I take into account the following exchange in cross-examination:

At the time you made the decision did you sit down and undertake an analysis of the constitution of the 2005 scheme and the other constituent documents and identify what rights of the various parties were and the impact on those rights of the proposed amendment? ... No.

This exchange cannot be considered in isolation from the whole of the evidence before me and, as I have indicated, that evidence bears out that the liquidators were cognisant that the very rights of the growers that would be impacted by the

¹⁶ Cf Justice Barrett, *"Insolvency of Registered Managed Investment Schemes"* (speech delivered at the Banking and Financial Services Law Association, Queenstown, New Zealand, July 2008). Barrett J wrote extra-curially:

The only really feasible outcome in the situation of the independently impecunious responsible entity seems to be for the company in liquidation to remain the responsible entity. That raises the issue already noticed. A liquidator's duty is to wind up the affairs of the company. To the extent that the affairs include the holding of property on trust, with ongoing duties, the liquidator's first task, it seems to me, will be to find a way to bring the managed investment scheme to an end, either by the *Orchard Aginvest* means (if it is truly viable) or by resort to s 601NC.

amendment were their rights with respect to their tenure of the licence.

- 15 The next matter for consideration is whether the evidence supports a finding that the liquidators considered whether the amendment would “adversely affect” members’ rights. In *ING Management Fund*, Barrett J in obiter observed as follows:

The task of a responsible entity under s 601GC(1)(b), then, is to assess members’ rights as they exist before the modification and members’ rights as they will exist after the modification and, if the rights afterwards are different from the rights beforehand, to decide whether the difference in the rights will be, from a member’s perspective, unfavourable. To put this another way, the responsible entity must decide whether the change will remove, curtail or impair existing rights in a way that is disadvantageous to the persons whose holdings of units cause them to possess and enjoy the rights. No particular degree of affectation is contemplated by the legislation. Any adverse affectation at all, however slight, is sufficient to deny the responsible entity the modification power.¹⁷

The exercise of power under s 601GC(1)(b) is not constrained merely because a proposed amendment affects a change in members’ rights but the criterion *will not adversely affect members’ rights*¹⁸ requires the responsible entity to be satisfied of a negative.

- 16 I am of the opinion that the evidence showed that the liquidators formed the view that the constitutional amendment would not adversely affect members’ rights. The decision was made in the context of the hopeless insolvency of TSL and the inability of the Citrus Scheme to continue under the original arrangements. The liquidators decided to make the constitutional amendment after they became aware that the Solora property was up for sale. Mr Korda’s evidence was that the liquidators expected that the property, if sold, would be subject to the same conditions precedent as the conditions precedent to the sales of assets in relation to the other managed investment schemes. Those conditions precedent included the requirement that the growers’ rights be extinguished so that the purchaser could acquire clear title. The strategy for informal winding up was the same as it had been with the other managed investment schemes and would not be acted on – that is to say, that

¹⁷ [2009] NSWSC 243 [100].

¹⁸ See [2009] NSWSC 243 [87], [100].

the liquidators did not intend to cause TSL to terminate the growers' licences – without a direction from the Court. In the process undertaken with the forestry and almond schemes, the liquidators had sought directions from the Court that they would be justified in procuring TSL to amend the constitutions of those schemes to permit TSL to “assign, terminate, surrender or otherwise deal with any sub-lease/licence and joint venture agreement”.¹⁹ Although it appears that there was no contradictor to the making of the directions, the fact that those directions were given provided the liquidators with comfort that such an amendment was uncontroversial and indeed the evidence showed that the liquidators had the olive scheme constitution amended similarly and later the Citrus Scheme Constitution without obtaining the protection of a court direction because of their view that the amendment was “not controversial”. Before doing so in the Citrus Scheme, the liquidators wrote to the Australian Securities and Investment Commission (“ASIC”) and various lawyers who had appeared for representative grower groups notifying them of their intention to make the constitutional amendment and of the liquidators’ view that the amendment was “not controversial” and, that unless an objection was made by ASIC or the grower representative groups, that the liquidators did not intend to seek a direction in relation to the making of the amendment, but:

As has been the case with each other Timbercorp project, the liquidators would seek directions from the Court prior to exercising any such power.²⁰

No objection was received, although it is fair to say that ASIC responded that it was not able to comment upon whether in the circumstances it was appropriate for the Constitution to be amended in the manner proposed “and more particularly, what the responsible entity may consider to be the effect of doing so on members’ rights”.²¹ But as I have stated, the liquidators were doing no more than following the same strategy as they had in the other managed investment schemes to be able to facilitate the informal winding up the Citrus Scheme, if that was the appropriate

¹⁹ Orders of Finklestein J in Federal Court proceeding VRD 595 of 2009, 18 August 2009; orders of Robson J in Supreme Court proceeding 9408 of 2009 made 21 August 2009, referred to in *Re Timbercorp Securities Limited (In Liquidation)* [2009] VSC 510, [19].

²⁰ Exhibit MAK-5 of the affidavit of Mark Anthony Korda sworn 8 February 2010.

²¹ Exhibit MAK-6 of the affidavit of Mark Anthony Korda sworn 8 February 2010.

course to take in circumstances where the Court on two previous occasions had directed that TSL was justified in using the s 601GC(1)(b) power to amend the scheme constitutions to confer an explicit power of termination in TSL. The matters taken into consideration by the liquidators bear out that they did not consider that members' rights would be adversely affected.

17 The next issue is whether there was a reasonable basis for the view of the liquidators that the amendment would not adversely affect members' rights. An inquiry into the "reasonableness" of the state of mind is an objective inquiry and requires consideration of whether there were facts sufficient to induce that state of mind which, in turn, requires consideration of the matters that were taken into consideration.²² Contrary to the submission put by Mr Shavin QC, in my view the factual context is part of the material which the Court not only may, but should, consider in determining whether the liquidators' view was reasonably based.

18 In the circumstances of this case, I am satisfied that it was reasonable for the liquidators to consider that the rights of the members would not be adversely affected by the amendment. Here the decision to effect the amendment was taken in the context of the insolvency of TSL and its inability to perform its task as responsible entity because of its insolvency. It was not a decision made in a vacuum or an isolated action on the part of the liquidators, unconnected with the incapacity of the Citrus Scheme to continue because of the insolvency of TSL and other companies in the Timbercorp group. It was quite the contrary. The original scheme arrangements could not continue; TSL could not continue to fund the operation of the scheme; the amendment was made in anticipation of enabling an informal winding up of the Citrus Scheme. Had the liquidators instead sought to have the scheme wound up by direction of the Court²³ or sought to take steps to wind up the scheme in accordance with s 601NC of the Act, the licence agreements would have terminated by operation of cl 4.2(b)(iv) of those agreements.

²² *George v Rockett* (1990) 170 CLR 104, 112; *ING Funds Management Ltd v ANZ Nominees Ltd* [2009] NSWSC 243, [102].

²³ *Corporations Act 2001* (Cth) s 601ND.

19 Accordingly, I have concluded that cl 11(fa) is valid and effective and the declaratory relief sought by the grower parties is refused.

B. Disclaimer of onerous property

20 The plaintiffs, as a fallback in the event that that the amendment was not valid, sought the leave of the Court to disclaim the licence agreements, if leave is required.²⁴ In view of the conclusion that I have reached concerning the validity of the exercise of power under s 601GC(1)(b) of the Act, it is unnecessary for me to consider whether the Court should give that leave. I should note that I did give consideration to whether I should form a view nonetheless given the extensive submissions, written and oral, put to me in the course of the hearing. Time has not permitted me to give proper consideration to the important factual and legal questions that I would need addressed to reach a concluded view, as there is the need to deliver judgment in this matter promptly because the making of the directions by 3 March 2010 is a condition precedent to the sale of the Solora property. Accordingly, I express no view on whether the licence agreements can or should be disclaimed by the liquidators.

C. Breach of fiduciary duty

21 In the course of cross-examination, Mr Shavin QC elicited from Mr Korda that the liquidators are also the liquidators of TL which has a 35% interest in the ultimate holding company ("Costa Holdings") of the purchaser ("Agriproperty") of the Solora property. Costa Holdings is also the holding company of CostaExchange Pty Ltd ("CostaExchange"), which provides management services under the Citrus Scheme to TSL and the growers. The shareholding interest of TL was not disclosed by the liquidators to the Court or to the growers for the purpose of obtaining the directions sought in this proceeding, although TL's shareholding interest in Costa Holdings is disclosed in publicly available records.

22 Mr Shavin QC submitted that the shareholding interest placed the liquidators in a

²⁴ *Corporations Act 2001* (Cth) ss 568(1A), 568(1)(f), 568D(1).

position of conflict and in breach of their fiduciary duty to the growers under the Citrus Scheme because they propose to cause TSL to terminate the growers' rights to benefit from the operation of the orchards, for the purpose of enabling the sale of the Solora property to a company in which TL has an interest. It was argued that TSL, and the liquidators by virtue of their office as liquidators of TSL, have obligations to the growers akin to those of a trustee. Mr Shavin QC relied on the equitable principle that a trustee cannot, without full disclosure to, and consent of, the beneficiaries participate in the sale for disposition of an interest held by the beneficiaries where the trustee derives, directly or indirectly, a benefit. It was submitted that the informed consent of the growers to the extinguishment of their rights is required before the liquidators could cause TSL to act on its power contained in cl 11(fa) of the constitution.

23 I reject the contention that the liquidators must obtain the informed consent of the growers before causing TSL to exercise that power.

24 In the first place, the liquidators' duties, as liquidators of TSL, are not solely to the growers under the scheme. Finkelstein J said in *Timbercorp Securities Limited (In Liquidation) v WA Chip and Pulp Co Pty Ltd*:²⁵

It is, I think, necessary to say something about the position of a liquidator of a responsible entity which is in the course of being wound up in insolvency. The liquidator is fiduciary. The principal beneficiaries of the duties owed by the liquidator in their capacity as a fiduciary are those who are interested in the liquidation, namely the creditors and members. Moreover, as a fiduciary the liquidator must act impartially between all those who are interested in the winding up.

Is the position of a liquidator of a responsible entity any different? The Corporations Act requires a managed investment scheme to have a responsible entity operate the scheme: s 601FB. The responsible entity must be a public company that holds an Australian financial services licence authorising it to operate a managed investment scheme: s 601FA. Strict duties are imposed on a responsible entity under s 601FC. One duty is that the responsible entity must act in the best interests of members and, if there is conflict between the members' interests and the entity's own interests, it must give priority to the members' interests: s 601FC(1)(c). This duty overrides any conflicting duty an officer of the responsible entity has under Pt 2D.1: s 601FC(3). Part 2D.1 contains the general duties owed by directors

²⁵ [2009] FCA 901.

and other officers of a corporation. Included among them is the duty to act with reasonable care and diligence (s 180), the duty of good faith (s 181), and the obligation to not use their position to improperly gain an advantage (s 182).

The Corporations Act also imposes duties upon an officer (which would include a liquidator) of a responsible entity: see s 601FD. The duties are similar to those owed by the responsible entity. Like the obligations of the responsible entity, the duties of an officer override any conflicting duty the officer has under Pt 2D.1: s 601FD(2).

The liquidators seem to be of the opinion that by reason of ss 601FC and 601FD they are required to look after the interests of investors even if that be at the expense of other creditors. In my view that is wrong. There is nothing in ss 601FC or 601FD that overrides the liquidator's duty to those interested in the winding up. It would be quite extraordinary were that to be the case. I think the liquidators should readjust their priorities.²⁶

The trustee analogy here is inapt to capture sufficiently the nature of the duties of the liquidators with respect to a company that is the responsible entity of a managed investment scheme.

- 25 Secondly, I do not accept that there is a conflict of interest. The conflicting duty was said by Mr Shavin QC to be the duty that the liquidators owe to the growers to consider how the benefits from the purchase of the property by Agriproperty that will accrue to TL from its shareholding in CostaHoldings should be allocated. It was submitted that the conflict is dealing with the excision of growers' rights on the basis that the growers get an interest in only one of two possible streams of benefits, and that there has been no consideration by the liquidators nor material placed before the Court as to whether that is an appropriate way to proceed. The two possible streams of benefits were identified as the benefit in sharing in receipt of the proceeds of the sale and the benefit which TL will have from the CostaGroup's operation of the orchards. However TL has no relevant relationship with the growers. Growers were never entitled to a share of the income stream derived by CostaExchange from its management of the orchards under the original scheme arrangements. I have concluded on the basis of the material before me that there is no conflict with respect to the liquidators procuring TSL to exercise the power so as to enable the Solora property to be sold free from the encumbrance of the growers' licences.

²⁶ Ibid [8] – [11].

- 26 Thirdly, the liquidators had no role in, and were completely independent of, the sale process for the Solora property. The sale process was undertaken by receivers and managers ("the receivers") appointed to the owner of that property. That sale process culminated in the receivers entering into a sale contract with Agriproperty. The sale process and bid offer accepted are described in detail in an affidavit of Mr McEvoy, one of the receivers. That evidence confirmed that the sale process was calculated to, and did, elicit a successful bid that was higher than the market valuation the receivers had for the property. Three bids were received for the purchase of the Solora property and associated assets. Each of those bids had as a condition of purchase that the property be sold unencumbered by the growers' licences. Agriproperty's bid was the highest and most acceptable bid.
- 27 The sale process was not challenged by the grower parties. They accept that a robust sale process was undertaken. As I said, the liquidators played no role or took any part in the bid that was made by Agriproperty. Although the liquidators have not conducted a review of the receivers' sale process, they did negotiate the terms of a deed with the receivers recording their agreement to obtain Court approval for the termination of the growers' rights with the receivers. The terms were recorded in a deed entitled the "Solora Grower Rights Deed" which was executed on 25 January 2010. The deed contains the receivers' confirmation to the liquidators that, in exercising their power of sale in respect of the property, they have complied with their obligations under s 420A of the Act.²⁷
- 28 The enquiry for the Court here is not whether it is commercially prudent for the liquidators to facilitate the sale and through it a potential return to the growers. The liquidators have explained to the Court their reasons for considering that the extinguishment of the growers' rights will be in their best interests and I accept that

²⁷ Solora Grower Rights Deed cl 3.1.
Corporations Act 2001 (Cth) s 420A provides: (1) In exercising a power of sale in respect of property of a corporation, a controller must take all reasonable care to sell the property for: (a) if, when it is sold, it has a market value--not less than that market value; or (b) otherwise--the best price that is reasonably obtainable, having regard to the circumstances existing when the property is sold. (2) Nothing in subsection (1) limits the generality of anything in section 180, 181, 182, 183 or 184 (emphasis added).

they have formed their view in good faith.

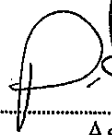
D. Conclusion

- 29 Accordingly for the above reasons I have concluded that an order should be made with respect to the liquidators procuring TSL to exercise the power in cl 11(fa) of the Constitution. I note that TSL will not exercise the power to surrender the licence agreements until the sale contract is completed and the purchase price paid to ensure that sale proceeds are received and that the sale proceeds are to be held in trust pending the Court's determination of the apportionment of those sale proceeds amongst the relevant groups of stakeholders.

CERTIFICATE

I certify that this and the 15 preceding pages are a true copy of the reasons for Judgment of Davies J of the Supreme Court of Victoria delivered on 26 February 2010.

DATED this twenty sixth day of February 2010.


Associate

The image shows a circular seal of the Supreme Court of Victoria. The outer ring contains the text "SUPREME COURT OF VICTORIA" at the top and "JUDGES ASSOCIATE" at the bottom. In the center is the Royal Coat of Arms of Victoria. A signature is written across the seal, and the word "Associate" is printed below it.

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

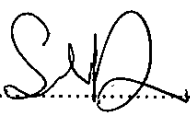
OIM#2 PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) as trustee for TIMBERCORP ORCHARD TRUST #2 & ORS (according to the attached Schedule)

Defendants

EXHIBIT NOTE

Date of document:	25 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.fernnon@clarendonlawyers.com.au

This is the exhibit marked "CJA-17" now produced and shown to **CELIA JANE ARMSTRONG** at the time of swearing her affidavit on 25 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-17

**Judgement of Judd J dated 15 March 2011 in SCV
Proceeding No S CI 2011 888**

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

Not Restricted

S CI 2011 0888

IN THE MATTER OF TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)

BETWEEN

**TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION) (ACN 092 311 469)
IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE 2004 TIMBERCORP
CITRUS PROJECT (ARSN 108 887 538) AND THE 2005 TIMBERCORP CITRUS
PROJECT (ARSN 114 091 299) AND ORS ACCORDING TO THE SCHEDULE**

Plaintiffs

<u>JUDGE:</u>	JUDD J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	3, 7 March 2011
<u>DATE OF JUDGMENT:</u>	15 March 2011
<u>CASE MAY BE CITED AS:</u>	Re Timbercorp Securities Limited (In liq)
<u>MEDIUM NEUTRAL CITATION:</u>	[2011] VSC 83

Corporations – Liquidation – Application for directions under s 511 of the Corporations Act 2001 (Cth) – Managed investment scheme – Constitutional amendment – Termination of rights of scheme members – Informal winding up – Sale of property under control of receivers.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiffs	Dr O Bigos	Arnold Bloch Leibler
For the Receivers of Align Funds Management Limited	Ms W Harris SC with Mr T Clarke	Allens Arthur Robinson
For TGG Citrus Committee Inc	Mr M Galvin	Gadens
For Timbercorp Growers Group	Ms C Armstrong	Clarendon Lawyers

HIS HONOUR:

- 1 This is an application made under s 511 of the *Corporations Act 2001* (Cth) by the liquidators of the first plaintiff Timbercorp Securities Limited (In liquidation). The liquidators, Mark Anthony Korda and Leanne Kylie Chesser, are the second and third plaintiffs. The liquidators seek a direction that they are justified and otherwise acting properly and reasonably in procuring Timbercorp Securities, in its capacity as the responsible entity of the 2004 Timbercorp Citrus Project and the 2005 Timbercorp Citrus Project to terminate or surrender licences granted to growers by Timbercorp Securities pursuant to Citrus Licence Agreements. Each grower was granted a licence over a 'citruslot' on land in South Australia known as Kangara Estate, although some citruslots for the 2005 Project were on adjoining land at Solara South. This application only concerns grower licences over citruslots on land at Kangara Estate.
- 2 The evident purpose of the application is to have the court approve the termination or surrender of the Licence Agreements to facilitate the completion of contracts for the sale of Kangara Estate and associated water rights. The sale process was not undertaken by the liquidators. Paul William Kirk and Michael Fung are receivers of the land and related water rights, having been appointed by the trustee of secured debenture holders in the Timbercorp Orchard Trust (TOT). They commenced the sale process in November 2009, and entered into a Land Sale Contract on 3 December 2010 and a Water Sale Contract on 4 January 2011.
- 3 There are no named respondents to the application, although members of the schemes were represented at the hearing. On the first day of the hearing Keree Anne Bezencon, chairperson of the Timbercorp Growers Group Citrus Committee Inc, was granted leave to appear on behalf of the growers represented by the Citrus Committee. Ms Bezencon is a director of Siger Super Services Pty Ltd, trustee of the Kereg Trust. The Kereg Trust is a member of the 2005 Timbercorp Citrus Project.

Also represented at the hearing was the Timbercorp Growers Group, which is a collection of other growers represented by Clarendon Lawyers.

- 4 The liquidators had served a copy of the originating process dated 28 February 2011 and all supporting affidavits on the Australian Securities and Investment Commission; Messrs Kirk and Fung; the Timbercorp Growers Group, represented by Clarendon Lawyers; and the Citrus Committee by its representative, Ms Bezencon.
- 5 At the close of submissions made on behalf of the liquidators and the receivers in support of the application, Ms Bezencon sought an adjournment for the purpose of obtaining legal advice and assistance to enable the Citrus Committee to better explain the merits of a proposal advanced to the receivers on 28 February 2011. That proposal had been rejected by the receivers and liquidators as so indefinite as to be incapable of serious consideration. The proposal followed upon earlier proposals advanced by or in association with Ms Bezencon. The further hearing of the application was adjourned to 7 March 2011. On that day the Citrus Committee was represented by counsel who sought a further adjournment for one week so that the proposal could be refined and perhaps made more attractive to the receivers and liquidators. The Citrus Committee did not attempt to explain and support the proposal dated 28 February 2011, which was the purpose for which the adjournment had been granted.
- 6 It was not submitted by anyone that the growers, whose interests stood to be affected by the proposed action of the liquidators, were not adequately notified of the application and I am satisfied that they were.
- 7 It was not disputed that the Timbercorp group of companies, including Timbercorp Securities, are hopelessly insolvent. Timbercorp Ltd is the holding company of Timbercorp Securities and other corporate members of the group. The liquidators were appointed liquidators of Timbercorp Securities on 29 June 2009.

- 8 Timbercorp Securities is the responsible entity of a large number of registered managed investment schemes, including schemes for the cultivation of eucalypt plantations, schemes for the growing of almonds, schemes for the growing of olives, schemes for the growing of citrus fruit and schemes for the growing of table grapes.
- 9 The 2004 and 2005 Citrus Projects are regulated under Chapter 5C of the Act. The relevant governing documents were Constitutions, Management Agreements and Grower Licence Agreements. The Constitution governing the 2004 Citrus Project is dated 27 April 2004 and the Constitution governing the 2005 Citrus Project is dated 2 May 2005. The Constitutions are relevantly identical.
- 10 Kangara Estate is described in several certificates of title. The registered proprietor of the land is Align Funds Management Limited (receivers and manager appointed) in its capacity as the responsible entity of the TOT. Align Funds Management was previously known as Orchard Investments Management Ltd. Kangara Estate is approximately 1,425 hectares, of which approximately 1,179 are planted. There are 739 hectares of citrus orchards (approximately 490,500 citrus trees) and 440 hectares of vineyards (approximately 739,700 vines).
- 11 Align Funds Management purchased the land from AgriExchange Murtho Pty Ltd, which retained a first right of refusal if the property was sold. That obligation bound Align Funds Management to offer the property to AgriExchange on the same terms and conditions as a proposed sale to a third party. Such a right and corresponding obligation presented the receivers with a significant strategic disadvantage when negotiating a sale of the land with a third party.
- 12 Align Funds Management had leased the land to Timbercorp under a head lease dated 26 May 2004. In turn, Timbercorp had granted two sub-leases to Timbercorp Securities, one in relation to that part of the land used in the 2004 Project and the other in relation to that part of the land used in the 2005 Project. The sub-leases are dated 28 April 2004 and 5 May 2005 respectively.

- 13 Kangara Estate is employed for scheme projects other than the Citrus Projects. Wine grape vineyards are located on some parts of it, and there is a vineyard that is not part of a managed investment scheme.
- 14 In addition to the land comprising Kangara Estate, Align Funds Management owned associated water rights, with access to 10,238.51 mega litres per annum. In October 2010, a 1,337.01 mega litre entitlement was transferred to Timbercorp so that Align Funds Management now holds the remaining 8,861.5 mega litre per annum entitlement.
- 15 Timbercorp Securities, as sub-lessee from Timbercorp of Kangara Estate, entered into Citrus Licence Agreements with participating growers in each of the 2004 and 2005 Citrus Projects. I was told that there are around 320 growers participating in the Projects with nearly 3000 citruslots on Kangara Estate land.
- 16 The TOT has 55 unit holders with a total of 24,976,537 units. The trust issued secured debentures listed on the Australian Stock Exchange, and unsecured and unlisted annuity bonds. Trading in the secured debentures was suspended on 23 April 2009. There are currently 614,530 debentures on issue with a face value of \$100. The Trust Company (Nominees) Ltd, previously known as Permanent Nominees (Aust) Ltd, is the trustee for the holders of the debentures pursuant to the Timbercorp Orchard Trust Debenture Trust Deed, dated 17 October 2003. The Trust Company holds, as security on behalf of the debenture holders, a fixed and floating charge over the assets of the TOT. The Trust Company also holds a mortgage over Kangara Estate. It is the only secured creditor of the TOT. The receivers were appointed by The Trust Company.
- 17 The purchasers under the Land Sale Contract are Agriproperty Pty Ltd and Kingston Vineyards Pty Ltd. The contract contains the following conditions precedent.

5.1 Conditions Precedent

Settlement will not proceed unless and until the following conditions (the *Conditions Precedent*) are fulfilled or waived in accordance with this Contract:

(a) (Growers' Claims): Each of the following having occurred in respect of the Citrus Projects:

- (A) the Court directing that the Liquidators of TSL are justified in procuring TSL, in its capacity as responsible entity of the Citrus Projects, to extinguish all of the rights of Growers (including under the Grower Licences) in respect of the Property, in accordance with the Surrender Deed;
- (B) the Court making orders determining the rights of all and any persons (including Growers and Permanent) to all or any part of the net proceeds of the sale under this Contract, or ordering that those net proceeds be held on trust until the rights of those persons are determined by a further order of the Court; and
- (C) the Liquidators of TSL executing and delivering to the Vendor the Surrender Deed,

Such that the Property may be transferred to the Purchaser at Settlement free of any encumbrances relating to the rights of Growers and Permanent and any Growers' Claims.

- (b) (Non-exercise of First Right of Refusal): The non-exercise or waiver of the First Right of Refusal by AgriExchange.
- (c) (Timbercorp Leases): Each of the parties to the deeds of surrender in respect of the Timbercorp Leases agree in writing to the execution of the deeds of surrender that are to be delivered by the Vendor at Settlement in accordance with Special Condition 16.3(a)(vi).

The date by which the conditions are to be satisfied is 16 March 2011.

- 18 The Water Sale Contract is between the receivers and the Commonwealth of Australia, for the sale of the water entitlement of 8,861.50 mega litres That contract contains the following conditions precedent.

2. CONDITIONS PRECEDENT

Completion will not occur unless and until the following conditions are fulfilled or waived under this Contract:

2.1. Each of the following having occurred for each of the Citrus Projects:

- (i) the Court directing that the Liquidators of TSL are justified in procuring TSL, in its capacity as the responsible entity of the Citrus Projects, to extinguish all of the rights of Growers (including under the Growers Licences) in respect of the Property and the Water Entitlement, in accordance with the Surrender Deed;

- (ii) the Court making orders determining the rights of all and any persons (including Growers and Permanent) to all or any part of the net proceeds of the sale under this Contract or ordering that those net proceeds be held on trust until the rights of those persons are determined by a further order of the Court; and
- (iii) the Liquidators of TSL executing and delivering to the Seller the Surrender Deed,

Such that the Water Entitlement may be transferred to the Buyer at Completion free of any encumbrances relating to the rights of Growers and any Growers' Claims; and

- 19 The apparent purpose of the evidence filed by and on behalf of the receivers, and of their submissions, was to satisfy the court of a 'robust sale process' concluding in the contracts, and to explain the history of the sale process and the various bids and proposals, including proposals advanced by or in association with Ms Bezencon. The sale process conducted by the receivers was described in great detail. One might have thought that this was an application made on behalf of the receivers seeking authorisation to enter into those contracts. It was not. It was an application by the liquidators for approval to terminate grower rights to facilitate the completion of contracts by the receivers. In that respect, the application resembled one made to Davies J in *Re Timbercorp Securities (In Liquidation)* on 9 December 2009.¹ That application concerned the sale of properties employed in almond schemes by Timbercorp Securities. The sale contracts were negotiated by receivers appointed by the Australia and New Zealand Banking Group Ltd. Mr Kirk was one of the receivers. The liquidators took no part in the sale process. That was also the situation with the sale process conducted by the receivers in this case.
- 20 The liquidators rely upon assurances given by the receivers to the effect that they have complied with their obligations under s 420A of the Act. The liquidators' application, if successful, will facilitate the sale by satisfying a condition precedent. The receivers also depend upon the cooperation of the liquidators to exercise the power to terminate or surrender the Licence Agreements to ensure that the receivers are in a position to transfer unencumbered land to the purchaser.

¹ [2009] VSC 590.
SC:HB

- 21 The sale process undertaken by the receivers was complicated. I have already mentioned the existence of a first right of refusal in favour of AgriExchange. During the sale process it was necessary for the receivers to ensure continued maintenance of the orchards in order to preserve their value. For that purpose they entered into agreements with CostaExchange Ltd to cultivate and market the citrus crops. The costs of CostaExchange were secured against the proceeds from crop sales, but any shortfall was to be paid out of the proceeds of settlement on the sale of Kangara Estate. The quality of the 2010 citrus crop was compromised. There was a likelihood of a shortfall of around \$600,000. Furthermore, it became apparent that citrus trees would need to be removed and replaced, resulting in falls in future forecast revenue.
- 22 An additional complication to the sale process was a resolution by growers, at a meeting held on 9 November 2010, to remove Timbercorp Securities as responsible entity of the Citrus Projects and appoint Food and Beveridge Australia Ltd in its place. Other complications included the reformulation of bids by potential buyers and the entry of new potential buyers into the process after deadlines had been reached.
- 23 In order to better inform themselves as to the value of Kangara Estate, the receivers engaged Mr Peter Hay, of Hay Consultants, to provide a valuation of Kangara Estate and the water rights. The initial valuation, dated 29 July 2010 was revised after the provision of some additional information. The most recent valuation was dated 21 October 2010. The valuation was sought on the basis of land only (without water entitlements); the land inclusive of water entitlements; and of water entitlements alone. The combined price obtained by the receivers for the land and water rights compares favourably with the range of values attributed to the land and water entitlements by Mr Hay.
- 24 While this court is not asked to declare that the receivers have discharged their obligations under s 420A, it is necessary to consider whether the evidence points to circumstances which might cause a reasonable liquidator, in the position of these liquidators, to doubt the veracity of assurances given by the receivers about the sale

process, or which might cause them to be dissatisfied by the evidence filed by the receivers in connection with the sale process, or to otherwise conclude that the transactions were not in the best interests of the scheme members.

- 25 When considering compliance with the obligations imposed by s 420A, the primary consideration will be the adequacy and robustness of the sale process. In *Florgale Uniforms Pty Ltd (Receivers and Managers Appointed) (in liquidation) and Ors v Orders and Anor*² Dodds-Streeton J observed,

The expert evidence establishes that the exercise of all reasonable care by a receiver would entail a process of selecting the method of realising the highest net return, by considering the different available means of sale and weighing the prices likely to be achieved against the likely costs and expenses entailed and the relative risks of the various methods in all the circumstances. The process is informed by the objective of securing the best possible return for the secured creditor, subject to the obligations imposed by general law doctrines and s.420A. It necessarily involves the exercise of judgment, taking into account all the relevant variables and circumstances of the particular case. It does not depend on matters of price or revenue alone, or any single factor in isolation.

In my opinion, the process of evaluating and balancing the competing costs and benefits and the associated risks of various methods of sale will not, in every case, require a formal comparative analysis or documented calculations. All will depend on the circumstances of the individual case, including the scale of the receivership, the value and nature of the property involved, the receiver's expertise in relation to the type of property, relevant expert advice, the advice or input of proprietors and staff, the trading history and marketing of the company, including during the receivership, and other relevant variables in a realistic commercial context.

- 26 The growers did not contend that the receivers had failed to comply with their obligations under s 420A of the Act.
- 27 The connection between one of the purchasers of the land, Agriproperty, and CostaExchange, exposed a matter of potential concern to the receivers and thus the liquidators. It is a former subsidiary of CostaExchange, involved in management of the trees and crop sales. AgriExchange was and is a subsidiary, and the holder of the right of first refusal. It should be noted that Agriproperty was the successful tenderer in the sale process in relation to the Solara South property when a

² (2004) 11 VR 54, paras 442 and 443.

subsidiary of CostaExchange. That sale process was the subject of orders made by Davies J on 26 February 2010³ in which her Honour considered and rejected an allegation that the liquidators at Timbercorp Securities were acting in breach of fiduciary duty in enabling a sale to a wholly owned subsidiary of CostaExchange.

- 28 Agriproperty is no longer a wholly owned subsidiary of CostaExchange. Timbercorp holds 35% of the issued shares in CostaExchange Holdings Pty Ltd. CostaExchange Holdings owns 90% of the issued shares in CostaExchange. CostaExchange no longer holds any shares in Agriproperty. ASIC records disclose that the shareholders comprise eight corporations, some of which are apparently connected with the Costa family. Robert Costa is a director.
- 29 The circumstances in which the change of ownership has taken place has not been explained, but the continued association or connection between the Costa family and Agriproperty no doubt contributed to the receiver's ability to procure AgriExchange to waive its right of first refusal, and an agreement to reduce the exposure of the proceeds from the sale to a reduction under the management agreements with CostaExchange. The waiver was necessary to clear the way for an uncomplicated completion of the Land Sale Contract. Thus, while the right of first refusal was an impediment, the connection between Agriproperty and CostaExchange gave the liquidators an opportunity to negotiate its removal as part of the overall transaction.
- 30 The evidence before the court does not, in my opinion, disclose any circumstance which would cast doubt upon the veracity of the assurances, given by the receivers to the liquidators of their compliance with s 420A of the Act. The evidence supports a considered and rigorous commercial sale process that has resulted in the execution of contracts, albeit conditional, at a price justified by an independent valuer.

Directions under s 511 of the Act

- 31 Section 511 of the Act provides:

Application to Court to have questions determined or powers exercised

³ [2010] VSC 50.
SC:HB

- (1) The liquidator, or any contributory or creditor, may apply to the Court:
 - (a) to determine any question arising in the winding up of a company; or
 - (b) to exercise all or any of the powers that the Court might exercise if the company were being wound up by the Court.
- (1A) APRA may apply to the Court under subsection (1) in relation to a company that is a friendly society within the meaning of the *Life Insurance Act 1995* and which may be wound up voluntarily under subsection 180(2) of that Act.
- (2) The Court, if satisfied that the determination of the question or the exercise of power will be just and beneficial, may accede wholly or partially to any such application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just.

32 The court has a discretion as to whether to give directions to a liquidator and will generally give directions to resolve a difficulty that has arisen in the liquidation.⁴ By giving a direction, the court does not finally determine the rights and liabilities of parties arising out of the subject-matter of the application for directions.⁵ It is not the function of the court to make commercial judgements on behalf of liquidators or substitute its judgement for their judgement. In *Re Ansett Australia Ltd*⁶ Goldberg J said,

In a number of authorities, the courts have made it clear that courts should pay regard to the commercial judgment of liquidators when considering compromises of claims or causes of action made by liquidators in respect of which compromises the approval of the court is sought. The Act and its predecessors, entrust to liquidators and administrators the conduct of liquidations and administrations, albeit subject to the ultimate supervision of the court. The court will generally defer to the commercial judgment of liquidators and administrators. In *Re Spedley Securities Ltd (in liq)* (1992) 9 ACSR 83, Giles J said at 85-6:

In any application pursuant to s 377(1) [equivalent to Corporations Act s 477(2A)] the court pays regard to the commercial judgment of the liquidator: *Re Chase Corp (Australia) Equities Ltd* (1990) 8 ACLC 1118. That is not to say that it rubber stamps whatever is put forward by the liquidator but, as is made clear in *Re Mineral Securities Australia Ltd* [1973]

⁴ *Dean Wilox v Soluble Solution Hydroponics Pty Ltd* (1997) 42 NSWLR 209, 212.

⁵ *Re GB Nathan & Co Pty Ltd (in liquidation)* (1991) 24 NSWLR 674, 677, 679-80.

⁶ (2001) 39 ACSR 355, [65]-[68].

2 NSWLR 207 at 231-2, the court is necessarily confined in attempting to second guess the liquidator in the exercise of his powers, and generally will not interfere unless there can be seen to be some lack of good faith, some error in law or principle, or real and substantial grounds for doubting the prudence of the liquidator's conduct. The same restraint must apply when the question is whether the liquidator should be authorised to enter into a particular transaction the benefits and burdens of which require assessment on a commercial basis.

Put shortly, it is not the role of the court to make a commercial judgment for the liquidators or administrators or to substitute its judgment for their judgment. The court is not qualified to do so and it is not part of the judicial function to do so. Street CJ made this point in *Re Mineral Securities Australia Ltd (in liq)* [1973] 2 NSWLR 207 at 232:

When the court is required to pronounce upon the commercial prudence of a transaction, it enters upon a slippery and uncertain field. Apart from the lawyer's disclaimer of expert qualifications in matters of business prudence, the very process of litigation and the necessary limitations upon the scope of admissible evidence restrict the available material to far less than is necessary for the making of a commercial decision.

As I have pointed out earlier, although courts will not pronounce upon the commercial prudence of a particular transaction, they will act in an appropriate case to protect liquidators and administrators from claims that they have acted unreasonably in entering into particular transactions. That protection will remain so long as the liquidators or administrators have made a full and fair disclosure to the court of all facts material to the subject-matter under consideration: *Re G B Nathan & Co Pty Ltd (in liq)*, above, at 679; *Mentha v G E Capital Ltd* (1997) 154 ALR 565 ; 27 ACSR 696 at 702.

In this consideration of relevant principles, I have considered the relevant principles as applying equally to court appointed liquidators and administrators appointed pursuant to Pt 5.3A of the Act.

There is a difference between court appointed liquidators and administrators appointed pursuant to the provisions of Pt 5.3A of the Act. Administrators are not officers of the court in the same way as court appointed liquidators are officers of the court. Part 5.3A of the Act enables an administrator of a company to be appointed by the company (s 436A), by a liquidator of a company (s 436B), by a person entitled to enforce a charge on the whole of the company's property (s 436C) and by the court where a company is under administration but no administrator is acting (s 449C(6)). There is a suggestion in some authorities that a voluntary liquidator not appointed by the court is not an officer of the court: *Re London County Commercial Reinsurance Office* [1922] 2 Ch 67 at 84; *Re David A Hamilton & Co Ltd (in liq)* [1928] NZLR 419 at 422, but see *Re T H Knitwear (Wholesale) Ltd* [1987] 1 WLR 371 at 377.

33 It has now become customary for liquidators to seek court approval before terminating grower rights when winding up schemes and their responsible entities. The sale process was outside their control. They were involved in an informal winding up of the schemes. In such circumstances I regard their application as prudent.

Constitutional amendment

34 It has now become customary for liquidators to seek court approval before terminating grower rights when winding up schemes and their responsible entities. The sale process was outside their control. They were involved in an informal winding up of the schemes. In such circumstances I regard their application as prudent.

35 The Constitutions for each scheme were, in material respects, the same. Each Constitution contemplated the preparation of Licence Agreements and Citruslot Management Agreements. Pro forma agreements were attached to each Constitution as a schedule. Each Constitution provided that the Licence Agreement must be read subject to the terms of the Constitution. Under each Constitution the Project may be wound up, prior to its completion, if the responsible entity considers that the purpose of the Project could not be accomplished (s 601NC) or was directed by a court to wind up the Project (s 601ND). The Projects have not yet been wound up.

36 Under the Citruslot Management Agreements, each participating grower engaged Timbercorp Securities to manage and administer the Project including the operation of each citruslot. Each Licence Agreement authorised the grower to use the relevant citruslot for the sole purpose of growing and cultivating citrus trees. The licence included a water licence for each citruslot. The Licence Agreement was to continue until the earlier of the date which is one day before the expiry or termination of the lease between Timbercorp Securities and Align Funds Management; termination of the participating growers' interest in the Project; 29 June 2026; and termination of the Project.

- 37 Following their appointment as liquidators of the companies in the Timbercorp group, the applicants commenced to manage and undertake a realisation of scheme assets. Various applications were made to the court with a view to extinguishing grower rights to facilitate the sale of unencumbered land. On 18 August 2009, Finkelstein J, in the Federal Court of Australia, made an order that the liquidators were justified in procuring Timbercorp Securities to unilaterally amend the Constitutions of the Forestry Schemes pursuant to s 601GC(1)(b) of the Act, granting the responsible entity an express power to terminate growers' rights. An order to that effect was made.⁷ The consequential amendment became the foundation for subsequent orders made in this court on 30 September 2009⁸ and 17 December 2009.⁹
- 38 On 21 August 2009 Robson J, in this court, authorised the liquidators to cause Timbercorp Securities to amend Constitutions by incorporating a power to terminate or surrender grower rights.
- 39 Having obtained orders from the Federal Court of Australia and from this court approving amendments to the Constitutions in relation to the forestry and almond schemes, the liquidators decided that they would proceed to make such amendments in relation to the olive schemes, and subsequently the citrus schemes with which this application is concerned, without first having obtained judicial approval. The amendments were made in the context of a sale process having been commenced by the receivers and following notice to ASIC and to solicitors known to the liquidators as representing grower groups.
- 40 Thus, the Constitutions for the 2004 and 2005 Citrus Projects were amended by deeds dated 29 December 2009 and by further deeds dated 28 January 2010. The effect of the amending deeds was to incorporate a power vested in the responsible entity 'to assign, terminate, surrender or otherwise deal with any Licence Agreement'.

⁷ Finkelstein J, 18 August 2009, Federal Court of Australia.

⁸ *In the Matter of Timbercorp Securities Ltd (in liquidation)* [2009] VSC 597, Pagone J.

⁹ *In the Matter of Timbercorp Securities Ltd (in liquidation)* [2009] VSC 608, Davies J.

41 The liquidators do not seek court approval of the amendment to the Constitution, but only to exercise of the power conferred upon the responsible entity by the amendment. The liquidators have given an undertaking that they will not cause Timbercorp Securities to exercise the power to surrender the Licence Agreements unless and until the Land Sale Contract and the Water Sale Contract are both completed. The liquidators also state that if they cause Timbercorp Securities to surrender the Grower Licences they will also use their power as liquidators to disclaim the head lease and sub leases on the grounds that those leases are onerous.

42 It was not submitted on behalf of the growers that the amendment was invalid or was otherwise effective. Nonetheless, it is appropriate to review the basis for the amendment, if only to be satisfied that there was a proper basis for the opinion of the liquidators that the amendment 'would not adversely affect members' rights'. Section 601GC(1) of the Act provides:

- (1) The Constitution of a registered scheme may be modified, or repealed and replaced with a new Constitution:
 - (a) by special resolution of the members of the scheme; or
 - (b) by the responsible entity if the responsible entity reasonably considers the change will not adversely affect members' rights.

43 In *ING Funds Management Ltd v ANZ Nominees Ltd*,¹⁰ Barrett J observed that there were three requirements that must be satisfied for a Constitutional amendment effected under the provision. His Honour said,

The conclusion just expressed as to deficiency in the form of the November 2008 documents makes it unnecessary to consider whether, in terms of s 601GC(1)(b), the situation at that time was one in which INGFM "reasonably considers the change will not adversely affect members' rights". I nevertheless proceed to consider that matter.

Before the factual context is examined, the content of the condition must be addressed. The necessary inquiry concerns the state of mind of INGFM and what, as a matter of fact, it "considered" (in the sense of "concluded"). There must be factual findings about the assessment INGFM actually made concerning the impact of the modification. For the condition to be satisfied, several components must be established. In the present proceedings, it is for INGFM as plaintiff to establish them.

¹⁰ (2009) NSWSC 243; (2009) 228 FLR 444, paras 84-88.
SC:HB 14

The first component involves an assessment of how INGFM viewed "members' rights" before the modification and the impact that the modification would have on those rights. The process of determining the state of mind of a company arises for consideration here, as does the meaning of "members' rights".

Second, it must be seen that INGFM considered that, according to a comparison of "members' rights" before the modification with the changed rights that would exist after the event, there would be no "adverse" affectation of the "rights" whatsoever, this being the import of the words "the change will not adversely affect members' rights". It is necessary here to consider the meaning of "adversely affect".

Third, it is necessary that the opinion formed by INGFM as to the absence of adverse affectation be seen to be something that the responsible entity "reasonably considers".

- 44 In *Re Timbercorp Securities Ltd*,¹¹ Davies J had occasion to consider an application by the liquidators seeking justification to procure Timbercorp Securities to exercise its power to terminate or surrender licences in relation to the 2005 Citrus Scheme. Her Honour took the view that in the course of considering the liquidators' application for endorsement of a proposed decision to exercise the power it was appropriate to consider the validity of the amendment. In that case it had been argued on behalf of growers that the amendment was invalid or of no affect. No such submission was made in this case.
- 45 Mr Korda deposed that the amendments were made in a context where Timbercorp Securities was insolvent, with no funds to continue to operate and manage the Citrus Projects. The amendments were made for the purpose of enabling an 'informal winding up' of the Citrus Projects, after the liquidators became aware that Kangara Estate and the water rights had been put up for sale by the receivers. The liquidators anticipated that any such sale would be conditional upon the extinguishment of any grower rights in order to maximise the purchase price by offering for sale unencumbered assets.
- 46 The liquidators said that they had formed the opinion that the process of informal winding up would be most beneficial for scheme members. They said that the

¹¹ [2010] VSC 50, Davies J, 26 February 2010.
SC:HB

amendment to the Constitution was designed to enable them to facilitate that process. The liquidators said that they had formed the opinion that the Constitutional amendment would not adversely affect growers' rights. They were not in a position to interfere with the sale process undertaken by the receivers.

47 The liquidators relied upon the fact of court approval of similar amendments in the past. Finally, they argued that in the absence of a power to support an informal winding up, involving a sale of Kangara Estate and the water rights by the receivers, they would have been confined to pursue a formal winding up. In that event the Licence Agreements could have been terminated upon a winding up of the schemes or termination of the head leases.

48 I am satisfied that the evidence discloses a basis upon which the liquidators could properly have concluded that the amendment would not adversely affect members rights.

Proposed exercise of the power to terminate

49 The liquidators are of the opinion that they should exercise the power to terminate or surrender the Grower Licences over Kangara Estate in order to support the informal winding up of the schemes. They are of the opinion that the Land Sale Contract and the Water Sale Contract provide the best outcome for the scheme members. They have been assured by the receivers that they have complied with their obligations under s 420A of the Act. I am not so much persuaded by the assurances of the receivers, as by the detailed material filed by them, explaining in great detail the steps taken in the sale process. The course taken by the liquidators is by no means novel. It is a course that has been adopted by them in respect of other schemes operated by the Timbercorp group. They have previously sought and obtained court approval for that course in similar circumstances.

50 In my opinion, there is no apparent basis upon which the court should not accept the commerciality and bona fides of the liquidators' judgement. The evidence strongly supports the appropriateness of their decision.

51 Perhaps the most powerful argument in favour of the proposed exercise of the power is that had the liquidators sought to wind up the Projects by order of the court or terminated the Head Leases, the Licence Agreements would have terminated by operation of cl 4.2(b)(iv). What they have sought to do is to participate in an informal winding up in circumstances where the principal assets are controlled by the receivers. The informal process undertaken by the liquidators is very likely to yield a better outcome for the growers than formal winding up proceedings.

Australian Financial Services Licence

52 Timbercorp Securities had been issued an Australian Financial Services licence which enabled it to operate managed investment schemes. That licence has now been cancelled by ASIC. Nevertheless, ASIC has allowed the licence to continue in effect, under s 915H of the Act, as though the cancellation had not happened. The extension is to enable Timbercorp Securities to provide, until 30 June 2011, financial services that are reasonably necessary for or incidental to the transfer to a new responsible entity or the winding up of the schemes of which Timbercorp Securities is currently the responsible entity.

53 In the absence of a further extension by ASIC of the licence, Timbercorp Securities will no longer be in a position to provide financial services to assist in the informal winding up of the schemes from 30 June 2011. Thus, quite apart from the obligations under the existing contracts, and the risks to those contracts if completion is frustrated or delayed, there is an added imperative that finality be achieved in the winding up prior to 30 June 2011.

The Citrus Committee proposal – Ms Bezencon

54 By presenting the proposal, dated 28 February 2011, to the receivers and liquidators, Ms Bezencon would interrupt the completion of the contracts. She contended that there was a new and meritorious option that must be considered before approval could be given to the liquidators to terminate grower rights. If the Citrus Committee is to be given a further opportunity to develop their proposal, as they have sought, it

would be very unlikely that the condition precedent could be satisfied by 16 March 2011. The question is whether the proceeding should be further adjourned and interrupt the approval process and completion.

- 55 Ms Bezencon has participated in the sale process in various capacities. The most recent, and only relevant capacity, is as chairperson of the Citrus Committee, to advocate a proposal to recapitalise the TOT and replace Align Fund Management as the responsible entity. The object of the proposal was to give growers an opportunity to rescue something from the wreckage by surrendering their existing rights in favour of an interest, yet to be defined, in the TOT.
- 56 Ms Bezencon was involved with a bid made to the receivers as early as 22 January 2010. In August 2010 she was involved in calling the meeting of growers to replace Timbercorp Securities as responsible entities. The proposed new responsible entity was to be Food and Beverage Australia Ltd. The meeting was adjourned on a number of occasions, but the resolution was apparently passed on 9 November 2010. Food and Beverage Australia has been reluctant to complete the formalities required for its appointment, and there is evidence that its chief executive officer, Mr Chris Day, has expressed his company's reluctance to take any step as responsible entity of the Citrus Projects, at least at this time.
- 57 In about October 2010 the receivers were informed that Ms Bezencon was attempting to prepare a proposal for the recapitalisation of the TOT. Also in that month, Ms Bezencon advanced a proposal for the purchase of the land and water rights. In mid-December 2010, Ms Bezencon advanced a further proposal to recapitalise the Projects. When engaged with the liquidators in discussions about her proposals she was told on 11 February 2011 that this application would be made to the court on 3 March 2011.
- 58 The proposal for the replacement of Timbercorp Securities as responsible entity seems to have fallen away in favour of the proposal advanced by Ms Bezencon on 28 February 2011. That proposal is comprised of a bundle of documents constituting

a confidential exhibit to an affidavit of Anthony Scott Munroe, sworn 2 March 2011. Mr Munroe is a chartered accountant and director of Kordamentha Pty Ltd. The proposal includes a timeline for its implementation, with the last event scheduled for 19 May 2011.

59 While I am reluctant to disclose much of the detail of the proposal that has been treated as confidential, some disclosure is necessary in order to explain my decision. The scheme of the proposal is set out in a document entitled Heads of Agreement, dated 28 February 2011. The Heads of Agreement are between Fresh Produce Group Pty Ltd and the Citrus Committee. Key terms of the proposal include restructuring the ownership of the TOT, by converting existing ownership interests into ordinary units. It is proposed to introduce new equity into the TOT from Fresh Produce Group and other investors to be introduced by the Citrus Committee or Fresh Produce Group. It is proposed to provide existing growers with an opportunity to subscribe for equity and to enter into management, operations and sales and marketing contracts with Fresh Produce Group.

60 Significantly, the proposal depends upon Kangara Estate remaining in the ownership of the TOT, although it is proposed to sell so much of the land and water rights as are not required for the new project. The scheme advanced by the Citrus Committee involves the conversion of existing interests in the TOT into new units 'based on agreed valuations' and the removal of the receivers, which implies a discharge of the TOT liabilities. It is proposed to replace Align Funds Management as responsible entity of the TOT.

61 The liquidators and the receivers submitted that the new proposal advanced by the Citrus Committee, encapsulated in the Heads of Agreement, was not a proposal that could be seriously considered by them as a basis to delay the completion of the Land Sale Contract and the Water Sale Contract.

62 Counsel on behalf of the Citrus Committee argued that the court should not proceed to deal with the application until the receiver had had an opportunity to consider all

relevant proposals. He submitted that the existence of an alternative proposal which might be viewed as more beneficial to the growers may be a basis upon which to refuse the application. That submission overlooked the importance of finality and timeliness in the determination of this application, but more particularly the work of the liquidators. There is no guarantee that the proposal, if reformulated or better particularised, will be any more attractive to the receivers and liquidators than the present proposal. The 28 February 2011 proposal was obviously incomplete and lacked detail and the information necessary to satisfy the receivers and liquidators of the capacity of the parties to perform.

63 The proponents of the recapitalisation scheme are, in effect, requesting the court to second guess the receivers and liquidator's judgement about what they should do in the discharge of their respective duties. That is not the function of the court. Moreover, they would have the court interrupt the completion of contracts, which the receivers and liquidators consider are the best that can be achieved, and to require them to consider a prospective and indefinite proposal from the Citrus Committee. For the court to so interfere would be to undermine the legislative scheme investing receivers and liquidators with powers and regulating the exercise of those powers.

64 Counsel for the Citrus Committee also submitted that the evidence did not address the viability of the orchards, as distinct from the responsible entity. That is true. The general thrust of the liquidators' concern in relation to solvency and viability related to the position of the Timbercorp group and its ability to continue to manage and maintain the orchards. The evidence did not descend to an analysis of the viability of individual orchards or of the orchards comprising the Project. Such an analysis may be a useful tool on an application to wind up a scheme, or when considering the viability of a restructuring proposal. The Citrus Committee did not adduce any evidence that the citrus orchards were viable, although its proposal seems to proceed on the assumption that they were.

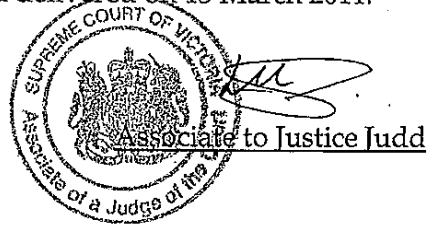
- 65 In my opinion, the absence of evidence as to viability does not warrant refusing the liquidators' application. If and insofar as the orchards are commercially viable, their value will be reflected in the price paid by the purchaser under the Land Sale Contract.
- 66 The paramount interest of the growers is the reason why the liquidators seek the court's approval. The liquidators are of the opinion that the Land Sale Contract and the Water Sale Contract are the best that can be achieved for the growers. The growers' interests are protected by certainty and by achieving the best possible price for the land and water rights and to hold the proceeds in trust awaiting apportionment by the court.
- 67 Ms Bezencon and the Citrus Committee have had more than enough time and opportunity to formulate proposals to advance to the receivers and liquidators prior to the execution of the contracts. Ultimately, the application by the liquidators must be decided on the material before the court. There is no justification in further delay in the hope that the Citrus Committee can formulate a more definite and attractive proposal.
- 68 I am satisfied that the liquidators would be justified in exercising their power to surrender the Licence Agreements over the land at Kangara Estate granted under the 2004 and 2005 Citrus Schemes upon completion of the Land Sale Contract and Water Sale Contract. The process of informal winding up, involving the sales by the receivers and the supervision by the court of the apportionment of the funds is, in my opinion, likely to lead to a more beneficial outcome for growers than a winding up under the Constitution or the *Corporations Act*. I will make the orders sought by the liquidators.
- 69 Confidentiality orders have been made in respect of many of the documents generated in the course of the sale process, including the executed contracts. In my view those orders should not extend beyond 28 days after the completion of the

contracts. There is no justification for permanent orders maintaining confidentiality of that material.

CERTIFICATE

I certify that this and the 21 preceding pages are a true copy of the reasons for judgment of Judd J of the Supreme Court of Victoria delivered on 15 March 2011.

DATED this 15th day of March 2011.



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:

25 September 2012

Filed on behalf of:

the Fourth Defendant

Prepared by:

Clarendon Lawyers
Level 17, Rialto North Tower
525 Collins Street
MELBOURNE VIC 3000

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Solicitors Code: 101294

Ref: MJF:1100563

michael.fernon@clarendonlawyers.com.au

This is the exhibit marked "CJA-18" now produced and shown to CELIA JANE ARMSTRONG at the time of
swearing her affidavit on 25 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-18

**Extract of the Affidavit of Ross Whyte McClymont
dated 16 March 2010 and filed in SCV Proceeding
No S CI 2010 1354**

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

No.

BETWEEN:

**BOSI SECURITY SERVICES LIMITED (A.C.N. 009 413 852) as trustee for
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
(A.C.N. 005 357 522) and BOS INTERNATIONAL (AUSTRALIA) LIMITED (A.C.N.
066 601 250) and WESTPAC BANKING CORPORATION (A.C.N. 007 457 141)**
Plaintiff

and

**B.B OLIVES PTY LTD (IN LIQUIDATION)
(A.C.N. 083 992 367) & ORS (according to the attached Schedule)**
Defendants

AFFIDAVIT OF ROSS WHYTE McClymont

Date sworn: 16 March 2010
Filed on behalf of: The Plaintiff
Prepared by:
Blake Dawson
Level 26
181 William Street
MELBOURNE VIC 3000

Solicitor's Code: 53
DX: 187
Tel: (03) 9679 3000
Fax: (03) 9679 3111
Ref: 03-2010-2555
Attention: Mr R McClymont
Email: ross.mcclymont@blakedawson.com

I, **Ross Whyte McClymont** of 181 William Street, Melbourne, Lawyer, make oath and say that:

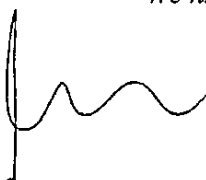
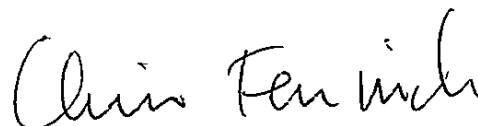
1. I am a Partner of Blake Dawson. I have the care and conduct of this proceeding on behalf of the Plaintiff.
2. I make this affidavit from my own knowledge save where otherwise stated. Where I depose to matters of information and belief, I believe those matters to be true.
3. I make this affidavit in support of the Plaintiff's summons dated 16 March 2010, seeking *inter alia*, orders that:



Representation of the Growers

24. In an affidavit sworn by Mark Anthony Korda in the Supreme Court of Victoria proceeding 7114 of 2009 on 4 June 2009 and published on the Korda Mentha website, Mr Korda deposes to the fact that:
 - (a) 351 Growers invested in the 2006 Olive Scheme;
 - (b) 471 Growers invested in the 2007 Olive Scheme; and,
 - (c) 815 Growers invested in the 2008 Olive Scheme.
25. Whilst it is to be expected that certain Growers invested in more than one Olive Scheme, it is apparent that there are potentially several hundred Growers who may have an interest in this proceeding.
26. The process of locating and serving each of the affected growers will therefore be expensive and time-consuming. For this reason, the Plaintiff seeks an order that representatives of the Growers be appointed, pursuant to rule 16.01(2) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic). This procedure has been adopted in respect of the Timbercorp Almond Projects the subject of proceeding No. SCI 2009 10699.
27. Clarendon Lawyers acted on behalf of the Timbercorp Growers Group in proceeding No.9998 of 2009. They are also acting on behalf of representatives of investors in the Timbercorp Almond Projects the subject of proceeding SCI 2009 10699. Maurice Blackburn acted on behalf of Kerree Anne Bezencon, an investor in certain of the Olive Schemes, in proceeding No. 9998 of 2009. On 5 February 2010, I wrote to Clarendon Lawyers and Maurice Blackburn in relation to the appointment of representative Growers in this proceeding. Now produced and shown to me marked "RWM-5" is a true copy of my letter to Clarendon Lawyers and Maurice Blackburn dated 5 February 2010.
28. On 12 February 2010, I received a letter from Herbert Geer. The letter relevantly stated that:

"We have been handed a copy of your letter dated 5 February 2010..."

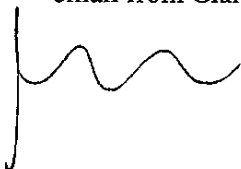
[W]e now act on behalf of TGG Almond Committee Inc. and Ms Kerree Bezencon.

We advise that we wish to be served with all papers in the proceedings.

We understand that Maurice Blackburn will not be acting in the matter."

Now produced and shown to me marked "RWM-6" is a true copy of the letter from Herbert Geer dated 12 February 2010.

29. On 18 February 2010, I received a reply to my letter dated 5 February 2010 from Clarendon Lawyers. Now produced and shown to me marked "RWM-7" is the letter from Clarendon Lawyers dated 18 February 2010.
30. I am informed by Chris Fenwick of Blake Dawson and believe that on 23 February 2010 he spoke with Tom May of Herbert Geer on the telephone. I am further informed by Chris Fenwick and believe that Mr May said to him that:
 - (a) he was seeking instructions from "the Bezencon Group" to:
 - (i) act in lieu of Maurice Blackburn in the almond proceeding (proceeding SCI 2009 10699);
 - (ii) nominate representative Growers in the olive proceeding; and,
 - (b) he would write to Blake Dawson again upon receipt of instructions.
31. On 11 March 2010, I received a further letter from Clarendon Lawyers. Now produced and shown to me marked "RWM-8" is the letter from Clarendon Lawyers dated 11 March 2010.
32. At the time of swearing this affidavit, I have not received a response to my letter dated 5 February 2010 from Maurice Blackburn.
33. I have also not received any further correspondence in relation to this proceeding from Herbert Geer since 12 February 2010.
34. I am informed by Chris Fenwick and believe that on 12 March 2010 he received an email from Clarendon Lawyers. Now produced and shown to me marked "RWM-9" is



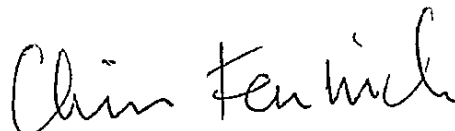
Chris Fenwick

a true copy of the email received by Chris Fenwick from Clarendon Lawyers dated 12 March 2010.

35. On 12 March 2010, I wrote to Clarendon Lawyers and advised them that in the absence of any alternative representative Growers' proposal being provided by Herbert Geer, the Plaintiff proposed to apply to the Court for orders that the Growers nominated by Clarendon Lawyers for the 2006, 2007 and 2008 Olive Schemes be appointed as the representative defendants. Now produced and shown to me marked "RWM-10" is a true copy of my letter to Clarendon Lawyers dated 12 March 2010.

The conduct of the proceeding

36. In addition to seeking an order for the appointment of representatives pursuant to rule 16.01(2), the Plaintiff seeks directions in relation to the future conduct of the proceeding. The issues raised in the proceeding require an analysis of:
- (a) What rights, if any, do each of the Plaintiff, Almond Land and the Growers respectively have to the Net Sale Proceeds?
 - (b) In respect of any such rights, what valuation methodology should be adopted?
 - (c) How much, if any, of the Sale Proceeds is each of the Plaintiff, Almond Land and the Growers entitled to received?
37. Given the nature of the proceeding and the issues raised, the Plaintiff considers that the parties ought to file contentions of fact and law in relation to each issue, on a staged basis. Staging of the contentions would allow each party to address the subsequent issues, such as the appropriate valuation methodology, with the benefit of knowing how the other parties' contend their rights were created and what valuation methodology ought to be applied. This is the approach that has been adopted in the context of the Timbercorp Almond Projects the subject of proceeding SCI 2009 10699.
38. While it is not necessary at this stage to decide how the proceeding is best managed, I believe it is useful for the Court and the parties to consider methods by which the proceeding could progress to an early determination. One such method may be for the Court to determine the issue as to rights and valuation methodology before determining the quantum of distribution from the fund as between the Plaintiff, Almond Land and



Rule 43.06(3)

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

No.

BETWEEN:

**BOSI SECURITY SERVICES LIMITED (A.C.N. 009 413 852) as trustee for
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (A.C.N. 005 357 522) and BOS
INTERNATIONAL (AUSTRALIA) LIMITED (A.C.N. 066 601 250) and WESTPAC BANKING
CORPORATION (A.C.N. 007 457 141)** Plaintiff

- and -

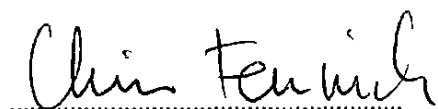
**B.B OLIVES PTY LTD (IN LIQUIDATION) (A.C.N. 083 992 367) & ORS (according to the
attached Schedule)** Defendants

CERTIFICATE IDENTIFYING EXHIBIT

Date sworn: 16 March 2010
Filed on behalf of: The Plaintiff
Prepared by:
Blake Dawson
Level 26
181 William Street
Melbourne VIC 3000
Australia

Solicitor's Code: 53
DX: 187
Tel: (03) 9679 3000
Fax: (03) 9679 3111
Ref: 03-2010-2555
Attention: Ross McClymont
Email: ross.mcclymont@blakedawson.com

This is the exhibit marked "RWM-5" now produced and shown to Ross Whyte McClymont at the
time of swearing his affidavit on 16 March 2010.



CHRIS MARSDEN FENWICK
Blake Dawson
181 William Street, Melbourne Vic. 3000
An Australian legal practitioner within the
meaning of the Legal Profession Act 2004

Exhibit RWM-5

Letter to Clarendon Lawyers and Maurice

Blackburn dated 5 February 2010

BY EMAIL

Level 26
181 William Street
Melbourne VIC 3000
Australia

Blake Dawson

Mr B Murphy
Maurice Blackburn
Level 10, 456 Lonsdale Street
MELBOURNE VIC 3000

Mr M Fernon
Clarendon Lawyers
Level 17, Rialto North Tower
525 Collins Street
MELBOURNE VIC 3000

T 61 3 9679 3000
F 61 3 9679 3111
DX 187 Melbourne

GPO Box 4958
Melbourne VIC 3001
Australia

www.blakedawson.com

5 February 2010

Our reference
RWM CHFE

Partner
Ross McClymont
T 61 3 9679 3025
ross.mcclymont
@blakedawson.com

Contact
Chris Fenwick
T 61 3 9679 3148
chris.fenwick
@blakedawson.com

Dear Mr Murphy and Mr Fernon

**BOSI Security Services Limited v Australia and New Zealand Banking
Group Limited & Ors
Supreme Court of Victoria Proceeding No SCI 2009 10699 (Almond
Proceeding)**

As we foreshadowed to Her Honour Justice Davies on 18 December 2009 in
the Almond Proceeding:

1. the sale of the Timbercorp olive assets, pursuant to inter alia the
Boundary Bend SPD, completed on 11 January 2010; and
2. our client now proposes to commence a proceeding in similar terms to
the Almond Proceeding in relation to the net proceeds of the Boundary
Bend SPD (**Olive Proceeding**).

As in the Almond Proceeding, we propose to issue a summons seeking, *inter
alia*, the appointment of a representative grower or growers in relation to the
relevant olive schemes (being the 2006 to 2008 Timbercorp olive schemes)
pursuant to order 16 of the *Supreme Court (General Civil Procedure) Rules
2005*.

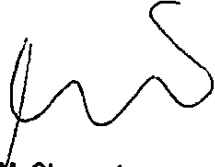
As in the Almond Proceeding, it appears to us that having growers represented
by two sets of lawyers in the Olive Proceeding would cause unnecessary
duplication, delay and expense.

Therefore, we suggest that you confer and seek to resolve your position on
grower representation in the relevant olive schemes as soon as possible. We
ask that you identify by close of business on Friday 12 February 2010 those
persons or entities your clients propose to be the representative grower or
growers in relation to the Olive Proceeding.

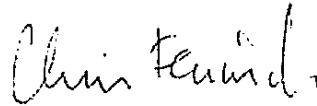
In the absence of agreement being reached, our client reserves the right to issue the Olive Proceeding and a summons seeking the appointment of representative growers for the purposes of the Olive Proceeding.

If you have any questions then please do not hesitate to contact us.

Yours faithfully



Ross McClymont
Partner
T 61 3 9679 3025
ross.mcclymont@blakedawson.com



Chris Fenwick
Senior Associate
T 61 3 9679 3148
chris.fenwick@blakedawson.com

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

No.

BETWEEN:

**BOSI SECURITY SERVICES LIMITED (A.C.N. 009 413 852) as trustee for
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (A.C.N. 005 357 522) and BOS
INTERNATIONAL (AUSTRALIA) LIMITED (A.C.N. 066 601 250) and WESTPAC BANKING
CORPORATION (A.C.N. 007 457 141)**
Plaintiff

- and -

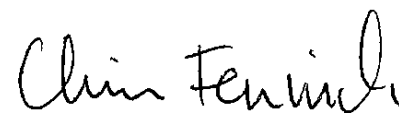
**B.B OLIVES PTY LTD (IN LIQUIDATION) (A.C.N. 083 992 367) & ORS (according to the
attached Schedule)**
Defendants

CERTIFICATE IDENTIFYING EXHIBIT

Date sworn: 16 March 2010
Filed on behalf of: The Plaintiff
Prepared by:
Blake Dawson
Level 26
181 William Street
Melbourne VIC 3000
Australia

Solicitor's Code: 53
DX: 187
Tel: (03) 9679 3000
Fax: (03) 9679 3111
Ref: 03-2010-2555
Attention: Ross McClymont
Email: ross.mcclymont@blakedawson.com

This is the exhibit marked "RWM-6" now produced and shown to Ross Whyte McClymont at the
time of swearing his affidavit on 16 March 2010.



CHRIS MARSDEN FENWICK

Blake Dawson
181 William Street, Melbourne Vic. 3000
An Australian legal practitioner within the
meaning of the Legal Profession Act 2004

Exhibit RWM-6

Letter from Herbert Geer dated 12 February 2010

RWM-6

From: unknown Page: 1/1 Date: 12/02/2010 2:55:37 PM

herbertgeer

Your Ref:
Our Ref: AHM:1339176
Partner: Tom May
Writer:
Email: tmay@herbertgeer.com.au

D 9641 8917
F 9642 4435

12 February 2010

BY FACSIMILE TRANSMISSION: 9679 3111

Blake Dawson
GPO Box 4958
MELBOURNE VIC 3000

Attention: Mr McClymont

Dear Sir

Supreme Court of Victoria Proceeding SCI 2009 10699 (Almonds)

We have been handed a copy of your letter dated 5 February 2010 regarding the above matter, and advise that we now act on behalf TGG Almond Committee Inc. and Ms Kerree Bezenoon.

We advise that we wish to be served with all papers in the proceedings.

We understand that Maurice Blackburn will not be acting in the matter. We also understand that Clarendon may wish to be involved in the proceedings

Yours faithfully
HERBERT GEER

Melbourne Sydney Brisbane

Bris_Docs 1339176 5960227 v1

Level 20/385 Bourke Street
Melbourne VIC 3000
GPO Box 524 Melbourne VIC 3001
Australia
DX 428 Melbourne

Telephone: +61 3 9670 6123
Facsimile: +61 3 9670 5670
www.herbertgeer.com.au
ABN 21 228 101 686

Rule 43.06(3)

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

No.

BETWEEN:

**BOSI SECURITY SERVICES LIMITED (A.C.N. 009 413 852) as trustee for
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INTERNATIONAL (AUSTRALIA) LIMITED (A.C.N. 066 601 250) and WESTPAC BANKING
CORPORATION (A.C.N. 007 457 141)** Plaintiff

- and -

**B.B OLIVES PTY LTD (IN LIQUIDATION) (A.C.N. 083 992 367) & ORS (according to the
attached Schedule)** Defendants

CERTIFICATE IDENTIFYING EXHIBIT

Date sworn: 16 March 2010
Filed on behalf of: The Plaintiff
Prepared by:
Blake Dawson
Level 26
181 William Street
Melbourne VIC 3000
Australia

Solicitor's Code: 53
DX: 187
Tel: (03) 9679 3000
Fax: (03) 9679 3111
Ref: 03-2010-2555
Attention: Ross McClymont
Email: ross.mcclymont@blakedawson.com

This is the exhibit marked "RWM-7" now produced and shown to Ross Whyte McClymont at the
time of swearing his affidavit on 16 March 2010.



CHRIS MARSDEN FENWICK
Blake Dawson
181 William Street, Melbourne Vic. 3000
An Australian legal practitioner within the
meaning of the Legal Profession Act 2004

Exhibit RWM-7

Letter from Clarendon Lawyers dated 18

February 2010



18 February 2010

Level 17 Rialto North Tower
525 Collins Street Melbourne
Victoria 3000 Australia

T 03 8681 4400 F 03 8681 4499
www.clarendonlawyers.com.au
ABN 43 704 593 249

Our Ref: MAB:MAB:0900460

Messrs Chris Fenwick and Ross McClymont
Blake Dawson
Level 26
181 William Street
MELBOURNE VIC 3000

Dear Sirs

BOSI Security Services Limited v ANZ Bank & Ors

We refer to your letter of 5 February 2010.

We are advised that Maurice Blackburn are no longer acting for the TGG Almond Committee Inc and that Herbert Geer is now acting.

We have had a discussion with Herbert Geer and are unable to reach agreement on who should represent the growers interests.

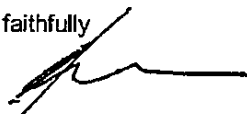
Our client's position is that:

- (a) the scheme documents for the olive schemes are substantially similar, if not identical, to the scheme documents for the almond schemes;
- (b) the arguments in favour of the olive growers in the apportionment proceedings would be the same as the arguments for the almond growers in the current proceedings;
- (c) the arguments to be submitted by the banks are likely to be the same;
- (d) the TGG lawyers have already spent a considerable amount of time in reviewing documents and preparing submissions.

For all these reasons, the TGG representatives should act for the olive growers.

We will let you have the names of the TGG's grower representatives shortly.

Yours faithfully



Michael Fernon
Director

Enc
Direct Tel: 03 8681 4419
Email: michael.fernon@clarendonlawyers.com.au

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

No.

BETWEEN:

**BOSI SECURITY SERVICES LIMITED (A.C.N. 009 413 852) as trustee for
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (A.C.N. 005 357 522) and BOS
INTERNATIONAL (AUSTRALIA) LIMITED (A.C.N. 066 601 250) and WESTPAC BANKING
CORPORATION (A.C.N. 007 457 141)** Plaintiff

- and -

**B.B OLIVES PTY LTD (IN LIQUIDATION) (A.C.N. 083 992 367) & ORS (according to the
attached Schedule)**

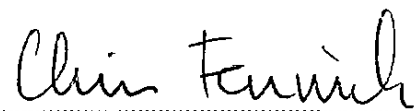
Defendants

CERTIFICATE IDENTIFYING EXHIBIT

Date sworn: 16 March 2010
Filed on behalf of: The Plaintiff
Prepared by:
Blake Dawson
Level 26
181 William Street
Melbourne VIC 3000
Australia

Solicitor's Code: 53
DX: 187
Tel: (03) 9679 3000
Fax: (03) 9679 3111
Ref: 03-2010-2555
Attention: Ross McClymont
Email: ross.mcclymont@blakedawson.com

This is the exhibit marked "RWM-8" now produced and shown to Ross Whyte McClymont at the
time of swearing his affidavit on 16 March 2010.



CHRIS MARSDEN FENWICK

Blake Dawson
181 William Street, Melbourne Vic. 3000
An Australian legal practitioner within the
meaning of the Legal Profession Act 2004

Exhibit RWM-8

**Letter from Clarendon Lawyers dated 11 March
2010**

RWM-8



11 March 2010

Level 17 Rialto North Tower
525 Collins Street Melbourne
Victoria 3000 Australia

T 03 8681 4400 F 03 8681 4499
www.clarendonlawyers.com.au
ABN 43 704 593 249

Our Ref: MJF:MJF:0900460

Chris Fenwick
Blake Dawson
Level 26
181 William Street
MELBOURNE VIC 3000
By email: chris.fenwick@blakedawson.com

Dear Mr Fenwick

Timbercorp Securities Limited (in liquidation): Olive schemes

We refer to your letter of 5 February 2010.

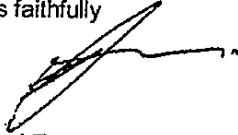
The grower defendants who agree to be nominated as representative of growers on behalf of the Timbercorp Growers Group in the olive schemes are as follows:

Scheme	Nominated Representative
2001 Olives	Pauline Emma Hammer 311/6 Victoria Street ST KILDA VIC 3182
2002 Olives	David Sydney Butterfield Level 2 428 Little Bourke Street MELBOURNE VIC 3000
2003 Olives	Graham Goldenberg Level 2 649 Bridge Road RICHMOND VIC 3121
2004 Olives	Manissa Pty Ltd (ACN 065 103 317) Level 13 10 Queens Road MELBOURNE VIC 3004
2006 Olives	Michael Charles Vicary Suite 1, Ashwood Hill Estate 35 Greenmont Close ASHGROVE QLD 4060
2007 Olives	Pamela Jan Dry 1 Timbertop Ridge WARRANDYTE VIC 3113

You will note that two of the persons are already defendants in the almond proceedings.

As with the existing defendants, the nominated persons are prepared to be representative defendants on the basis that their costs will be paid out of the fund on an indemnity basis.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Michael Fernon', with a long horizontal stroke extending to the right.

Michael Fernon
Director

Enc
Direct Tel: 03 8681 4419
Email: michael.fernon@clarendonlawyers.com.au

Rule 43.06(3)

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

No.

BETWEEN:

**BOSI SECURITY SERVICES LIMITED (A.C.N. 009 413 852) as trustee for
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INTERNATIONAL (AUSTRALIA) LIMITED (A.C.N. 066 601 250) and WESTPAC BANKING
CORPORATION (A.C.N. 007 457 141)** Plaintiff

- and -

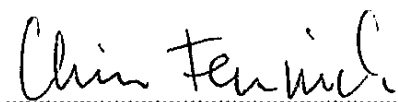
**B.B OLIVES PTY LTD (IN LIQUIDATION) (A.C.N. 083 992 367) & ORS (according to the
attached Schedule)** Defendants

CERTIFICATE IDENTIFYING EXHIBIT

Date sworn: 16 March 2010
Filed on behalf of: The Plaintiff
Prepared by:
Blake Dawson
Level 26
181 William Street
Melbourne VIC 3000
Australia

Solicitor's Code: 53
DX: 187
Tel: (03) 9679 3000
Fax: (03) 9679 3111
Ref: 03-2010-2555
Attention: Ross McClymont
Email: ross.mcclymont@blakedawson.com

This is the exhibit marked "RWM-9" now produced and shown to Ross Whyte McClymont at the
time of swearing his affidavit on 16 March 2010.



CHRIS MARSDEN FENWICK
per [signature] Blake Dawson
181 William Street, Melbourne Vic. 3000
An Australian legal practitioner within the
meaning of the Legal Profession Act 2004

Exhibit RWM-9

Email from Clarendon Lawyers to Chris Fenwick

dated 12 March 2010

Fenwick Chris 3148

From: Michael Fernon [Michael.Fernon@clarendonlawyers.com.au]
Sent: Friday, 12 March 2010 10:40 AM
To: Fenwick Chris 3148
Subject: RE: Timbercorp Olive schemes apportionment

Chris

The 2008 nominee is David Butterfield. You have his details.

regards

Michael Fernon | Director

Clarendon Lawyers | Level 17 North, Rialto, 525 Collins Street, Melbourne 3000
T + 61 3 8681 4419 | F + 61 3 8681 4488 | M + 61 417 543 373
www.clarendonlawyers.com.au

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From: chris.fenwick@blakedawson.com [mailto:chris.fenwick@blakedawson.com]
Sent: Thursday, 11 March 2010 5:44 PM
To: Michael Fernon
Cc: Celia Armstrong; Billy Dwyer
Subject: RE: Timbercorp Olive schemes apportionment

BLAKE DAWSON

Confidential (see notice below)

Michael

Thanks for your letter.

Are you able to nominate a representative Grower for the 2008 olive scheme?

Regards

Chris Fenwick
Senior Associate
Blake Dawson

T 61 3 9679 3148
F 61 3 9679 3111
M 0419 494 651
chris.fenwick@blakedawson.com
www.blakedawson.com

181 William Street Melbourne VIC 3000 Australia
DX 187 Melbourne

From: Michael Fernon [mailto:Michael.Fernon@clarendonlawyers.com.au]
Sent: Thursday, 11 March 2010 4:07 PM

14/03/2010

To: Fenwick Chris 3148
Cc: Celia Armstrong; Billy Dwyer
Subject: Timbercorp Olive schemes apportionment

Chris

Please see the attached letter

Michael Fernon | Director

Clarendon Lawyers | Level 17 North, Rialto, 525 Collins Street, Melbourne 3000
T + 61 3 8681 4419 | F + 61 3 8681 4488 | M + 61 417 543 373
www.clarendonlawyers.com.au

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<http://www.mailguard.com.au>

14/03/2010

Rule 43.06(3)

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

No.

BETWEEN:

**BOSI SECURITY SERVICES LIMITED (A.C.N. 009 413 852) as trustee for
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INTERNATIONAL (AUSTRALIA) LIMITED (A.C.N. 066 601 250) and WESTPAC BANKING
CORPORATION (A.C.N. 007 457 141)**
Plaintiff

- and -

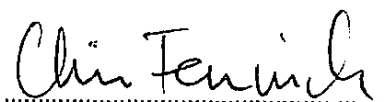
**B.B OLIVES PTY LTD (IN LIQUIDATION) (A.C.N. 083 992 367) & ORS (according to the
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Defendants

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Date sworn: 16 March 2010
Filed on behalf of: The Plaintiff
Prepared by:
Blake Dawson
Level 26
181 William Street
Melbourne VIC 3000
Australia

Solicitor's Code: 53
DX: 187
Tel: (03) 9679 3000
Fax: (03) 9679 3111
Ref: 03-2010-2555
Attention: Ross McClymont
Email: ross.mcclymont@blakedawson.com

This is the exhibit marked "RWM-10" now produced and shown to Ross Whyte McClymont at the
time of swearing his affidavit on 16 March 2010.



CHRIS MARSDEN FENWICK
Blake Dawson

181 William Street, Melbourne Vic. 3000
An Australian legal practitioner within the
meaning of the Legal Profession Act 2004

Exhibit RWM-10

Letter to Clarendon Lawyers dated 12 March

2010

BY EMAIL

Level 26
181 William Street
Melbourne VIC 3000
Australia

Blake Dawson

Mr M Fernon
Clarendon Lawyers
Level 17, Rialto North Tower
525 Collins Street
MELBOURNE VIC 3000

T 61 3 9679 3000
F 61 3 9679 3111
DX 187 Melbourne
GPO Box 4958
Melbourne VIC 3001
Australia
www.blakedawson.com

12 March 2010

Dear Mr Fernon

BOSI Security Services Limited (as trustee for Australia and New Zealand Banking Group Limited (ANZ) and BOS International (Australia) Limited and Westpac Banking Corporation) -v- Growers in the 2006, 2007 and 2008 Timbercorp Olive Schemes (Proposed Proceeding)

We refer to your letter dated 11 March 2010 and your email to Chris Fenwick sent on 12 March 2010, which were in response to our letter to you dated 5 February 2010 (also sent to Maurice Blackburn) in relation to the appointment of representative Growers in the Proposed Proceeding.

Maurice Blackburn did not respond to our letter. We did receive a letter from Herbert Geer on 12 February 2010 indicating that they now act on behalf of TGG Almond Committee Inc and Ms Kerree Bezencon and that Maurice Blackburn would not be acting in the Almond and Olive proceedings. However, Herbert Geer have not proposed any representative growers.

In these circumstances, our client proposes to apply to the Court for orders that the Growers nominated by you for the 2006, 2007 and 2008 Olive Schemes be appointed as representative defendants in the proceeding.

Yours faithfully



Ross McClymont
Partner
T 61 3 9679 3025
ross.mcclymont@blakedawson.com



Chris Fenwick
Senior Associate
T 61 3 9679 3148
chris.fenwick@blakedawson.com

Our reference
RWM CHFE

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Contact
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chris.fenwick
@blakedawson.com

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:

25 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-19" now produced and shown to CELIA JANE ARMSTRONG at the time of
swearing her affidavit on 25 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-19

**Orders of Davies J dated 22 March 2010 in SCV
Proceeding No S CI 2010 1354**

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

LIST E
S CI 2010 1354

BETWEEN:

BOSI SECURITY SERVICES LIMITED (ACN 009 413 852) AS
TRUSTEE FOR AUSTRALIA AND NEW ZEALAND BANKING GROUP
LIMITED (ACN 005 357 522) AND BOS INTERNATIONAL
(AUSTRALIA) LIMITED (ACN 066 601 250) AND WESTPAC
BANKING CORPORATION LIMITED (ACN 007 457 141) Plaintiff

- and -

B.B OLIVES PTY LTD (IN LIQUIDATION) (ACN 083 992 367)
and others according to the schedule attached Defendants

GENERAL FORM OF ORDER

JUDGE: The Honourable Justice Davies

DATE MADE: 22 March 2010

ORIGINATING PROCESS: Originating Motion filed 16 March 2010

HOW OBTAINED: Upon return of the orders of the Honourable Justice
Davies made 22 March 2010

ATTENDANCE: Mr. P Anastassiou of Senior Counsel with
Mr. R G Craig of Counsel for the Plaintiffs
Mr. P Crutchfield of Senior Counsel with
Mr. O Bigos of Counsel for the First to Sixth Defendants
Mr. G Bigmore of Her Majesty's Counsel with
Mr. S Hopper of Counsel for Michael Charles Vicary,
Pamela Jan Dry and David Butterfield

OTHER MATTERS: Not applicable

THE COURT ORDERS THAT:

1. Pursuant to rule 45.05 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) the requirements of rules 5.03(1) and 8.02 are dispensed with.
2. Pursuant to rule 45.05 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) the Plaintiff has leave to proceed by originating motion in Form 5C.

ORDTDCI110.DOC



3. Pursuant to rule 16.01(2) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic):
 - (a) Michael Charles Vicary is appointed as the representative of the Growers in the 2006 Timbercorp Olive Project (ARSN 119 182 179);
 - (b) Pamela Jan Dry is appointed as the representative of the Growers in the 2007 Timbercorp Olive Project (ARSN 123 155 715); and
 - (c) David Butterfield is appointed as the representative of the Growers in the 2008 Timbercorp Olive Project (ARSN 129 307 722).
4. The persons appointed pursuant to paragraph 3 above, are joined as the Seventh, Eighth, and Ninth Defendants in the proceeding pursuant to rule 9.02 and/or rule 9.06(b) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).
5. The Plaintiff is granted leave to file and serve an amended originating motion on the defendants on or before 4:00pm on 26 March 2010:
 - (a) incorporating a declaration as to what, if any, right the Growers represented by the Seventh, Eighth, and Ninth Defendants have to the sale proceeds held on trust by the First Defendant pursuant to paragraph 8 of the Orders; and
 - (b) amending paragraph 5 of the originating motion to read "A declaration as to how the sale proceeds held on trust by the First Defendant pursuant to paragraph 8 of the orders ought to be distributed between the Plaintiff and the Second, Seventh, Eighth, and Ninth Defendants."
6. The Plaintiff is granted leave to proceed against Almond Land Pty Ltd ACN 091 460 992 (in liquidation), B.B. Olives Pty Ltd ACN 083 992 367 (in liquidation) and Timbercorp Limited ACN 055 185 067 (in liquidation) pursuant to s 471B of the *Corporations Act 2001* (Cth).
7. Paragraph 11 of the orders made by the Honourable Justice Croft in proceeding S CI 2009 9998 is discharged, insofar as it relates to exhibit MAK-19 to the affidavit of Mark Anthony Korda sworn 10 November 2009 in proceeding S CI 2009 9998.
8. The Plaintiff serve on the Defendants a draft list of the documents on which the Plaintiff intends to rely in relation to the Rights Issue (the Draft List) on or before 4:00pm on 23 April 2010.
9. The Defendants serve on the Plaintiff a list of any documents which are not already identified in the Draft List and on which the Defendants intend to rely in relation to the Rights Issue (Further Documents) on or before 4:00pm on 7 May 2010.
10. The Plaintiff file and serve a List of Documents incorporating those documents identified in the Draft List and the Further Documents on or before 4:00pm on 14 May 2010.
11. On or before 4:00pm on 21 May 2010 the parties file and serve:



- (a) written contentions of fact and law addressing the issue of what right, if any, right they have to the net sale proceeds (the Funds) to be held on trust by the first defendant pursuant to paragraph 8 of the Orders (the Rights Issue) (the Rights Contentions);
 - (b) any affidavit material upon which they wish to rely in relation to the Rights Issue.
- 12. On or before 4:00pm on 4 June 2010 the parties file and serve:
 - (a) written contentions of fact and law in reply to the rights contentions;
 - (b) any affidavit material upon which they wish to rely by way of reply in relation to the rights issue.
- 13. Each party serve a copy of the documents referred to in paragraphs 8, 9, 10, 11 and 12 upon Herbert Geer, solicitors of Level 20/385 Bourke Street, Melbourne, 3001 (marked to the attention of Mr Tom May) for TGG Almond Committee Inc and Ms Kerree Bezencon and any other document filed in the proceeding from the date of this order at the same time as the document is served upon a party to the proceeding.
- 14. The Liquidators of the First Defendant pay from the Funds to Clarendon Lawyers, the solicitors for the Seventh, Eighth and Ninth Defendants, the legal costs and disbursements of the Seventh, Eighth and Ninth Defendants of and incidental to this proceeding on a solicitor and client basis pursuant to rule 63.32(2)(a) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) within 14 days of presentation to the Liquidator by Clarendon Lawyers of:
 - (a) a tax invoice for Clarendon Lawyers' legal costs and disbursements in relation to this proceeding; and
 - (b) a bill of costs on a solicitor and client basis, prepared and certified by an appropriately qualified costs consultant, to be agreed by the parties (the Consultant).
- 15. The proceeding is listed for further directions at 10:00am on 18 June 2010.
- 16. All other questions of costs are reserved.
- 17. Liberty to apply.

DATE AUTHENTICATED

19 April 2010



SCHEDULE OF PARTIES

S CI 2010 1354

BETWEEN:

BOSI SECURITY SERVICES LIMITED
(ACN 009 413 852) AS TRUSTEE FOR AUSTRALIA
AND NEW ZEALAND BANKING GROUP LIMITED
(ACN 005 357 522) AND BOS INTERNATIONAL
(AUSTRALIA) LIMITED (ACN 066 601 250) AND
WESTPAC BANKING CORPORATION LIMITED
(ACN 007 457 141)

Plaintiff

- and -

B.B OLIVES PTY LTD (IN LIQUIDATION)
(ACN 083 992 367)

First Defendant

ALMOND LAND PTY LTD (IN LIQUIDATION)
(ACN 091 460 392)

Second Defendant

TIMBERCORP LIMITED (IN LIQUIDATION)
(ACN 055 185 067)

Third Defendant

MARK ANTHONY KORDA (IN HIS CAPACITY AS
LIQUIDATOR OF ALMOND LAND PTY LTD
(IN LIQUIDATION))

Fourth Defendant

LEANNE KYLIE CHESSER (IN HER CAPACITY AS
LIQUIDATOR OF ALMOND LAND PTY LTD
(IN LIQUIDATION))

Fifth Defendant

MARK FRANCIS XAVIER MENTHA (IN HIS
CAPACITY AS LIQUIDATOR OF B.B OLIVES PTY
LTD (IN LIQUIDATION))

Sixth 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:	25 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-20" now produced and shown to **CELIA JANE ARMSTRONG** at the time of swearing her affidavit on 25 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-20

**Extract of the Affidavit of Clinton Charles Hinchey
dated 5 December 2011 and filed in SCV Proceeding
No S CI 2011 6606**

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

List E D

SCI 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 ORS ACCORDING TO THE
SCHEDULE ATTACHED

Defendants

AFFIDAVIT OF CLINTON CHARLES HINCHEN
(Solara Rights Proceeding)

Date of document: 5 December 2011

Filed on behalf of: The Plaintiff

Prepared by:

Allens Arthur Robinson
Lawyers
530 Collins Street
Melbourne VIC 3000

Solicitor code: 21455
DX 30999 Melbourne
Tel 9614 1011 Fax 9614 4661
Ref CCHM: 120039226
(Clint Hinchén: clint.hinchen@aar.com.au)

I, **CLINTON CHARLES HINCHEN** of Allens Arthur Robinson, 530 Collins Street, Melbourne, in the State of Victoria, Lawyer, SAY ON OATH that:

1. I am a Partner of Allens Arthur Robinson. I have the care and conduct of this proceeding on behalf of the plaintiff (ANZ).
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. I make this affidavit in support of the ANZ's summons dated 5 December 2011, and the orders sought therein, namely that:

35 

32. Given that ANZ (as the secured creditor) is bringing this proceeding, I do not anticipate that the Receivers, who were appointed by ANZ, will play any substantive role in the proceeding. I have read the letter dated 23 September 2011 from Mr Fung to the directors of OIM#2 (as trustee of TOT#2) (the **Receivers' Letter**) and understand that, subject to reserving their right to be heard in respect of certain identified matters, the Receivers do not intend to participate actively in the proceeding and will simply abide in its role as stakeholder the Court's orders regarding the Net Sale Proceeds. Now produced and shown to me and marked "CCH-12" is a true copy of the Receivers' Letter.
33. In my respectful opinion, it is appropriate that OIM#2 is separately represented in the proceeding to ensure that it can make its own submissions to the Court in relation to its rights to the balance of the Net Sale Proceeds (if any) after payment of ANZ's secured debt. Based on the Receivers' Letter, I understand that, for this reason, the Receivers have consented to the directors of OIM#2 representing the interests of OIM#2 for the limited purpose of the present proceeding (notwithstanding the ongoing receivership).

Representation of the Growers

34. I am informed by Mr Bryan Webster of KordaMentha and believe that 156 Growers invested in the Project.
35. I believe it is likely that, because of the number of Growers who invested in the Projects, there will be considerable time and cost involved in locating and serving each of them. ANZ therefore seeks an order that a representative of the Growers be appointed, pursuant to rule 16.01(2) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).
36. As noted in paragraph 29 above, in the Almond Land Rights Proceeding, Justice Davies made a similar order appointing representative growers in that proceeding. Submissions were made by, among others, different grower groups as to who should represent all the growers: Mr. Butterfield and a number of other growers (represented by Clarendon Lawyers) on the one hand, and Ms Kerree Bezencon and the TGG Almond Committee Inc

(represented by Maurice Blackburn) on the other hand. Justice Davies decided that Clarendon Lawyers should have primary conduct of the proceeding on behalf of all the growers in that proceeding. The 22 December 2009 Orders therefore included directions that Mr Butterfield and certain other growers represented by Clarendon Lawyers be appointed as representatives of all the growers in relation to the Almond Projects the subject of that proceeding.

37. On 19 August 2011, I wrote to Clarendon Lawyers and Ms Kerree Bezencon on behalf of the TGG Citrus Committee Inc. in relation to the appointment of representative Growers in the present proceeding (the **19 August 2011 AAR Letter**). In the 19 August 2011 AAR Letter, I stated, amongst other things, that:
 - (a) given that Clarendon Lawyers had acted for Grower representatives appointed by Justice Davies in the Almond Land Rights Proceeding, that firm may also consider acting for a representative Grower for the Project the subject of the present proceeding; and
 - (b) given that the TGG Citrus Committee Inc. and Ms Bezencon had appeared and made submissions in proceedings relating to the sale of the Solara property, they may also have an interest in nominating a Grower representative for the Project the subject of the present proceeding.
38. In the circumstances, in the 19 August 2011 Letter I requested that Clarendons Lawyers and Ms Bezencon confer and seek to resolve their position on Grower representation in the present proceeding as soon as possible and identify by the close of business on 26 August 2011 the person or entity they or their clients propose to be the representative Grower in the proceeding. Now produced and shown to me marked exhibit "CCH-13" is a true copy of the 19 August 2011 AAR Letter.
39. On 26 August 2011, I had a telephone conversation with Michael Fernon of Clarendon Lawyers in relation to the 19 August 2011 AAR Letter. Mr Fernon stated on that call,

amongst other things, that while he was still due to discuss the position with Mr Tom May of Herbert Geer, if neither Herbert Geer nor Ms Bezencon were to act for the representative Grower in the present proceeding, Clarendon Lawyers would be prepared to do so upon identification of an appropriate party to be the nominated representative.

40. On 12 September 2011, I received a letter from Mr Tom May of Herbert Geer, whom I understood to be acting on the instruction of Kerree Bezencon and the TGG Citrus Committee, stating that it was his firm's intention to act for the nominated Grower representative in the present proceeding, subject to ANZ agreeing that its client was entitled to be paid his or her reasonable costs out of the fund in which the Net Sale Proceeds are currently held (the **12 September 2011 Herbert Geer Letter**). Now produced and shown to me marked exhibit "CCH-14" is a true copy of the 12 September 2011 Herbert Geer Letter.
41. On 23 November 2011, I wrote to Herbert Geer (the **23 November 2011 AAR Letter**) and noted, amongst other things, that:
 - (a) ANZ understood that Mediterranean Olives Estate Limited (**MOE**), of which, Mr May was at the relevant time the Managing Director, was approached by the TGG Citrus Committee to become the replacement responsible entity of the Project;
 - (b) Mr May's involvement in the Project in his capacity as the Managing Director of MOE at the relevant time will likely be a key matter for consideration, and the subject of evidence, during the trial in the present proceeding;
 - (c) in light of the relevant case law and the *Legal Professional Conduct and Practice Rules 2005* (Vic) (Rule 13.4 in particular), in the circumstances, ANZ was concerned that the proper administration of justice would preclude Herbert Geer from acting on behalf of the Grower representative appointed in the present proceeding; and
 - (d) having regard to:

- (i) ANZ's intention to apply for an order that the present proceeding and the Liparoo and Yungera Rights Proceeding be heard and managed together; and
- (ii) the fact that Clarendon Lawyers represented each of the appointed Grower representatives in the Almond Land Rights Proceeding (and continues to do so for the purpose of the appeal of that proceeding),

in ANZ's view, from an efficiency and cost viewpoint, Clarendon Lawyers was appropriately placed to represent the Grower representative appointed in the present proceeding and it was in the interests of all the stakeholders that it does so.

42. The 23 November 2011 AAR Letter requested that Herbert Geer give consideration with Ms Bezencon to, amongst other things, the above matters and confirm in writing their position on Grower representation in the present proceeding by the close of business on 28 November 2011. Now produced and shown to me marked exhibit "CCH-15" is a true copy of the 23 November 2011 AAR Letter.
43. On 24 November 2011, I wrote to Clarendon Lawyers in relation to the appointment of a Grower representative in the present proceeding and enclosed a copy of the 23 November 2011 AAR Letter (the **24 November 2011 AAR Letter**). The 24 November 2011 Letter requested confirmation by the close of business on 28 November 2011 that, in light of the matters set out in the 23 November 2011 AAR Letter, Clarendon Lawyers were prepared to act on behalf of a nominated Grower representative in the present proceeding. Now produced and shown to me marked exhibit "CCH-16" is a true copy of the 24 November 2011 AAR Letter.
44. On 28 November 2011, I received a reply to the 24 November 2011 AAR Letter from Clarendon Lawyers in which, among other things, Clarendon Lawyers confirmed that, subject to certain conditions, Robert and Elizabeth Bugden were prepared to be nominated in the present proceeding as the representative Growers for the Project and that Clarendon

Lawyers were prepared to act on their behalf (the **28 November 2011 Clarendon Lawyers Letter**). Now produced and shown to me marked exhibit "CCH-17" is a true copy of the 28 November 2011 Clarendon Lawyers Letter.

45. On 30 November 2011, I received from Herbert Geer a reply dated 25 November 2011 to the 23 November 2011 AAR Letter (the **25 November 2011 Herbert Geer Letter**). The 25 November 2011 Herbert Geer Letter referred to the following two matters in support of Herbert Geer's view that there was no impediment to Herbert Geer acting in the present proceeding:
- (a) in Herbert Geer's view, the parties to be opposed to ANZ in the present proceeding will not call Mr May as a witness in the proceeding; and
 - (b) a letter dated 28 July 2010 from Mr May in his capacity as a director of MOE which indicated that MOE did not have any documents that responded to a subpoena which was apparently issued in an unidentified proceeding.
46. The 25 November 2011 Herbert Geer Letter also stated Herbert Geer's view that it was not advisable to progress significantly the present proceeding until the appeal of the Almond Land Rights Proceeding was heard and decided. Now produced and shown to me marked exhibit "CCH-18" is a true copy of the 25 November 2011 Herbert Geer Letter.
47. By letter to Herbert Geer dated 5 December 2011 (the **5 December 2011 AAR Letter**), I (amongst other things):
- (a) set out, by reference to the two matters referred to in paragraph 45 above, why the 25 November 2011 Herbert Geer Letter provided no comfort that Herbert Geer's proposal to act for the nominated Grower representative in the proposed Solara Rights Proceeding would be in the best interests of the administration of justice;

- (b) in response to Herbert Geer's comment referred to in paragraph 46 above, addressed why progressing the present proceeding as expeditiously as possible was in the interests of all stakeholders;
- (c) noted that the 25 November 2011 Herbert Geer Letter did not address at all the observations in the 23 November 2011 AAR Letter to the effect that, from an efficiency and cost viewpoint, it is in the best interests of all stakeholders that Clarendon Lawyers represent the Grower representative appointed in the present proceeding; and
- (d) notified Herbert Geer that ANZ intended to issue the present proceeding imminently and would provide Herbert Geer with a copy of the relevant Court documents.

Now produced and shown to me marked exhibit "CCH-19" is a true copy of the 5 December 2011 AAR Letter.

Issues and future steps in this proceeding

- 48. As stated above at paragraph 24, this proceeding raises the following primary issues:
 - (a) the Rights Issue;
 - (b) the Valuation Issue; and
 - (c) how much (if any) of the Net Sale Proceeds ANZ, OIM#2 and the Growers are entitled to receive.
- 49. Following the appointment by the Court of Grower representatives for the Project the subject of this proceeding, ANZ intends to put a without prejudice settlement proposal to those representatives with a view to ascertaining if a compromise of the proceeding can be reached which would be binding on all Growers, subject to the approval of the Court.
- 50. In these circumstances, subject to the outcome of the settlement proposal ANZ intends to put to the Grower representatives, ANZ does not presently seek orders in this proceeding

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

List ~~E~~ D

SCI 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 ORS ACCORDING TO THE
SCHEDULE ATTACHED

Defendants

AFFIDAVIT OF CLINTON CHARLES HINCHEN
(Solara Rights Proceeding)

Date of document: 5 December 2011

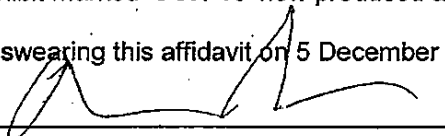
Filed on behalf of: The Plaintiff

Prepared by:

Allens Arthur Robinson
Lawyers
530 Collins Street
Melbourne VIC 3000

Solicitor code: 21455
DX 30999 Melbourne
Tel 9614 1011 Fax 9614 4661
Ref CCHM:120039226

This is the exhibit marked 'CCH-13' now produced and shown to CLINTON CHARLES HINCHEN
at the time of swearing this affidavit on 5 December 2011.

Before me: 

JONATHAN GUY JOSEPH
of 530 Collins Street, Melbourne
Victoria 3000
An Australian Legal Practitioner
within the meaning of the
Legal Profession Act 2004

Exhibit 'CCH-13'

Copy of the 19 August 2011 AAR
Letter





Date 19 August 2011
From Clint Hinchin / Ben Rechter
To Michael Femon, Director, Clarendon Lawyers,
Melbourne
Email Michael.Femon@clarendonlawyers.com.au
To Kerree Bezencon, Citrus Committee Inc. Melbourne
Email kerree@siger.com.au

ABN 47 762 595 759
Level 27
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Melbourne VIC 3000
Australia
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Correspondence
GPO Box 1776
Melbourne VIC 3001
Australia
DX 30999 Melbourne

www.aar.com.au

Copy To Jane Sheridan, Partner, Arnold Bloch Leibler,
Melbourne
Email jsheridan@abl.com.au

Confidential Email

Dear All

**Timbercorp Securities Limited (In Liquidation) –
Supreme Court of Victoria Proceeding No. S CI 2010 398**

Please see attached.

Attach

Our Ref CCHM:BZRM:120039226

bzrm A0117503109v3 120039226 19.8.2011

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1
1
Allens Arthur Robinson

19 August 2011

Michael Fernon
Director
Clarendon Lawyers
Level 17
North Rialto
525 Collins Street
Melbourne VIC 3000
By Email

Kerree Bezencon
953 Don Road
Healesville VIC 3777
By Email

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F +61 3 9614 4661
Correspondence
GPO Box 1776
Melbourne VIC 3001
Australia
DX 30999 Melbourne
www.aar.com.au

Dear All

**Timbercorp Securities Limited (In Liquidation) –
Supreme Court of Victoria Proceeding No. S CI 2010 398**

We refer to the **attached** orders of Justice Davies made on 26 February 2010 in the above proceeding (the **Orders**). Terms defined in the Orders also apply in this letter.

The Sale Contract settled on 9 April 2010. In accordance with paragraph 4 of the Orders, the Net Sale Proceeds are currently being held by the Receivers of OIM#2 in an interest bearing trust account pending the hearing and determination by the court of a proceeding to determine which person or persons have any rights to all or any part of the Net Sale Proceeds (the **Solara Rights Proceeding**).

As you are aware, on 15 June 2011 the Honourable Justice Davies handed down judgment in Supreme Court of Victoria Proceeding No. SCI 2009 10699 (the **Almond Land Rights Proceeding**), which is now the subject of an appeal by the representative growers in that proceeding.

Our client, Australia and New Zealand Banking Group Limited (**ANZ**), proposes to commence imminently the Solara Rights Proceeding adopting substantially the same format and procedure used in the Almond Land Rights Proceeding, namely, by issuing an Originating Motion seeking declarations as to:

- (a) what, if any, rights the parties have to the Net Sale Proceeds held on trust by the Receivers pursuant to paragraph 4 of the Orders; and
- (b) how the Net Sale Proceeds ought to be distributed between the parties.

At the same time as issuing the Originating Motion, or shortly thereafter, our client will also issue an application by Summons (the **Application**) seeking, among other things, directions and orders for the appointment of representative growers to the Citrus Scheme pursuant to order 18 of the *Supreme Court (General Civil Procedure) Rules 2005 (Vic)*.

We note that Clarendon Lawyers represent the Timbercorp Growers Group and acted for the representative growers appointed by Justice Davies in the Almond Land Rights

Our Ref CCHM:BZRM:120039226

bzrm AD117503109v3 120039226 19.8.2011

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Proceeding. Accordingly, we expect that Clarendon Lawyers may also act for a Grower interested in acting as the representative Grower for the Citrus Scheme the subject of the Solara Rights Proceeding.

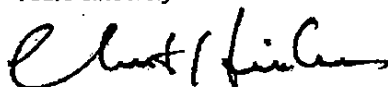
We also note that the TGG Citrus Committee Inc. and Ms Kerree Bezencon (represented, at that time, by Herbert Geer) appeared and made submissions in proceedings relating to the sale of the Solara property and may also, therefore, have an interest in nominating a representative Grower for the Citrus Scheme the subject of the Solara Rights Proceeding.

In accordance with the approach endorsed by Justice Davies in the Almond Land Rights Proceeding, however, it appears to us that having Growers represented by two sets of lawyers would cause unnecessary duplication, delay and expense. Therefore, we suggest that you confer and seek to resolve your position on Grower representation in the Citrus Scheme as soon as possible. We ask that you identify by close of business on Friday, 26 August 2011 the person or entity you or your clients propose to be the representative Grower in the Solara Rights Proceeding.

In the absence of agreement being reached, our client reserves the right to issue the Application and put forward its own submissions regarding the appointment of a representative Grower for the purposes of the proceeding.

We look forward to hearing from you.

Yours sincerely



Clint Hinchey
Partner
Clint.Hinchey@aar.com.au
T +61 3 9613 8924

Ben Rechter
Senior Associate
Ben.Rechter@aar.com.au
T +61 3 9613 8227

Copy to:

Jane Sheridan
Arnold Bloch Leibler
Level 21
333 Collins Street
Melbourne VIC 3000
By Email

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

LIST E
S CI 2010 398

IN THE MATTER OF TIMBERCORP SECURITIES LTD (IN LIQUIDATION)

BETWEEN:

TIMBERCORP SECURITIES LTD (IN LIQUIDATION) Plaintiffs
CAN 092 311 469 IN ITS CAPACITY AS RESPONSIBLE
ENTITY OF THE 2005 TIMBERCORP CITRUS
PROJECT (ARSN 114 091 299)
and others according to the schedule attached

GENERAL FORM OF ORDER

JUDGE: The Honourable Justice Davies

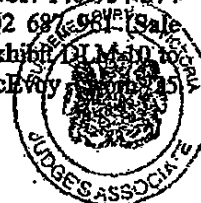
DATE MADE: 26 February 2010

ORIGINATING PROCESS: Originating Process filed 29 January 2010

HOW OBTAINED: At trial

ATTENDANCE: Mr. L Zweir, Solicitor with
Mr. O Bigos of Counsel for the Plaintiffs
Mr. D Shavin of Her Majesty's Counsel with
Mr. D Gration of Counsel for Ms Bezencon and TGG
Citrus Committee Inc.
Mr. S Hopper of Counsel with
Mr. M Galvin of Counsel for Mr Bugden
Ms. Harris of Counsel for David Laurence McEvoy and
Paul William Kirk, as receivers and managers of OIM#2
Pty Ltd ATF Timbercorp Orchard Trust #2

OTHER MATTERS: OIM#2 Pty Ltd ACN 112 691 997 (Receivers and
Managers Appointed) in its capacity as trustee for the
Timbercorp Orchard Trust #2 (OIM#2) has entered into
a sale and purchase contract in respect of land known as
"Solara" with Agriproperty Pty Ltd ACN 140 954 874
and CostaExchange Limited ACN 002 687 981 (Sale
Contract) which forms confidential exhibit 121 M-10 to
the affidavit of David Laurence McEvoy, sworn 25
January 2010 (McEvoy Affidavit).



The receivers of OIM#2 are David Laurence McEvoy and Paul William Kirk (Receivers).

THE COURT ORDERS THAT:

1. Siger Super Services Pty Ltd as trustee for the Kereg Trust and TGG Citrus Committee Inc are to be joined as Defendants to these proceedings.
2. The Second and Third Plaintiffs (in their capacity as Liquidators of the First Plaintiff) are justified in procuring the First Plaintiff as responsible entity of the 2005 Timbercorp Citrus Project (ARSN 114 091 299) (Citrus Scheme) to terminate or surrender each relevant Grower licence and extinguishing all of the rights of Growers (investors in the Citrus Scheme) in respect of the assets the subject of the Sale Contract (Grower Rights).
3. The Second and Third Plaintiffs (in their capacity as liquidators of the First Plaintiff) are justified in making, doing and executing such documents or things to give effect to the extinguishment of all of the Grower Rights in order to enable OIM#2 and the Receivers to perform the Sale Contract.

THE COURT ORDERS, DECLARES AND DIRECTS THAT:

4. Upon completion of any sale under the Sale Contract the net proceeds of sale (after payment of the Receivers' selling costs and expenses, retentions (if any), the costs and expenses of the Receivers referable to the preservation and realisation of the assets the subject of the Sale Contract, and the costs and expenses of the liquidators of the First Plaintiff which are to be reimbursed by the Receivers in accordance with the Solara Grower Rights Deed (as defined in the McEvoy Affidavit) (Net Sale Proceeds) are to be held by the Receivers of OIM#2 in an interest bearing trust account with an Australian bank (as defined in section 9 of the Corporations Act), pending the hearing and determination by the Court of a proceeding to determine which person or persons have any rights to all or any part of the Net Sale Proceeds, and to be held on trust for the person or persons who are able to establish such a right, or until further order of the Court.
5. Insofar as the Australia and New Zealand Banking Group Limited has any rights to the assets the subject of the Sale Contract, whether under its securities over those assets or otherwise, nothing in the release of those securities upon completion of the Sale Contract will prejudice those rights for the purposes of its claim to all or any part of the Net Sale Proceeds.
6. Insofar as the Growers have any rights to the assets the subject of the Sale Contract nothing in orders 2 and 3 above, or any action taken thereunder by the Second and Third Plaintiffs, will prejudice those rights for the purposes of their claim to all or any part of the Net Sale Proceeds.
7. Exhibits DLM-6, DLM-8, DLM-9 and DLM-10 to the McEvoy Affidavit are confidential.



8. Exhibit MAK-2 to the Affidavit of Mark Korda sworn 8 February 2010 is kept confidential.
9. Costs reserved.

DATE AUTHENTICATED: 26 February 2010



SCHEDULE OF PARTIES

S CI 2010 398

**TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION) (ACN 092 311 469)
IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE 2005 TIMBERCORP
CITRUS PROJECT (ARSN 114 091 299).**

First Plaintiff

MARK ANTHONY KORDA

Second Plaintiff

LEANNE KYLIE CHESSE

Third Plaintiff



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

List B D

SCI 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 ORS ACCORDING TO THE
SCHEDULE ATTACHED

Defendants

AFFIDAVIT OF CLINTON CHARLES HINCHEN
(Solara Rights Proceeding)

Date of document: 5 December 2011

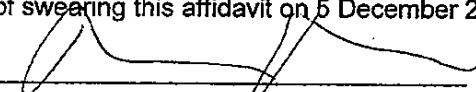
Filed on behalf of: The Plaintiff

Prepared by:

Allens Arthur Robinson
Lawyers
530 Collins Street
Melbourne VIC 3000

Solicitor code: 21455
DX 30999 Melbourne
Tel 9614 1011 Fax 9614 4661
Ref CCHM:120039226

This is the exhibit marked 'CCH-14' now produced and shown to CLINTON CHARLES HINCHEN
at the time of swearing this affidavit on 5 December 2011.

Before me: 

JONATHAN GUY JOSEPH
of 530 Collins Street, Melbourne
Victoria 3000
An Australian Legal Practitioner
within the meaning of the
Legal Profession Act 2004

Exhibit 'CCH-14'

Copy of the 12 September 2011
Herbert Geer Letter



herbertgeer

Your Ref:
Our Ref: AHM
Writer: Tom May - Partner
Email: tmay@herbertgeer.com.au

D 03 9641 8917
F 03 9642 4435

12 September 2011

Alens Arthur Robinson
Level 27
530 Collins Street
MELBOURNE VIC 3000

Attention: Mr Clint Hinchin

Dear Sir

Timbercorp: Solora: 2010/398

We refer to a telephone conversation earlier today between Mr May of our office and Messrs Hinchin and Rechter of your office.

We confirm that it is our intention to act for "representative growers" in the above matter. We confirm that we do not expect to act for any party in matter 2009/10382.

However, we also confirm that our agreement to act set out above is conditional upon your clients agreeing that our clients are to be entitled to be recompensed their reasonable costs out of the Fund into which the proceeds of the sale of the Solora asset has been placed.

We look forward to receiving your response in the immediate future.

Yours faithfully
HERBERT GEER LAWYERS

Winner - Best Law Firm (\$50m - \$200m revenue)
BRW Client Choice Awards 2011

Winner - Melbourne Law Firm of the Year
Australasian Legal Business Law Awards 2011

Melbourne Sydney Brisbane

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www.herbertgeer.com.au
ABN 21 228 101 686

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

List E D

SCI 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 ORS ACCORDING TO THE
SCHEDULE ATTACHED

Defendants

AFFIDAVIT OF CLINTON CHARLES HINCHEN
(Solara Rights Proceeding)

Date of document: 5 December 2011

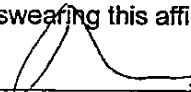
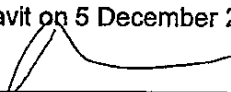
Filed on behalf of: The Plaintiff

Prepared by:

Allens Arthur Robinson
Lawyers
530 Collins Street
Melbourne VIC 3000

Solicitor code: 21455
DX 30999 Melbourne
Tel 9614 1011 Fax 9614 4661
Ref CCHM:120039226

This is the exhibit marked 'CCH-15' now produced and shown to CLINTON CHARLES HINCHEN
at the time of swearing this affidavit on 5 December 2011.

Before me:  

JONATHAN GUY JOSEPH
of 530 Collins Street, Melbourne
Victoria 3000
An Australian Legal Practitioner
within the meaning of the
Legal Profession Act 2004

Exhibit 'CCH-15'

Copy of the 23 November 2011
AAR Letter





Date 23 November 2011
From Clint Hinchin / Jonathan, Joseph
To Tom May, Partner, Herbert Geer Lawyers, Melbourne
Email tmay@herbertgeer.com.au

ADN 47 702 585 758
Level 27
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F +61 3 9614 4661

Correspondence
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Australia
DX 30989 Melbourne

www.aar.com.au

Confidential Email

Dear Sir

**Timbercorp Securities Limited (in Liquidation) –
Proposed Solara Rights Proceeding**

Please see attached.

Attach

Our Ref BZRM:120039226

pxjm A0119385375v3 120039226 23.11.2011

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Shanghai
Singapore
Sydney

23 November 2011

Mr Tom May
Partner
Herbert Geer
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By Email

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T +61 3 9614 1011
F +61 3 9614 4661
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www.aar.com.au

Dear Sir

**Timbercorp Securities Limited (In Liquidation) –
Proposed Solara Rights Proceeding**

We refer to our previous correspondence in relation to the issue of Grower representation in the proposed Solara Rights Proceeding and to the various messages we have left with your office over the last few days seeking to arrange a call with you to discuss various matters in this regard.

Background

1. By letter to Clarendon Lawyers and Ms Kerree Bezencon dated 19 August 2011, we stated, amongst other things, that:
 - (a) our client, Australia and New Zealand Banking Group Limited (**ANZ**), proposed to commence the proposed Solara Rights Proceeding;
 - (b) at the same time as issuing the Solara Rights Proceeding, or shortly thereafter, ANZ would issue a summons seeking, amongst other things, orders that:
 - (i) in accordance with rule 16.01(2) of the *Supreme Court (General Civil Procedure) Rules 2005 (Vic)*, a nominated Grower be appointed as the representative of the Growers in the 2005 Citrus Scheme the subject of the Solara Rights Proceeding; and
 - (ii) the person appointed as the Grower representative be joined to the Solara Rights Proceeding pursuant to rule 9.02 or rule 9.06(b) of the *Supreme Court (General Civil Procedure) Rules 2005 (Vic)*;
 - (c) given that Clarendon Lawyers represents the Timbercorp Growers Group and acted for the Grower representatives appointed by Justice Davies in the Almond Land Rights Proceeding, that firm may also act for a Grower interested in acting as the Grower representative for the 2005 Citrus Scheme the subject of the proposed Solara Rights Proceeding;
 - (d) given that the TGG Citrus Committee Inc. and Ms Bezencon appeared and made submissions in proceedings relating to the sale of the Solara property, they may also have an interest in nominating a Grower representative for

Our Ref BZRM:120039226

bdm A0119385375v3 120039226 23.11.2011

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- the Citrus Scheme the subject of the proposed Solara Rights Proceeding; and
- (e) in the circumstances, we requested that, in order to avoid the unnecessary duplication, delay and expense of having two sets of lawyers representing the Growers' interests in the Solara Rights Proceeding, Ms Bezencon and Clarendon Lawyers confer with a view to resolving the position of Grower representation in the Solara Rights Proceeding as soon as possible.

2. On 26 August 2011, we had a telephone conversation with Michael Fernon of Clarendon Lawyers in relation to our letter dated 19 August 2011. Mr Fernon stated on that call, amongst other things, that while he was still due to discuss the position with you, if your firm/Ms Bezencon were not to take on the representative role for the 2005 Citrus Scheme in the Solara Rights Proceeding, Clarendon Lawyers would be prepared to do so upon identification of an appropriate party to be the nominated representative.
3. On 12 September 2011, we received a letter from you in which you confirmed your firm's intention to act for the nominated Grower representative in the proposed Solara Rights Proceeding subject to ANZ agreeing that your client is entitled to be paid his or her reasonable costs out of the fund in which the proceeds of the sale of the Solara assets are currently being held.

ANZ's intention to issue the Solara Rights Proceeding

4. Matters have progressed to the point where ANZ now intends to issue the Solara Rights Proceeding imminently and seek orders for the appointment of a Grower representative to represent the Growers in the 2005 Citrus Scheme.
5. In light of the following common features between the proposed Solara Rights Proceeding and the proposed Liparoo and Yungera Rights Proceeding, ANZ also proposes to apply for an order, at or shortly after the time of issuing the Solara Rights Proceeding, that these two proceedings be heard and managed together:
- (a) both proceedings will address similar issues to those before the Court in the Almond Land Rights Proceeding and the subject of Justice Davies' judgment dated 25 June 2011 in that proceeding;
 - (b) both proceedings will be determined by reference to scheme and related documentation which is similar in content and structure;
 - (c) Timbercorp Securities Limited (TSL) was the same responsible entity for each of the Schemes the subject of the two proceedings; and
 - (d) having regard to the Almond Land Rights Proceeding, there is likely to be an investigation required at trial in each of the two proceedings of the status and ongoing viability of each of the Schemes the subject of the two proceedings.

Legal representation of nominated Grower representative

6. Against the above background, ANZ has given further consideration since September 2011 to the question of legal representation for the nominated Grower representative in the Solara Rights Proceeding.
7. In this context, ANZ understands that Mediterranean Olives Estate Limited (MOE), of which you were at the relevant time the Managing Director, was approached by the TGG Citrus

Committee to become the replacement responsible entity of the 2005 Timbercorp Citrus Scheme (the subject of the Solara Rights Proceeding) in lieu of TSL. ANZ also understands that certain resolutions were put to growers in the 2005 Citrus Scheme at the meeting of growers on 25 February 2010 including that TSL be removed as responsible entity of the scheme and TSL be replaced by MOE as the new responsible entity. Both resolutions were purportedly passed at the meeting.

8. ANZ notes in this regard that, in the Almond Land Rights Proceeding, the managing director of the proposed replacement responsible entity for the Schemes the subject of that proceeding gave evidence (and was cross-examined on that evidence) about the basis on which his company was prepared to assume the responsible entity role for those schemes. Indeed, this issue, which went to the viability of the Schemes and therefore to questions of valuation, was of central prominence in the trial of the Almond Land Rights Proceeding. By analogy, it would seem likely that the issues arising in the Solara Rights Proceeding will include the viability of the 2005 Citrus Scheme, proposals to restructure the Scheme and the terms on which entities were prepared to become the temporary/permanent responsible entity of that scheme.
9. In this context, your involvement in the 2005 Citrus Scheme in your capacity as the Managing Director of MOE at the relevant time will likely be a key matter for consideration, and the subject of evidence, in the proposed Solara Rights Proceeding.
10. Our review of the relevant case law and the *Legal Professional Conduct and Practice Rules 2005* (Vic.) (Rule 13.4 in particular) suggests that it is inappropriate for a lawyer, or a partner or employee of that lawyer, to act in a proceeding if there is reason to believe that the lawyer will be required to give evidence material to the determination of contested issues before the Court. In particular, the Court will be concerned with the likelihood of the lawyer being called as a witness on a material contentious matter, and its impact on the integrity of the trial process and the administration of justice.
11. In the circumstances, ANZ is concerned that the proper administration of justice would preclude Herbert Geer from acting on behalf of the Grower representative appointed to represent the interests of the Growers in the 2005 Citrus Scheme for the purpose of the Solara Rights Proceeding. It is also, for obvious reasons, concerned to avoid a situation where a solicitor who had been acting for a Grower representative was obliged to withdraw part way through the proceeding.
12. Further, having regard to the matters set out in paragraph 5 above and, in particular the fact that Clarendon Lawyers represented each of the appointed Grower representatives in the Almond Land Rights Proceeding (and continues to do so for the purpose of the appeal of that proceeding), it seems to ANZ that, from an efficiency and cost viewpoint, Clarendon Lawyers is appropriately placed to represent the Grower representative appointed in the Solara Rights Proceeding and that it is in the interests of all stakeholders that it does so.

In the circumstances, we are instructed to request that you give consideration with Ms Bezencon to the matters contained in this letter and revert to us in writing by the close of business on Monday, 28 November 2011 in relation to your firm's position. This letter and your reply will be produced to the Court on the return of ANZ's application for the appointment of a Grower representative for the 2005 Citrus Scheme for the purpose of the proposed Solara Rights Proceeding.

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

List B D

SCI 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 ORS ACCORDING TO THE
SCHEDULE ATTACHED

Defendants

AFFIDAVIT OF CLINTON CHARLES HINCEN
(Solara Rights Proceeding)

Date of document: 5 December 2011

Filed on behalf of: The Plaintiff

Prepared by:

Allens Arthur Robinson
Lawyers
530 Collins Street
Melbourne VIC 3000

Solicitor code: 21455
DX 30999 Melbourne
Tel 9614 1011 Fax 9614 4661
Ref CCHM:120039226

This is the exhibit marked 'CCH-16' now produced and shown to CLINTON CHARLES HINCEN
at the time of swearing this affidavit on 5 December 2011.

Before me: 

JONATHAN GUY JOSEPH
of 530 Collins Street, Melbourne
Victoria 3000
An Australian Legal Practitioner
within the meaning of the
Legal Profession Act 2004

Exhibit 'CCH-16'

Copy of the 24 November 2011
AAR Letter





Date 24 November 2011
From Clint Hinchey / Jonathan Joseph
To Michael Femon, Director, Clarendon Lawyers,
Melbourne
Email Michael.Femon@clarendonlawyers.com.au

ABN 47 702 595 758

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F +61 3 9614 4681

Correspondence
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Melbourne VIC 3001
Australia
DX 30999 Melbourne

www.aar.com.au

Confidential Email

Dear Mr Femon

**Timbercorp Securities Limited (In Liquidation) –
Proposed Solara Rights Proceeding**

Please see attached.

Attach

Our Ref CCHM:BZRM:120039226

pjm A0119427004v1 120039226 24.11.2011

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24 November 2011

Michael Fernon
Director
Clarendon Lawyers
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Melbourne VIC 3000
By Email

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Melbourne VIC 3000
Australia
T +61 3 9614 1011
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Correspondence
GPO Box 1776
Melbourne VIC 3001
Australia
DX 30999 Melbourne
www.aar.com.au

Dear Mr Fernon

**Timbercorp Securities Limited (In Liquidation) (TSL) –
Proposed Solara Rights Proceeding**

As you know, we act on behalf of Australia and New Zealand Banking Group Limited (ANZ).

We refer to our letter dated 19 August 2011 in relation to the issue of Grower representation in the proposed Solara Rights Proceeding and to our telephone conversation with you on 26 August 2011 in this regard.

During our discussion on 26 August 2011, you stated, amongst other things, that while you were still due to discuss the position with Tom May of Herbert Geer, if his firm/Ms Bezencon were not to take on the representative role for the 2005 Citrus Scheme in the proposed Solara Rights Proceeding, your firm would be prepared to do so upon identification of an appropriate party to be the nominated representative.

We now enclose for your consideration a letter from us to Herbert Geer dated 23 November 2011 which (amongst other things):

- (a) sets out the relevant background matters in relation to the issue of Grower representation in the proposed Solara Rights Proceeding;
- (b) confirms ANZ's intention to issue the proposed Solara Rights Proceeding imminently; and
- (c) notes a number of additional considerations concerning the issue of legal representation for the nominated Grower representative in the proposed proceeding.

We are yet to receive a reply from Herbert Geer to this letter.

In light of the matters set out in our letter to Herbert Geer dated 23 November 2011, we seek your written confirmation as soon as possible, and by no later than the close of business on Monday, 28 November 2011, that your firm is prepared to act on behalf of a nominated Grower representative in the proposed Solara Rights Proceeding subject to that Grower representative being entitled to be paid his or her reasonable costs out of the fund in which the proceeds of the sale of the Solara assets are currently being held.

Our Ref CCHM:BZRM:120039226

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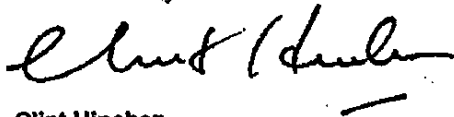
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In anticipation that your firm is prepared to act for a nominated Grower representative, we have contacted Arnold Bloch Leibler, the solicitors for the Liquidators of TSL, with a request that their clients identify a person who might be prepared to act as a Grower representative of the relevant scheme.

Please note that this letter and your reply will be produced to the Court on the return of ANZ's application for the appointment of a Grower representative for the 2005 Citrus Scheme for the purpose of the Solara Rights Proceeding.

We look forward to hearing from you.

Yours sincerely



Clint Hinchey
Partner
Clint.Hinchey@aar.com.au
T +61 3 9613 8924

Jonathan Joseph
Senior Associate
Jonathan.Joseph@aar.com.au
T +61 3 9613 8663

Aliens Arthur Robinson

Date 23 November 2011
From Clint Hinchon / Jonathan Joseph
To Tom May, Partner, Herbert Geer Lawyers, Melbourne
Email tmay@herbertgeer.com.au

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Correspondence
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Melbourne VIC 3001
Australia
DX 30696 Melbourne
www.agr.com.au

Confidential Email

Dear Sir

**Timbercorp Securities Limited (in Liquidation) –
Proposed Solara Rights Proceeding**

Please see attached.

Attach

Our Ref BZRM120038228

Jgm A0119385375v3 120038228 23.11.2011

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23 November 2011

Mr Tom May
Partner
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Correspondence
GPO Box 1775
Melbourne VIC 3001
Australia
DX 30999 Melbourne
www.aar.com.au

Dear Sir

**Timbercorp Securities Limited (in Liquidation) –
Proposed Solara Rights Proceeding**

We refer to our previous correspondence in relation to the issue of Grower representation in the proposed Solara Rights Proceeding and to the various messages we have left with your office over the last few days seeking to arrange a call with you to discuss various matters in this regard.

Background

1. By letter to Clarendon Lawyers and Ms Kerree Bezencon dated 19 August 2011, we stated, amongst other things, that:
 - (a) our client, Australia and New Zealand Banking Group Limited (ANZ), proposed to commence the proposed Solara Rights Proceeding;
 - (b) at the same time as issuing the Solara Rights Proceeding, or shortly thereafter, ANZ would issue a summons seeking, amongst other things, orders that:
 - (i) in accordance with rule 16.01(2) of the *Supreme Court (General Civil Procedure) Rules 2005 (Vic)*, a nominated Grower be appointed as the representative of the Growers in the 2005 Citrus Scheme the subject of the Solara Rights Proceeding; and
 - (ii) the person appointed as the Grower representative be joined to the Solara Rights Proceeding pursuant to rule 9.02 or rule 9.08(b) of the *Supreme Court (General Civil Procedure) Rules 2005 (Vic)*;
 - (c) given that Clarendon Lawyers represents the Timbercorp Growers Group and acted for the Grower representatives appointed by Justice Davies in the Almond Land Rights Proceeding, that firm may also act for a Grower interested in acting as the Grower representative for the 2005 Citrus Scheme the subject of the proposed Solara Rights Proceeding;
 - (d) given that the TGG Citrus Committee Inc. and Ms Bezencon appeared and made submissions in proceedings relating to the sale of the Solara property, they may also have an interest in nominating a Grower representative for

Our Ref BZRM.120036226

Bangkok
Beijing
Brisbane
Hong Kong
London
Melbourne
New York
Perth
Singapore
Sydney
Tokyo

- ### **ANZ's Intention to Issue the Solara Rights Proceeding**

4. Matters have progressed to the point where ANZ now intends to issue the Solara Rights Proceeding imminently and seek orders for the appointment of a Grower representative to represent the Growers in the 2005 Citrus Scheme.
5. In light of the following common features between the proposed Solara Rights Proceeding and the proposed Liparoo and Yungera Rights Proceeding, ANZ also proposes to apply for an order, at or shortly after the time of issuing the Solara Rights Proceeding, that these two proceedings be heard and managed together:
 - (a) both proceedings will address similar issues to those before the Court in the Almond Land Rights Proceeding and the subject of Justice Davies' judgment dated 26 June 2011 in that proceeding;
 - (b) both proceedings will be determined by reference to scheme and related documentation which is similar in content and structure;
 - (c) Timbercorp Securities Limited (TSL) was the same responsible entity for each of the Schemes the subject of the two proceedings; and
 - (d) having regard to the Almond Land Rights Proceeding, there is likely to be an investigation required at trial in each of the two proceedings of the status and ongoing viability of each of the Schemes the subject of the two proceedings.

6. Against the above background, ANZ has given further consideration since September 2011 to the question of legal representation for the nominated Grower representative in the Solara Rights Proceeding.

2. 日期 2014年11月20日 12:07:32 20 11 2014

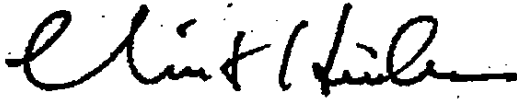
Committee to become the replacement responsible entity of the 2005 Timbercorp Citrus Scheme (the subject of the Solara Rights Proceeding) in lieu of TSL. ANZ also understands that certain resolutions were put to growers in the 2005 Citrus Scheme at the meeting of growers on 25 February 2010 including that TSL be removed as responsible entity of the scheme and TSL be replaced by MOE as the new responsible entity. Both resolutions were purportedly passed at the meeting.

8. ANZ notes in this regard that, in the Almond Land Rights Proceeding, the managing director of the proposed replacement responsible entity for the Schemes the subject of that proceeding gave evidence (and was cross-examined on that evidence) about the basis on which his company was prepared to assume the responsible entity role for those schemes. Indeed, this issue, which went to the viability of the Schemes and therefore to questions of valuation, was of central prominence in the trial of the Almond Land Rights Proceeding. By analogy, it would seem likely that the issues arising in the Solara Rights Proceeding will include the viability of the 2005 Citrus Scheme, proposals to restructure the Scheme and the terms on which entities were prepared to become the temporary/permanent responsible entity of that scheme.
9. In this context, your involvement in the 2005 Citrus Scheme in your capacity as the Managing Director of MOE at the relevant time will likely be a key matter for consideration, and the subject of evidence, in the proposed Solara Rights Proceeding.
10. Our review of the relevant case law and the *Legal Professional Conduct and Practice Rules 2005* (Vic.) (Rule 13.4 in particular) suggests that it is inappropriate for a lawyer, or a partner or employee of that lawyer, to act in a proceeding if there is reason to believe that the lawyer will be required to give evidence material to the determination of contested issues before the Court. In particular, the Court will be concerned with the likelihood of the lawyer being called as a witness on a material contentious matter, and its impact on the integrity of the trial process and the administration of justice.
11. In the circumstances, ANZ is concerned that the proper administration of justice would preclude Herbert Geer from acting on behalf of the Grower representative appointed to represent the interests of the Growers in the 2005 Citrus Scheme for the purpose of the Solara Rights Proceeding. It is also, for obvious reasons, concerned to avoid a situation where a solicitor who had been acting for a Grower representative was obliged to withdraw part way through the proceeding.
12. Further, having regard to the matters set out in paragraph 5 above and, in particular the fact that Clarendon Lawyers represented each of the appointed Grower representatives in the Almond Land Rights Proceeding (and continues to do so for the purpose of the appeal of that proceeding), it seems to ANZ that, from an efficiency and cost viewpoint, Clarendon Lawyers is appropriately placed to represent the Grower representative appointed in the Solara Rights Proceeding and that it is in the interests of all stakeholders that it does so.

In the circumstances, we are instructed to request that you give consideration with Ms Bezencon to the matters contained in this letter and revert to us in writing by the close of business on Monday, 28 November 2011 in relation to your firm's position. This letter and your reply will be produced to the Court on the return of ANZ's application for the appointment of a Grower representative for the 2005 Citrus Scheme for the purpose of the proposed Solara Rights Proceeding.

We look forward to hearing from you.

Yours sincerely



Clint Hitchen

Partner

Clint.Hitchen@aar.com.au

T +61 3 9613 8824

Jonathan Joseph

Senior Associate

Jonathan.Joseph@aar.com.au

T +61 3 9613 8863

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

List # D

SCI 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 ORS ACCORDING TO THE
SCHEDULE ATTACHED

Defendants

AFFIDAVIT OF CLINTON CHARLES HINCEN
(Solara Rights Proceeding)

Date of document: 5 December 2011

Filed on behalf of: The Plaintiff

Prepared by:

Allens Arthur Robinson
Lawyers
530 Collins Street
Melbourne VIC 3000

Solicitor code: 21455
DX 30999 Melbourne
Tel 9614 1011 Fax 9614 4661
Ref CCHM:120039226

This is the exhibit marked 'CCH-17' now produced and shown to CLINTON CHARLES HINCEN
at the time of swearing this affidavit on 5 December 2011.

Before me:

JONATHAN GUY JOSEPH
of 530 Collins Street, Melbourne
Victoria 3000
An Australian Legal Practitioner
within the meaning of the
Legal Profession Act 2004

Exhibit 'CCH-17'

Copy of the 28 November 2011
Clarendon Lawyers Letter





28 November 2011

Level 17 Rialto North Tower
525 Collins Street Melbourne
Victoria 3000 Australia

T 03 8681 4400 F 03 8681 4499
www.clarendonlawyers.com.au
ABN 43 704 593 249

Our Ref: MJF:MJF:1000126

Clint Hinchey
Allens Arthur Robinson
530 Collins Street
MELBOURNE VIC 3000
By email: Clint.Hinchey@aar.com.au

Jonathan Joseph
Allens Arthur Robinson
530 Collins Street
MELBOURNE VIC 3000
By email: Jonathan.Joseph@aar.com.au

Dear Clint and Jonathan

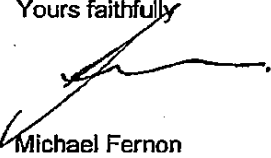
**Timbercorp Securities Limited (In liquidation)
Proposed Solara Rights Proceeding**

We refer to your letter of 24 November 2011.

We confirm that we are prepared to act on behalf of the nominated grower representative in the proposed Solara rights proceedings, subject to that grower representative being entitled to be paid his or her reasonable costs out of the fund in which the proceeds of the sale of the Solara assets are currently being held on the same basis as in the Almond Land almond apportionment case.

The names of the representatives are: Robert and Elizabeth Bugden and Bugden Family Personal Superannuation Fund of 44 Arthur Circle, Red Hill, ACT, 2603, who are joint investors in the 2005 scheme.

Yours faithfully



Michael Fernon
Director

Direct Tel: 03 8681 4419
Email: michael.fernon@clarendonlawyers.com.au

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

List # D

SCI 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 ORS ACCORDING TO THE
SCHEDULE ATTACHED

Defendants

AFFIDAVIT OF CLINTON CHARLES HINCHEN
(Solara Rights Proceeding)

Date of document: 5 December 2011

Filed on behalf of: The Plaintiff

Prepared by:

Allens Arthur Robinson
Lawyers
530 Collins Street
Melbourne VIC 3000

Solicitor code: 21455
DX 30999 Melbourne
Tel 9614 1011 Fax 9614 4661
Ref CCHM:120039226

This is the exhibit marked 'CCH-18' now produced and shown to CLINTON CHARLES HINCHEN
at the time of swearing this affidavit on 5 December 2011.

Before me:

JONATHAN GUY JOSEPH
of 530 Collins Street, Melbourne
Victoria 3000
An Australian Legal Practitioner
within the meaning of the
Legal Profession Act 2004

Exhibit 'CCH-18'

Copy of the 25 November 2011
Herbert Geer Letter

CH

herbertgeer

Your Ref:
Our Ref: AHM
Writer: Tom May - Partner
Email: tmay@herbertgeer.com.au

D 03 9641 8917
F 03 9642 4435

25 November 2011

Allens Arthur Robinson
Level 27
530 Collins Street
MELBOURNE VIC 3000

Attention: Mr Hinchin

Dear Sir

Timbercorp Securities Limited (In Liquidation) : Solora

We refer to your letter of 23 November 2011.

We understand that in the Almond Land Rights Proceeding the Managing Director of a proposed replacement Responsible Entity was called as a witness by parties opposed to you. It is our view that in any Solora proceeding the parties opposed to you will not call Mr May as a witness.

In this context, we refer to a letter dated 28 July 2010 from Mr May in his capacity as a director of Mediterranean Olives Estate Limited to the effect that the company did not have any documents that responded to the Subpoena which was issued in that proceeding.

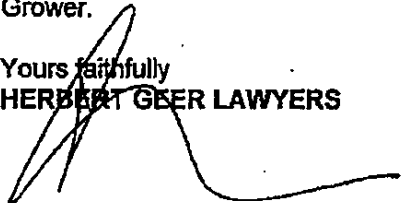
Accordingly, we are of the view that there is no impediment to us acting in that proceeding.

We note that you have thus far ignored the third paragraph of our letter to you dated 12 September 2011 in which we confirm that our agreement to set out in that letter is conditional upon your clients agreeing that our clients are to be entitled to be recompensed their reasonable costs out of the Fund into which the proceeds of the sale of the Solora asset have been placed.

We also understand that the appeal from the first instance decision in the Almond Land Right matter is proceeding and is likely to be heard by the Court of Appeal sometime towards the middle of 2012. In these circumstances, we are of the view that it would not be wise to move very far in relation to Solora until that appeal has been heard and decided.

We currently are in a position to provide you with the details of an appropriate representative Grower.

Yours faithfully
HERBERT GEER LAWYERS



Melbourne Sydney Brisbane

Level 20/385 Bourke Street
Melbourne VIC 3000
GPO Box 524 Melbourne VIC 3001

Telephone: +61 3 9670 6123
Facsimile: +61 3 9670 5670
www.herbertgeer.com.au

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

List # D

SCI 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 ORS ACCORDING TO THE
SCHEDULE ATTACHED

Defendants

AFFIDAVIT OF CLINTON CHARLES HINCHEN
(Solara Rights Proceeding)

Date of document: 5 December 2011

Filed on behalf of: The Plaintiff

Prepared by:

Allens Arthur Robinson
Lawyers
530 Collins Street
Melbourne VIC 3000

Solicitor code: 21455
DX 30999 Melbourne
Tel 9614 1011 Fax 9614 4661
Ref CCHM:120039226

This is the exhibit marked 'CCH-19' now produced and shown to CLINTON CHARLES HINCHEN
at the time of swearing this affidavit on 5 December 2011.

Before me: _____

JONATHAN GUY JOSEPH
of 530 Collins Street, Melbourne
Victoria 3000
An Australian Legal Practitioner
within the meaning of the
Legal Profession Act 2004

Exhibit 'CCH-19'

Copy of the 5 December 2011
AAR Letter

US

Date 5 December 2011
From Clint Hinchin / Jonathan Joseph
To Tom May, Partner, Herbert Geer Lawyers, Melbourne
Email tmay@herbertgeer.com.au

ABN 47 702 595 758

Level 27
530 Collins Street
Melbourne VIC 3000
Australia
T +61 3 9614 1011
F +61 3 9614 4861

Correspondence
GPO Box 1776
Melbourne VIC 3001
Australia
DX 30999 Melbourne

www.aar.com.au

Confidential Email

Dear Sir

**Timbercorp Securities Limited (in Liquidation) –
Proposed Solara Rights Proceeding**

Please see attached.

Attach

Our Ref BZRM:120039226

jxjm A0119508950v2 120039226 5.12.2011

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5 December 2011

Mr Tom May
Partner
Herbert Geer
Level 20
385 Bourke Street
Melbourne VIC 3000
By Email

ABN 47 702 595 758
Level 27
530 Collins Street
Melbourne VIC 3000
Australia
T +61 3 9614 1011
F +61 3 9614 4661
Correspondence
GPO Box 1776Q
Melbourne VIC 3001
Australia
DX 30999 Melbourne
www.aar.com.au

Dear Sir

**Timbercorp Securities Limited (in Liquidation) –
Proposed Solara Rights Proceeding**

We refer to your letter dated 25 November 2011, received by us on 30 November 2011, in relation to the issue of Grower representation in the proposed Solara Rights Proceeding.

For the reasons set out below and in our letter dated 23 November 2011, we remain of the view that it is in the interests of the administration of justice, and also in the interests of all stakeholders interested in the relevant fund, that your firm not act for the appointed Grower representative in the proposed proceeding.

Matters raised in your letter

1. You refer to the following two matters as supporting your view that there is no impediment to your firm acting in the proposed proceeding:
 - (a) You state that, in your view, the parties opposed to our client in the proceeding will not call you as a witness.
 - (b) You refer to a letter dated 28 July 2010 from yourself in your capacity as a director of Mediterranean Olives Estate Limited (**MOE**) to the effect that MOE did not have any documents that responded to a subpoena which was apparently issued in an unidentified proceeding.
2. Dealing first with the first matter set out above, you provide no basis for your view. In particular:
 - (a) You give no explanation as to why you say you will not be called to give evidence in the proceeding by the parties opposed to our client. Your failure to provide any such explanation arises in circumstances where, for the reasons set out in paragraph 8 of our letter dated 23 November 2011, key issues in the proceeding are likely to include the viability of the 2005 Citrus Scheme, proposals to restructure the Scheme and the terms on which entities were prepared to become the temporary/permanent responsible entity of the Scheme. On any objective view, your involvement in MOE is likely to be a key matter for consideration, and the subject of evidence, in the context of these issues.

Our Ref BZRM:120039226

bjm A0119508950v2 120039226 5.12.2011

Bangkok
Beijing
Beijing IP
Brisbane
Hanoi
Ho Chi Minh City
Hong Kong
Jakarta
Melbourne
Perth
Phnom Penh
Port Moresby
Shanghai
Singapore

- (b) You do not address the possibility that, having regard to Justice Davies' judgment in the Almond Land Rights Proceeding, our client might compel you to give evidence in the proceeding based on advice that it is a proper course having regard to the issues for determination before the Court.
 - (c) You make no attempt to address our client's concern that, given your involvement with MOE and having regard to the conduct of, and judgment in, the Almond Land Rights Proceeding, your proposal to act for the Grower representative in the proposed proceeding may impact on the integrity of the trial process and the administration of justice. Further, you do not address how your proposal to act will satisfy the objective test on which Rule 13.4 of the *Legal Professional Conduct and Practice Rules 2005* (Vic) is based.
3. Turning to the second matter set out above, you have not provided a copy of the letter to which you refer, nor have you identified the nature of the subpoena or proceeding in question. In any event, we note the following (which, for the avoidance of doubt, is not intended to be an exhaustive statement of relevant considerations in this regard):
- (a) We assume you are referring to MOE's letter, signed by you in your capacity as director of MOE, to the Supreme Court of Victoria dated 28 July 2010 (the **MOE Letter**) in response to the subpoena dated 24 June 2010 addressed to MOE and issued by our client in the Almond Land Rights Proceeding (the **MOE Subpoena**). Copies of the MOE Letter and the MOE Subpoena are enclosed.
 - (b) We fail to see how the MOE Letter and the MOE Subpoena bear on the question of whether, on an objective view, you may be called to give evidence in the proposed Solara Rights Proceeding.
 - (c) As noted in our letter dated 23 November 2011, ANZ understands that MOE was approached by the TGG Citrus Committee to become the replacement responsible entity of the 2005 Citrus Scheme the subject of the proposed Solara Rights Proceeding. In this regard, we enclose a copy of the purported notice of meeting on 25 February 2010 for the members of this Scheme to consider and vote on proposed resolutions which would have the effect of MOE replacing TSL as the responsible entity of the Scheme (**purported notice of meeting**). (ANZ understands that this purported meeting was adjourned on several occasions prior to a vote taking place on these resolutions at a purported meeting on 25 March 2010 – see sub-paragraph (e) below.) You were, at that time, the managing director of MOE.
 - (d) In addition, ANZ understands that you appeared on behalf of, amongst others, the TGG Citrus Committee before Justice Davies on 24 February 2010 in proceeding number SCI 2010 971 in which the Liquidators of TSL were seeking (amongst other things) declarations that the purported notice of meeting was invalid.
 - (e) At the purported meeting of the members of the 2005 Citrus Scheme on 25 March 2010, resolutions were purportedly passed which, if valid, would have had the effect of MOE replacing TSL as the responsible entity of the 2005 Citrus Scheme.

- (f) In these circumstances, for the reasons noted in our letter dated 23 November 2011, it is likely that your involvement in the 2005 Citrus Scheme in your capacity as the managing director of MOE will be a key matter for consideration, and the subject of evidence, in the proposed Solora Rights Proceeding.

ANZ reserves its right, if necessary, to raise at the appropriate time further matters in relation to your and MOE's involvement in the 2005 Citrus Scheme.

4. In the circumstances, your letter provides no comfort to our client that your firm's proposal to act for the nominated Grower representative in the proposed Solora Rights Proceeding would be in the best interests of the administration of justice. Nevertheless, if, despite our client's concerns, the Court were to appoint a Grower representative represented by your firm, we confirm that, subject to the matters set out below, our client would not object to any application to the Court being made on behalf of that Grower representative for their reasonable legal fees, including costs and disbursements, of the proceeding to be paid out of the fund in which the proceeds of the sale of the Solora assets are currently being held:
- (a) first, our client reserves its right to make submissions to the Court, at the appropriate time, in respect of the form of any such pre-emptive costs order sought by the appointed Grower representative; and
 - (b) secondly, our client reserves its right to:
 - (i) review any costs claimed by the Grower representative;
 - (ii) form a view about the reasonableness of those costs; and
 - (iii) challenge any costs which our client regards as not being reasonably incurred.
5. We also note your comment that "it would not be wise to move very far in relation to Solora" until the appeal of the Almond Land Rights Proceeding is heard and decided. You also state that you understand that the Almond Land appeal is likely to be heard some time towards the middle of 2012. ANZ makes the following comments in reply:
- (a) ANZ is conscious that interest is continuing to accrue at default rates on amounts advanced by it to OIM#2 to fund the acquisition and operation of the Solora property. Accordingly, it is preferable, in the interests of all stakeholders, for the Solora Rights Proceeding to be resolved as expeditiously as possible, so that the balance of any net proceeds remaining for other stakeholders after repayment of the secured debt to ANZ is maximised.
 - (b) Having contacted the Court of Appeal Registry office last week, we were informed that, absent any order for expedition, the appeal is likely to be heard between February and July 2013. ANZ's present view is that, given the relevant test for expedition, it is unlikely that the proper grounds for expedition arise in that case.
 - (c) In the circumstances, ANZ considers that progressing the proposed proceeding as expeditiously as possible is in the interests of all stakeholders. As you appreciate, the parties to the appeal might come to an accommodation as to whether the appeal proceeds and accordingly the parties to the Solora Rights Proceeding

should be wary of doing little to progress that proceeding pending the outcome of the appeal.

Additional matters

6. In addition, you have not addressed at all the observations in our letter dated 23 November 2011 to the effect that, from an efficiency and cost viewpoint, it is in the best interests of all stakeholders that Clarendon Lawyers represent the Grower representative appointed in the proposed Solara Rights Proceeding.
7. We note in this context that, were your firm to act for the appointed Grower representative in the proposed Solara Rights Proceeding, this would be likely to result in the Grower representative incurring greater costs than if Clarendon Lawyers were acting for that representative (i.e. having regard to Clarendon Lawyers' role in acting for the Grower representatives in the Almond Land Rights Proceeding and the appeal of that proceeding, and for the nominated Grower representatives in the proposed Liparoo and Yungera Rights Proceeding).
8. In turn, on the assumption that, as with the Grower representatives in the Almond Land Rights Proceeding, an order is made in the Solara Rights Proceeding for the appointed Grower representative's costs of the proceeding to be paid from the relevant fund of net sale proceeds, this would be likely to result in the fund being depleted to a greater extent than if Clarendon Lawyers were to act for the appointed Grower representative.

We confirm that our client intends to issue the Solara Rights Proceeding imminently. In the circumstances, we will provide a copy of the relevant Court documents to your firm. It will be open to you and counsel retained by you to attend the hearing, at which orders will be sought for (amongst other things) the appointment of the Grower representative to represent the interests of the Growers in the 2005 Citrus Scheme, and to seek the Court's permission to make any relevant submissions. We understand that this hearing will take place before Justice Davies on 16 December 2011. Final hearing details will be included in the Summons on Originating Motion to be issued at the Court, a copy of which will be provided to you.

Yours sincerely



Clint Hinch
Partner
Clint.Hinch@aar.com.au
T +61 3 9613 8924

Jonathan Joseph
Senior Associate
Jonathan.Joseph@aar.com.au
T +61 3 9613 8663

MEDITERRANEAN OLIVES ESTATE

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AFS Licence 248285
Level 21
385 Bourke Street
Melbourne Vic. 3000



Tel: 1300 688 512
Fax: 03 9542 4435
info@mediterraneanolives.com.au
www.mediterraneanolives.com.au

28 July 2010

Prothonotary's Office
Supreme Court of Victoria
Level 2, 436 Lonsdale Street
Melbourne VIC 3000

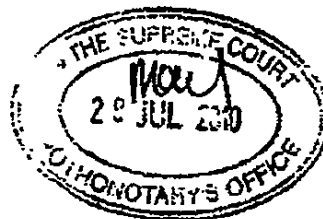
Dear Sirs

Supreme Court Action No. 10859 of 2009

This company has been served with a Subpoena in the above proceedings. The company does not have any documents that respond to the Subpoena.

Yours sincerely

AH May
Director



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

**LIST E
S CI 2009 10699**

BETWEEN

**BOSI SECURITY SERVICES LIMITED (ACN 006 413 852) AS TRUSTEE FOR
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
(ACN 005 357 522) AND BOS INTERNATIONAL (AUSTRALIA) LIMITED
(ACN 066 601 250) AND WESTPAC BANKING CORPORATION (ACN 007 457 141)**

Plaintiff

and

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

First defendant

AND OTHERS

**NOTICE TO ADDRESSEE AND DECLARATION
(Form 42B; Rule 42.10(3))**

Date of document: 24 June 2010
Filed on behalf of: the first defendant
Prepared by:
**Allens Arthur Robinson
Lawyers
530 Collins Street
Melbourne VIC 3000**

Solicitor code: 21455
DX 30999 Melbourne
Tel 9614 1011 Fax 9614 4661
Ref Matthew White

To: The Proper Officer, Mediterranean Olives Estate Limited, c/- Herbert Geer & Rundle
of 365 Bourke Street MELBOURNE VIC 3000:

You may produce copies of any subpoenaed documents, unless the subpoena specifically requires you to produce originals. A copy of a document may be—

- (a) a photocopy; or
- (b) in PDF format on a CD-Rom.

You must complete the declaration below, attach it to the subpoena or a copy of the subpoena and return them with the documents or things you provide to the Court under the subpoena.

If you declare that the material you produce is copies of documents, the Prothonotary may, without further notice to you, destroy the copies after the expiry of a period of four months from the conclusion of the proceeding or, if the documents become exhibits in the proceeding, when they are no longer required in connection with the proceeding, including on any appeal.

If the material you produce to the Court is or includes any original document, the Court will return all of the material to you at the address specified by you in the Declaration below.

DECLARATION BY ADDRESSEE (SUBPOENA RECIPIENT)

Note: Tick the relevant option below, provide your address as appropriate, sign and date

- ☐ All of the material I am providing to the Court in compliance with the attached subpoena is copies of documents. I acknowledge that the Court will destroy the copies once they are no longer required, without further notice to me.
- ☐ Some or all of the material I am providing to the Court in compliance with the attached subpoena is an original document. Once the material is no longer required, all of the material should be returned to me at the following address—

Address:

Date:

Signature of Addressee

Name of addressee

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

**LIST E
S CI 2009 10699**

B E T W E E N

**BOSI SECURITY SERVICES LIMITED (ACN 009 413 852) as trustee for
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
(ACN 005 357 522) and BOS INTERNATIONAL (AUSTRALIA) LIMITED
(ACN 086 801 250) and WESTPAC BANKING CORPORATION (ACN 007 457 141)**

Plaintiff

and

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

First defendant

AND OTHERS

SUBPOENA FOR PRODUCTION TO THE PROTHONOTARY

Date of document: 24 June 2010

Filed on behalf of: the first defendant

Prepared by:

**Allans Arthur Robinson
Lawyers
530 Collins Street
Melbourne VIC 3000**

**Solicitor code: 21455
DX 30999 Melbourne
Tel 9814 1011 Fax 9814 4661
Ref Matthew Whittle**

To: The Proper Officer

Mediterranean Olives Estate Limited

C/- Herbert Geer & Rundle, Level 21 355 Bourke Street

MELBOURNE VIC 3000

YOU ARE ORDERED:

**To produce to the Prothonotary this subpoena or a copy of it and the documents or things specified
in the Schedule.**

**Failure to comply with this subpoena without lawful excuse is a contempt of court and may
result in your arrest.**

The last day for service of this subpoena is: **7 JUL 2010**

Please read Notes 1 to 18 at the end of this subpoena.


Seal of the Court

Date: **27 JUN 2010**

Issued at the request of the first defendant, whose address for service is Allens Arthur Robinson,
530 Collins Street, Melbourne VIC 3000 (Ref: Matthew Whittle).

You must comply with this subpoena by delivering or sending this subpoena or a copy of it and the
documents or things specified in the Schedule below to the Prothonotary at the address below so
that they are received on or before the date for production specified below.

Date for production: 14 July 2010

The address of the Prothonotary to which the subpoena (or copy) and documents or things must
be delivered or sent is:

The Prothonotary
Supreme Court of Victoria
436 Lonsdale Street
Melbourne

SCHEDULE

The documents and things you must produce are as follows:

1. Documents evidencing any consideration given, in the period from 1 April 2009 onwards (the **relevant period**), to the replacement of (including the viability of replacing) Timbercorp Securities Limited (TSL) as responsible entity of any or all of:

- (a) the 2001 Timbercorp Almond Project;
- (b) the 2002 Timbercorp Almond Project;
- (c) the 2002 Timbercorp Almond Project (Private Offer No 1);
- (d) the 2003 Timbercorp Almond Project;
- (e) the 2004 Timbercorp Almond Project;
- (f) the 2006 Timbercorp Almond Project; or
- (g) the 2007 Timbercorp Almond Project,

(collectively, the **Almond Projects**), including (without limitation) documents evidencing consideration:

- (a) of the likely and/or actual funding requirements of the relevant Almond Project and the proposed source of those funds;
 - (b) of the costs likely to be incurred by Mediterranean Olives Estate Limited or a related entity (**Mediterranean Olives**) as a result of accepting appointment as responsible entity;
 - (c) of the likely and/or actual cost of operating the relevant Almond Project; and
 - (d) as to how Mediterranean Olives would deal with the owner of the land on which the relevant Almond Project was operated in the event that Mediterranean Olives accepted an appointment as responsible entity in relation to that Almond Project.
2. Documents evidencing any proposal for the replacement of TSL as responsible entity of any or all of the Almond Projects in the relevant period.

3. Documents referring to the terms on which it was proposed or contemplated, in the relevant period, that Mediterranean Olives might replace TSL as responsible entity of any or all of the Almond Projects, including without limitation:
 - (a) the fees which Mediterranean Olives proposed or contemplated it might charge for performing the functions of responsible entity;
 - (b) any other terms or conditions which Mediterranean Olives proposed or contemplated it might impose in consideration of accepting appointment as responsible entity;
 - (c) any proposed or contemplated alteration in the rights or obligations of Participant Growers in the relevant Almond Project; and
 - (d) any other proposed or contemplated amendment of the scheme documentation applicable to the relevant Almond Project.
4. A copy of any documents or other written material provided to any investors in any or all of the Almond Projects (Participant Growers) in the relevant period:
 - (a) with respect to the possible replacement of TSL as responsible entity; and/or
 - (b) for the purposes of considering the replacement of TSL as responsible entity.
5. Documents evidencing any proposal by or in respect of Mediterranean Olives that it replace the responsible entity of any other managed investment scheme operated by members of the Timbercorp Limited group of companies in the relevant period.
6. Documents referring to the terms on which it was proposed or agreed, in the relevant period, that Mediterranean Olives or another entity would or might replace the responsible entity of any other managed investment scheme operated by members of the Timbercorp Limited group of companies, including without limitation:
 - (a) the fees which Mediterranean Olives proposed it might charge, or agreed to charge, for performing the functions of responsible entity;
 - (b) any other terms or conditions which Mediterranean Olives proposed to impose, or did impose, in consideration of accepting appointment as responsible entity;
 - (c) any proposed or actual alteration in the rights or obligations of members of the relevant managed investment scheme; and
 - (d) any other proposed or actual amendment of the scheme documentation applicable to the relevant managed investment scheme.

NOTES

Last day for service

1. Subject to Note 2, you need not comply with the subpoena unless it is served on you on or before the day specified in the subpoena as the last day for service of the subpoena.
2. Even if this subpoena has not been served personally on you, you must, nevertheless, comply with its requirements, if you have, by the last day for service of the subpoena, actual knowledge of the subpoena and of its requirements.

Addressee a corporation

3. If the subpoena is addressed to a corporation, the corporation must comply with the subpoena by its appropriate or proper officer.

Document not in writing

4. If compliance with the subpoena requires the production of a document which is not in writing (such as a photograph, computer disk, diskette, audio-tape, video-tape etc.: see section 38 of the Interpretation of Legislation Act 1984) then, provided the original is held by you until trial, a copy only need be produced to the Prothonotary. If a copy is produced, it must be clearly marked as such and it may be used by the Prothonotary for the purposes of inspection and, if necessary, copying.

Question concerning subpoena

5. Any question concerning this subpoena should be directed not to the Court but to the solicitor for the party at whose request the subpoena was issued.

Availability of documents for inspection and at trial

6. All documents produced in compliance with this subpoena will be available, unless earlier returned, at the trial of the proceeding and, subject to the following, may be inspected in the meantime by each party to the proceeding and his, her or its solicitor, and copies taken.

Objection by addressee to production or inspection

7. If you are the person required by this subpoena to produce documents, and you object to producing the documents or to their being inspected by any one or more of the parties to the proceeding, you must notify the Prothonotary in writing of your objection and the grounds of that objection before the day specified in the subpoena for the production of the documents. The party at whose request this subpoena is issued is required to inform you of the time and place when your objection will be heard by a Judge or an Associate Judge of the Court.

Objection by party served with subpoena to inspection

8. If you are a party to the proceeding and have been served with a copy of this subpoena, and you object to the documents being inspected by another party to the proceeding, you must notify the Prothonotary of your objection and the grounds of that objection before the day specified in the subpoena for the production of the documents. The party at whose request this subpoena is issued is required to inform you of the time and place when your objection will be heard by a Judge or an Associate Judge of the Court.

Objection by plaintiff to production of hospital or medical file or record

9. If you are the plaintiff in this proceeding and this subpoena seeks from another person the production of a hospital or medical file or record concerning you or your condition, you may, before taking objection, inspect the file or record produced to the Prothonotary and, after such inspection, notify any objection you may have to inspection of that file or record by any other party, provided that you make your inspection and notify your objection and the grounds of that objection, if any, in writing within seven days after the day specified in the subpoena for production.

Obligation of issuing party after objection

10. If you are the party at whose request the subpoena was issued and any objection is taken, either to the production of the documents or to their being inspected, you will be informed by the Prothonotary of the objection and of the time and place when the objection will be heard. You are required promptly to inform the addressee in the subpoena and all other parties to the proceeding accordingly so that they may be heard, if they wish, before the objection is determined.

Removal of document

11. Documents produced in compliance with this subpoena may not be removed from the custody of the Prothonotary, even for the purpose of their being photocopied, except upon application in writing signed by a solicitor for a party. Rule 42A.11(2) of Chapter I of the Rules of the Supreme Court is then relevant:

"(2) A solicitor who signs an application under paragraph (1) and removes a document from the office of the Prothonotary, undertakes to the Court by force of this Rule that—

- (a) the document will be kept in the personal custody of the solicitor or a barrister briefed by the solicitor in the proceeding; and
- (b) the document will be returned to the office of the Prothonotary in the same condition, order and packaging in which it was removed, as and when directed by the Prothonotary."

A breach of this undertaking may be dealt with as a contempt of court.

Production of a number of documents or things

12. If you produce more than one document or thing, you must, if requested by the Prothonotary, produce a list of the documents or things produced.

Production of copy instead of original

13. You may, with the consent of the issuing party, produce a copy, instead of the original, of any document that the subpoena requires you to produce.

Return of documents or copies

14. Any documents produced by you in accordance with this subpoena may be returned by post to you at your address shown on this subpoena but you may in writing on or attached to this subpoena (or a copy) request that the documents be posted to you at another address given by you or that you be informed when they are available to be collected by you.

Applications in relation to subpoena

15. You have the right to apply to the Court—

- (a) for an order setting aside the subpoena (or a part of it) or for relief in respect of the subpoena; and
- (b) for an order with respect to your claim for privilege, public interest immunity or confidentiality in relation to any document or thing the subject of the subpoena.

Loss or expense of compliance

16. If you are not a party to the proceeding, you may apply to the Court for an order that the issuing party pay an amount (in addition to any conduct money or witness's expenses) in respect of the loss or expense, including legal costs, reasonably incurred in complying with the subpoena.

Contempt of court—arrest

17. Failure to comply with a subpoena without lawful excuse is a contempt of court and may be dealt with accordingly.
18. Note 17 is without prejudice to any power of the Court under any Rules of the Supreme Court (including any Rules of the Supreme Court providing for the arrest of an addressee who defaults in attendance in accordance with a subpoena) or otherwise, to enforce compliance with a subpoena.

1

**Notice of meeting of Members of 2005Timbercorp Citrus Project ARSN
114 091 299**

The attached List of Members of the 2005 Timbercorp Citrus Project ARSN 114 091 299 ("Project") who hold interests in the Project carrying at least 5% of the votes that may be cast at a meeting of the Project's members HEREBY GIVE NOTICE that they have pursuant to section 252D of the Corporations Act, 2001 requisitioned a meeting of Members ("Members") of the Project at the time, date and place listed below to consider and vote on the resolutions specified in this notice.

Please refer to the Explanatory Memorandum that accompanies this Notice of Meeting for important information on the resolutions proposed.

Time and date of Meeting: 25th February 2010 at 12.00 noon

Place of Meeting: Power House Function Centre, Aughlie Drive, Albert Park Lake.

Business: Election of Chairperson

Pursuant to section 252S of the Corporations Act, 2001, the members present must elect a member present to chair the meeting. Nominations will be accepted on the floor of the meeting and a member will be elected to chair the meeting from those nominations

Extraordinary Resolution 1 –Removal of Current Responsible Entity

Subject to Extraordinary Resolution 2 being passed, that the current responsible entity of the Project, Timbercorp Securities Limited ACN 092 311 469 (In Liquidation) be removed as responsible entity of the Project, effective from the time referred to in Extraordinary Resolution 2

Extraordinary Resolution 2 – Appointment of New Responsible Entity

Mediterranean Olives Estate Limited ACN 091 024 396 to be appointed as the new Responsible Entity (RE), such appointment to take effect immediately upon the AFSL of Mediterranean Olives Estate Limited being amended to allow it to accept such appointment

NOTES

Explanatory Memorandum

An explanation of the resolutions is set out in the accompanying Explanatory Memorandum.

Proxies

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1. Members have a right to appoint a proxy.
2. A proxy form accompanies this Notice of Meeting.
3. A proxy does not have to be a Member.
4. If a Member appoints 2 proxies the Member must specify the proportion or the number of votes each proxy is appointed to exercise.
5. The Member or the Member's attorney must sign the proxy form. Proxies given by a corporation must be executed in accordance with the Corporations Act and the Constitution of that corporation.
6. Please forward your proxy to:

TGG Citrus Committee Inc
Po Box 1147
Healesville, 3777

not less than 72 hours before the time set for the holding of the meeting or adjourned meeting at which the person named in the proxy form proposes to vote.

TGG Citrus Committee Inc will then attend to lodgement of your proxy with the responsible entity within the statutory time of 48 hours prior to the meeting.

List of Members Calling Meeting

Name	Address	No. of Groves

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2005 Timbercorp Citrus Project ARSN 114 091 299

PROXY FORM

I
(Name of Member)

of
(Address of Member)

(Member) being a Member of 2005 Timbercorp Citrus Project ARSN 114 091 299 appoint

.....
(Name of Proxy)

of
(Address of Proxy)

or failing him/her, the Chair of the meeting as my proxy to attend and vote for me and
on my behalf at the meeting of the Members to be held on [] at []
and at any adjournment of that meeting.

This proxy is directed to vote as specified below in relation to the following matters. However
if nothing is specified below then my proxy has a general proxy.

Extraordinary Resolution 1 – Removal of Current Responsible Entity

☐

FOR

☐

AGAINST

Extraordinary Resolution 2 – Appointment of New Responsible Entity

☐

FOR

☐

AGAINST

(A mark should be placed in the appropriate box if the Member wishes to direct the proxy to vote in a specified way in relation to the above resolutions if no direction is given the proxy may vote or not as the proxy see fit).

This form must be signed by the Member or by an attorney of the Member.

Dated:

If the Member is a company.

EXECUTED by THE MEMBER in accordance with section 127 of the Corporations Act, 2001:

Director/Secretary

Director

Name PLEASE PRINT

Name PLEASE PRINT

If the Member is an individual

SIGNED by THE MEMBER in the presence of:

Witness

Member

Name PLEASE PRINT

Name PLEASE PRINT

If the Member is a company or the Member is an individual and the proxy is to be signed by the Member's attorney

SIGNED for and on behalf of THE MEMBER by the duly appointed attorney who warrants that the attorney has received no notice of revocation of the appointment in the presence of:

Witness

Attorney

Name PLEASE PRINT

Name PLEASE PRINT

Date of Power of Attorney

Error! Unknown document property name.

**2005 Timbercorp Citrus Project ARSN 114 091 299
Explanatory Memorandum to Members**

These notes explain the resolutions set out in the Notice of Meeting and should be read in conjunction with the Notice.

Your Vote is Vital
Please ensure that if you cannot attend you send in a proxy voting in favour of the resolutions.

Extraordinary Resolution 1 – Removal of Current Responsible Entity and

Extraordinary Resolution 2 – Appointment of New Responsible Entity

Section 601FM(1) of the Corporations Act, 2001 provides that if members of a registered scheme want to remove the responsible entity, they may take action under Division 1 of Part 2G.4 for the calling of a members' meeting to consider and vote on a resolution that the current responsible entity should be removed and a resolution choosing a company to be the new responsible entity. These resolutions must be extraordinary resolutions if the scheme is not listed.

The Members of the Project who have called this meeting consider that Member's interests will be better served by the removal of Korda Mentha (liquidators) acting for the current responsible entity Timbercorp Securities Limited ACN 092 311 469 (In Liquidation) (TSL) and the appointment of Mediterranean Olives Estate Limited ACN 091 024 396 as the replacement Responsible Entity

Statement of purpose

- To date, growers have been told their schemes are "hopelessly Insolvent"
- There is strong evidence to show that this is not the case – the assets have been sold at a price substantially below replacement costs, to the detriment of the growers.
- The committee believe that, had the sale process been handled differently by Korda Mentha, the growers benefits would have been dramatically improved.
- The purchasers of these projects, however, will become even more profitable as
 - water costs are coming down
 - world demand is effectively increasing prices
 - fertiliser costs has been reducing

Error! Unknown document property name.

- o Australian dollar eases back to a more realistic values
- In addition, profitability will be further enhanced once excessive Timbercorp costs are removed (some 25 to 30% of costs).
- Korda Mentha are "hopelessly conflicted" - as they try to act for both banks/secured creditors as liquidators, as well as taking on the role of RE for growers. The result is that the growers interests have taken second place.
- Changing the RE is not a futile exercise - an unbiased RE can maximise protection of your rights.

Thus, the purpose for changing the RE is to have an independent and unconflicted representative having only grower/ investor interests at heart and pursuing all available options to financially secure the best outcome to growers. By replacing the RE we are not trying to overturn any sale of land - we are simply maximising growers rights. A new RE can achieve a number of things-

1. Maintain a check on Korda Mentha charges- both to date and going forward
2. Liaise and check with farm managers on their charges and actions to date - the RE should and does have extensive experienced consultants in the Citrus industry to be able to query these costs - Korda Mentha do not..
3. Seek to protect those leases still intact and an effectively keep all options open for the RE to negotiate the best outcome for growers using this leverage
4. Pursue any legal arguments on growers behalf
5. Protect and maximise the financial benefit derived from the growers "rights" in these projects - land, water, capital works, infrastructure. All these assets have been established and built from growers financial contributions.
6. Obtain and get access to necessary information to benefit growers - to date it's been very difficult to obtain pertinent information as an individual grower. An RE can do so.
7. As substantial fees have been paid to Korda Mentha to act as the Responsible Entity, and since it is taken out of growers funds proceeds irrespective, we should have someone of our choice - acting only for growers.
8. Establish a strong united presence to represent growers, and growers only (without any conflict of interest) and achieve a legal standing for the grower group that individual growers on their own cannot achieve.
9. Respond and react quickly to issues that arise - to the financial benefit of growers
10. Be paid the same way as Korda Mentha, so not costing more
11. Including arranging prompt payment of harvest proceeds to growers -which is vital for growers with loans.
12. Where projects had an independent responsible entity replace Korda Mentha, those projects had continued operating successfully with a positive future outlook. - Timbercorp Avocados, Mangoes.
13. Other agri schemes, such as Great Southern, have very recently just improved the position for investors substantially by appointing Gunns as their new Responsible Entity (RE)

Error! Unknown document property name.

The TGG Citrus Committee Incorporated is proposing the appointment of Mediterranean Olives Ltd as the RE with its own independent citrus agri-specialists. This combination brings a number of skills. This includes:-

- Substantial farming experience and technological innovation derived from leading world research in the Citrus production and water irrigation
- A wealth of Legal experience and skills - willing and able to argue legally with Korda Mentha
- both have MIS experience to enable them to understand the legislation, as they run their own MIS schemes
- Familiarity with the Timbercorp schemes - cashflows, constitution, leases, licences, agreements and other documentation
- Been involved from the onset of Timbercorp administration and been present and familiar with court cases and issues
- transparent fees;

Consequence of Resolutions Not Being Passed

In the event that a resolution is not passed by the requisite majority, the meeting will be adjourned to another date for a resolution to be put a second time.

Appointing A Proxy

In the event that you are unable to attend the meeting, you are urged to provide your proxy. You may direct your proxy to vote the way that you require, or you may leave the proxy to vote at their discretion.

You may appoint a proxy of your choice to attend the meeting on your behalf, or appoint the Chairperson at the meeting.

Error! Unknown document property name.

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:	25 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-21" now produced and shown to **CELIA JANE ARMSTRONG** at the time of swearing her affidavit on 25 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-21

**Letter from M Fernon to T May dated 13 December
2011**

Jenny Bogie

From: Michael Fernon
Sent: Tuesday, 13 December 2011 5:40 PM
To: 'Tom May'
Subject: Solora Citrus proceeding (1100583)
Attachments: img-Z13164044-0001.pdf

SaveToDatabase: 0

Tom

Please see attached letter

Michael Fernon | Director

Clarendon Lawyers | Level 17, Rialto North Tower, 525 Collins Street, Melbourne 3000
T + 61 3 8681 4419 | F + 61 3 8681 4499
www.clarendonlawyers.com.au

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Level 17 Rialto North Tower
525 Collins Street Melbourne
Victoria 3000 Australia

T 03 8681 4400 F 03 8681 4499
www.clarendonlawyers.com.au
ABN 43 704 593 249

13 December 2011

Our ref: MJF:1100563

Tom May
Herbert Geer
Level 20, 385 Bourke Street
MELBOURNE VIC 3000
By email: tmay@herbertgeer.com.au

Dear Tom

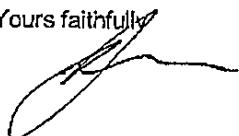
Timbercorp Solora citrus proceeding: SCI 2011 6606

We refer to our discussion yesterday.

We confirm that if the TGG (Garnaut) nominated representative is appointed as representative of growers in the 2005 Timbercorp Citrus Project and we act for that representative, we will:

- (a) keep your client, through Ms Bezencon, informed on any settlement negotiations, to the extent that such negotiations are not confidential, and of any directions or orders by the court that growers be notified and/or be provided with an opportunity to appear at court to make submissions on any proposed settlement; and
- (b) not object to your client making an application for their costs to date to be paid out of the fund constituted by the proceeds of sale of the Solora citrus assets – we are not able to seek those costs for your client.

Yours faithfully



Michael Fernon
Director

Enc
Direct Tel: 03 8681 4419
Email: michael.fernon@clarendonlawyers.com.au

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:	25 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-22**" now produced and shown to **CELIA JANE ARMSTRONG** at the time of swearing her affidavit on 25 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-22

**Transcript of the hearing before Davies J on 16
December 2011**

Australia and New Zealand Banking Group Limited

v.

OIM2 Pty Ltd (receivers and managers appointed as trustee for
Timbercorp Orchard Trust #3) & Ors

And

In the Matter of an application by Fenceport Proprietary
(16/12/11)

(Davies J)

MS HARRIS: Your Honour, in that matter I appear with my
learned friend Mr Rush. I'm not sure whether Your Honour
had both matters called over or just one. There are two
related proceedings - - -

HER HONOUR: Yes.

MS HARRIS: - - - 6604 and 6606.

HER HONOUR: Yes, I have both matters before me.

MS HARRIS: If Your Honour is content to deal with both matters
at the same time, it might be solicitous Your Honour and
I appear in both matters on behalf of the plaintiff with
my learned friend Mr Rush.

HER HONOUR: Yes, thank you Ms Harris.

DR BIGOS: If Your Honour pleases there's another related
proceeding, which is Number 6777.

HER HONOUR: Yes.

DR BIGOS: In the matter of Fenceport.

HER HONOUR: Yes, I have that also.

DR BIGOS: In that matter I appear for the plaintiffs,
Your Honour.

HER HONOUR: Thank you, Dr Bigos.

MS PASCOE: Your Honour, I appear on behalf of Michael Fung and
Paul William Kirk, they're the receivers and managers of

1 the relevant OIM companies and they're the 3rd and
2 4th defendants in 6604 and 2nd and 3rd in 6606.

3 HER HONOUR: Thank you, Ms Pascoe.

4 MR BIGMORE: If Your Honour pleases I appear with Mr Hopper for
5 the growers. It'll become apparent that they are
6 specifically growers who are intended to be joined as
7 representative parties in this case.

8 HER HONOUR: Yes, thank you Mr Bigmore.

9 MR TANG: Thank you, Your Honour. If Your Honour pleases I
10 appear for the 1st and 2nd defendants in Proceeding 6604
11 and for the 1st defendant in Proceeding 6606.

12 HER HONOUR: Yes, thank you, Mr Tang.

13 MS BEZENCON: Excuse me a minute, I'm sorry I'm not sure how I
14 (indistinct) and I'm not sure about exactly the number.
15 But I'm appearing for the Timbercorp Grower Group Citrus
16 Committee and we're (indistinct).

17 HER HONOUR: Yes, and your name is?

18 MS BEZENCON: Kerree Bezencon.

19 HER HONOUR: Yes, thank you Ms Bezencon.

20 MS HARRIS: Your Honour, can I deal with the common matters
21 together and then each matter seriatim if Your Honour
22 pleases? Your Honour should have two originating
23 motions, one in each proceeding and summonses on each
24 originating motion. Order 6 in each summons, which is an
25 order seeking to have the proceedings managed and then
26 dealt with together - - -

27 HER HONOUR: Yes.

28 MS HARRIS: - - - should cross refer. So Your Honour will see
29 that the proceeding number in each summons is blank and
30 it's intended to cross refer.

31 HER HONOUR: Yes, I understand.

1 MS HARRIS: If Your Honour pleases. In each matter Your Honour
2 ought to have an affidavit of
3 Clinton Charles Hinchin - - -
4 HER HONOUR: Yes.
5 MS HARRIS: - - - sworn on 5 December.
6 HER HONOUR: Yes.
7 MS HARRIS: Then in the Solora proceeding Mr Hinchin swore a
8 further affidavit dated 15 December 2011, which I believe
9 was forwarded to Your Honour's chambers last night. I
10 have a copy - - -
11 HER HONOUR: I'm not sure that I have - - -
12 MS HARRIS: - - - in court if Your Honour doesn't have that
13 affidavit.
14 HER HONOUR: I don't seem to have it. No, I do have it.
15 MS HARRIS: Thank you, Your Honour.
16 HER HONOUR: I do have it.
17 MS HARRIS: It relates to a discrete issue in relation to
18 representation on that second Solora proceeding. The
19 6604 proceeding I'll refer to with Your Honour's leave as
20 the Liparoo Yungara proceeding, because that's the name
21 of the land concerned.
22 HER HONOUR: Yes.
23 MS HARRIS: Then the 6606 proceeding as the Solora proceeding,
24 again after the name of the land.
25 HER HONOUR: Yes.
26 MS HARRIS: Each proceeding arises out of the insolvency of the
27 Timbercorp group.
28 HER HONOUR: Yes.
29 MS HARRIS: With which Your Honour is very familiar. Each
30 proceeding is brought by a secured creditor of the
31 Timbercorp entity, as ANZ, seeking some or all of the

1 proceeds of sale of assets, which were formerly deployed
2 in MIS arrangements conducted by Timbercorp.

3 HER HONOUR: Yes.

4 MS HARRIS: Can I give Your Honour a little snapshot of the
5 issues in each of the proceedings. The Liparoo Yungara
6 proceeding, again arises out of MIS arrangements
7 conducted in relation to horticulture, again in relation
8 to almonds. Your Honour is familiar with the almond
9 schemes of course, it's the almond schemes that were
10 deployed on the Liparoo Yungara land were 2001 through to
11 2005 registered MIS's.

12 HER HONOUR: Yes.

13 MS HARRIS: Plus a private offer project in 2002, which was
14 also the subject of Your Honour's judgment in the
15 apportionment proceeding. As before, Your Honour TSL,
16 Timbercorp Securities Limited, is the RE of all those
17 schemes save for the private office scheme, where again
18 Almond Management was the manager. Your Honour is
19 familiar with all of those schemes in the context of
20 Bossi v. ANZ.

21 In terms of the ownership of the Liparoo land, the
22 Liparoo land was owned by OIM#2 Pty Ltd, the
23 1st defendant. It is in receivership - it's not in
24 liquidation Your Honour, it's in receivership. It's
25 trustee for the Timbercorp Orchard Trust #3, which is a
26 wholly owned subtrust of the Timbercorp Primary
27 Infrastructure Fund, listed property trust.

28 The Yungara land is owned by OIM#3, which is also in
29 receivership. Confusingly it's trustee for the
30 Timbercorp Orchard Trust #5, which is also owned by the
31 Timbercorp Primary Infrastructure Fund. Your Honour

1 might recall because these matters were before you in
2 late 2009, early 2010, the Liparoo land was the subject
3 of a sale contract between OIM#2 as the owner and other
4 stakeholders and Olam Orchards. That was dated 16
5 November 2009.

6 On the same date a sale contract was entered into
7 between the relevant parties in relation to the Yungara
8 land. Until the sale both of those properties were the
9 subject of securities in favour of my client. The sale
10 contracts were the subject of conditions precedent,
11 effectively requiring the extinguishment of the interests
12 of the growers in the schemes conducted on that land and
13 having the sale proceeds set aside for determination in
14 relation to apportionment between those who might be
15 entitled to them.

16 Your Honour made orders in those terms on
17 11 December 2009 and since that date proceeds have been
18 sitting in an account held by the receivers as
19 stakeholders. The net proceeds realised on the sale
20 awaiting apportionment are approximately \$147.5m, so this
21 proceeding Your Honour is directed towards the Liparoo
22 Yungara proceeding, it's directed towards ascertaining
23 who might have a right to share in those proceeds and the
24 value of the rights of those stakeholders.

25 HER HONOUR: Yes.

26 MS HARRIS: Can I deal with representation in relation to the
27 Liparoo Yungara proceeding Your Honour. The net proceeds
28 of sale exceed by some amount the secured debt. So
29 depending upon the entitlement of growers to share in the
30 net proceeds the companies which own the land have an
31 interest in the upside as it were, any amounts over and

1 above the amount of the secured debt.

2 As Mr Hinchin deposes, the directors of the company
3 who are represented by Maddocks are happy to represent
4 the interests of the company in this proceeding. The
5 receivers will in effect simply act as stakeholders and
6 when I come to the orders Your Honour will see that it's
7 proposed that they don't have to play any substantive
8 role in the proceedings.

9 In relation to grower representation Your Honour,
10 again when I come to the orders Your Honour will see that
11 one nominee grower is put forward for each of the
12 affected schemes, that is 2001, 2002, 2003, 2004, 2005
13 registered project and one for the 2002 private office
14 scheme. Each of these growers is represented by my
15 learned friend, Mr Bigmore, instructed by Clarendon
16 Lawyers. It's proposed that those grower representatives
17 as in the earlier almond proceeding, be appointed
18 pursuant to
19 Order 16 of the Supreme Court Rules.

20 No opposition has been heard from any other
21 interested party as to the appointment of those growers
22 Your Honour, so in effect what we're seeking to implement
23 is the same procedure as was utilised in the earlier
24 almond proceeding. Can I then give Your Honour a little
25 bit of background on the Solora proceeding, before moving
26 to the orders that we seek in each? The Solora land was
27 used for the 2005 Timbercorp citrus project. As in the
28 other schemes, the other registered schemes, Timbercorp
29 Securities Limited was the RE of that registered scheme
30 and is now of course in liquidation.

31 The structure of that scheme is similar, not

1 identical but similar to the almond schemes. The
2 landholding arrangements are probably most similar to the
3 licence schemes that Your Honour is familiar with and
4 then the arrangements for the management of the citrus
5 lots and so on is essentially the same as applied in
6 relation to the almonds.

7 The Solora land is owned by OIM#2, the
8 1st defendant, which is in receivership in its capacity
9 this time as trustee for the Timbercorp Orchard Trust #2,
10 which as before is owned by Timbercorp Primary
11 Infrastructure Fund, that listed property trust I
12 referred to earlier. As before there was a contract for
13 the sale of assets relating to the citrus project -
14 sorry, I beg your pardon, relating to the Solora land
15 which was entered into between OIM#2 and other
16 stakeholders on the one hand and Costa Exchange Limited
17 on the other, on 18 December 2009.

18 Until that point, Solora was the subject of
19 securities granted in favour of my client ANZ, and the
20 secured debt is 12.6 million plus interest. The sale
21 realised \$13.3m-odd, so there's a little gap between the
22 secured debt and the proceeds of sale again Your Honour.
23 As before the sale contracts were the subject of like
24 conditions precedent that the property was to pass
25 unencumbered by the grower interests, which were to be
26 extinguished subject to putting the sale proceeds aside
27 awaiting apportionment.

28 Your Honour made orders to that effect on
29 26 February 2010 and Your Honour might remember that
30 Ms Bezencon was on that occasion represented by counsel
31 who was heard against the making of the orders and

1 Your Honour ultimately decided the orders ought to be
2 made. Settlement under the sale contract occurred in
3 April this year and again these proceedings are directed
4 towards the same end point as the Liparoo proceedings,
5 namely determination of which stakeholders might have an
6 entitlement to share in the net proceeds of sale and
7 valuation of those rights.

8 In terms of representation Your Honour, as I've
9 pointed out the net proceeds of sale presently exceed the
10 secured debt by a small margin. So depending upon the
11 entitlement of growers to share in those net proceeds,
12 again there's a need for representation of the interests
13 of the owning companies and the directors have again
14 agreed - the directors of the owning company has again
15 agreed to fulfil that role. Again the receivers are
16 merely stakeholders and will not take any substantive
17 part in the proceeding.

18 An issue which we apprehend will require some
19 argument before Your Honour this morning is in relation
20 to the grower representation. Your Honour will see from
21 the affidavit of Mr Hinchin filed in the Solora
22 proceeding that there has been a deal of correspondence
23 and discussion both with Clarendon Lawyers who represent
24 the grower who is proposed to be nominated as the grower
25 representative under Order 16 and also with Herbert Geer,
26 Mr May or Herbert Geer, who was instructed by Ms Bezencon
27 on behalf of the TGG Citrus Committee.

28 Mr Hinchin deposes that - I may just summarise the
29 position rather than taking Your Honour through the
30 affidavit bit by bit. The process of discussing grower
31 representation in this proceeding, bearing in mind that

1 only one grower representative is required, because
2 there's only one scheme in issue, commenced in August.

3 At that stage my instructing solicitors approached
4 both Herbert Geer and Clarendon's and pointed out that
5 proceedings would be issued imminently and could they
6 turn their minds to whether they wanted to seek
7 instructions about grower representation.

8 Clarendon's indicated in August that they would be
9 in a position to act for a grower nominee. Herbert Geer
10 wrote on 12 September saying that they acted for
11 Ms Bezencon and the TGG Citrus Committee and would act
12 for a grower representative subject to the payment of
13 their costs, but they didn't nominate a particular grower
14 representative at that time. Indeed they hadn't
15 nominated anyone until a couple of days ago as a proposed
16 grower representative.

17 In the meantime Your Honour it became apparent and
18 probably the issue is most neatly summarised in
19 Mr Hinchin's Exhibit 15, which is a letter from Allens
20 Arthur Robinson to Herbert Geer of 23 November 2011.

21 HER HONOUR: I don't have the exhibits.

22 MS HARRIS: Can I hand you up a copy?

23 HER HONOUR: Here they are. I'm sorry, what exhibit number?

24 MS HARRIS: Fifteen, in the Solora - so 6606.

25 HER HONOUR: Yes.

26 MS HARRIS: Might I just summarise an issue there discussed to

27 Your Honour. Mr May of Herbert Geer, who proposes to act
28 for a nominee grower on the instructions of the TGG
29 Citrus Committee is and was in 2009 and 2010 the managing
30 director of a company called Mediterranean Olive Estate
31 Limited.

1 Mediterranean Olive Estate has acted in the capacity
2 as responsible entity of a number of registered
3 investment schemes, including olive schemes and it was
4 approached to become the responsible entity for the 2005
5 citrus project by the TGG Citrus Committee.

6 Your Honour may recall that there were some
7 proceedings actually conducted before Your Honour last
8 year at which meetings held to seek the interposition or
9 the substitution of Mediterranean Olives as RE of the
10 citrus scheme and others, came before Your Honour for
11 some orders in relation to the validity of the
12 resolutions passed at those meetings and if necessary
13 I'll hand up to Your Honour an affidavit sworn by
14 Mr Monroe of KordaMentha in those proceedings which sets
15 out the chronology of what occurred.

16 In short compass a meeting was held in March 2010.
17 There were meetings of both the growers in the 2004
18 citrus project and the 2005 citrus project. The
19 resolutions put to those meetings were to the affect that
20 TSL ought to be removed as responsible entity of the
21 project and Mediterranean Olives substituted.

22 The resolutions did not succeed in relation to the
23 2004 project, but were purportedly passed in relation to
24 the 2005 project with which we are concerned. So there
25 were resolutions purportedly appointing Mr May's company
26 as the RE of the schemes at that time.

27 Thereafter substantial debate, I think it's fair to
28 say, took place between the liquidators of TSL and those
29 promoting the restructuring of the scheme as to whether
30 those resolutions had been validly passed. That issue
31 was the subject of the proceedings before Your Honour and

1 ultimately some consent orders were filed in those
2 proceedings to the effect that the resolutions and the
3 calling of the meetings were invalid.

4 Nevertheless there was, as Your Honour will
5 appreciate, quite a deal of activity around the question
6 whether Mr May's company would assume the role of RE.
7 Your Honour will also recall that in the
8 Bossi v. ANZ proceedings, concerning the apportionment of
9 the almond assets that Your Honour decided earlier in the
10 year, one of the key issues in the proceeding was the
11 viability of the schemes and in particular whether there
12 was a prospect at the time Justice Robson made his orders
13 extinguishing the growers rights, that the schemes could
14 have continued and could have continued to term under a
15 new RE.

16 Those issues were explored in depth in the evidence
17 before Your Honour with the evidence of Mr Knox of
18 Huntley Management who was the managing director of the
19 putative RE in respect of the almond schemes. Findings
20 were made by Your Honour in relation to the prospect that
21 a new RE would have been able to take over the schemes
22 and all of the hurdles, as it were, that would have had
23 to have been overcome in order to put a new RE in place.
24 We apprehend that it's likely that similar issues will
25 arise for the consideration of the court in this case.
26 In other words, that again there will be an issue about
27 viability of the schemes and the question whether they
28 could have continued to term if the grower rights had not
29 been extinguished by force of Your Honour's orders.

30 For that reason we apprehend that there is a real
31 prospect that evidence from and concerning Mediterranean

1 Olives will have to be given in the proceeding. In
2 particular there is a real prospect that Mr May will have
3 to give evidence.

4 Now, he may or may not be called by our opponents
5 and if he were not called by our opponents then obviously
6 we would have to give serious consideration to calling
7 him ourselves, because we might want to show that there
8 was no - show through him that there really was no
9 realistic prospect of the schemes being restructured and
10 continuing. Now, will be aware that under the solicitors
11 practice rules, the legal profession practice rules, a
12 solicitor can't continue unless there are exceptional
13 circumstances to act if he is or is likely to give
14 evidence in a proceeding for this kind.

15 We are concerned Your Honour that there is a
16 sufficiently real prospect of Mr May having to give
17 evidence in the proceeding, that if he were to act for
18 the grower representative in this proceeding that at some
19 point he would have to withdraw and with all of the
20 associated costs and delay and expense to all parties
21 that would ensue from that.

22 It is of course of special interest to the plaintiff
23 on two levels I guess Your Honour. Firstly we're
24 interested in the expeditious resolution of the
25 proceeding generally. But Your Honour will see that the
26 orders proposed that the grower representative have their
27 costs paid out of the fund. Any issue in the proceeding
28 that was likely to result in great diminution in the fund
29 would affect our interests and also those of the other
30 stakeholders, including in particular the property owned
31 company.

1 That's on the one hand, Your Honour. These matters
2 were raised with Mr May. Your Honour will see from the
3 affidavit that the correspondence which followed really
4 didn't tackle the issue. Mr May's response was in
5 effect, "I can't see why the growers would want to call
6 me, so I wouldn't be embarrassed from acting. When I was
7 issued with a subpoena in the almond proceeding, I didn't
8 have any documents to return so I don't think I'd be of
9 any use to anybody".

10 Now, Your Honour with respect we don't find those
11 reasons of much comfort and for the reasons that I've
12 just articulated to Your Honour or sought to, even if
13 Mr Bigmore doesn't choose to call Mr May in his case,
14 there's every chance that I might want to call him in
15 mine. Particularly I guess if Mr Bigmore chooses not to
16 call him because I might want to rebut any suggestion
17 that there could have been another RE.

18 Critically Your Honour, Mr May has not put forward
19 any reason why the grower representative nominated on
20 behalf of the Clarendon's - those instructing Clarendon's
21 would be inappropriate. Coming to that grower
22 representative, the grower representative there is in
23 fact a joint venture between two individuals whose names
24 are Mr and Mrs Bugden, Robert Bugden and Elizabeth
25 Bugden, who jointly owned an interest in the citrus
26 project.

27 Your Honour will not find anything in the affidavit
28 material to suggest that those persons are inappropriate.
29 Your Honour we see that there are some very positive
30 imperatives for appointing those persons because they
31 will then be represented by the same lawyers who not only

1 conducted the earlier proceedings but will be conducting
2 on behalf of the growers subject to Her Honour's
3 discretion this morning, the case of the nominee
4 representatives in the Liparoo Yungara proceedings.

5 Your Honour will recall that no one else has come
6 forward in the Liparoo Yungara proceeding wanting to be
7 nominated as a grower, so if Your Honour were to make
8 those orders, those representative orders in Liparoo
9 Yungara, then Clarendon's and their counsel will be the
10 (indistinct) for the growers in that proceeding. We say
11 that there are strong reasons driven by efficiency in
12 terms of resources and costs for having the same set of
13 lawyers deal with the grower interests in the Solora
14 proceeding.

15 Particularly as we will be urging on Your Honour to
16 deal with these proceedings together as it were, again
17 for reasons of efficiency and in order to deplete the
18 fund as little as possible because somewhat unusually
19 - although not unusually for a representative case, all
20 of the costs of the growers will be coming out of the
21 fund here, so it is in the interests of all stakeholders
22 we would say to have that fund depleted as little as
23 possible. With that background Your Honour, might I come
24 to the orders which again I hope were forwarded to
25 Your Honour last night.

26 HER HONOUR: Yes, I have that.

27 MS HARRIS: Your Honour will see - and perhaps it's helpful
28 Your Honour to have the Liparoo orders and the Solora
29 orders side by side, because they differ little, subject
30 only to one matter. You will see when we come to it that
31 in Solora we are proposing that notwithstanding what I

1 just said about Mr May and those he represents, we would
2 propose that there be a regime for serving on them
3 documents filed in this proceeding so that they are aware
4 of what's going on and if they feel the need to seek to
5 come before the court to either intervene or to have
6 their point of view put forward.

7 Your Honour might recall that that regime was also
8 implemented in the almond proceedings, where
9 Ms Bezencon's interests wanted to intervene them. Your
10 Honour, in relation to each order we have recorded in
11 other matters a reservation of rights in relation to
12 costs to which I will return in a minute, when I come to
13 the costs of the growers. The first order is simply a
14 procedural order Your Honour, included in light of the
15 short amount of time that's occurred in between issue of
16 the proceeding and this directions hearing.

17 Not all of the defendants Your Honour have filed
18 notice of appearance so there is a formal need to
19 dispense with the requirements of the rules in that
20 regard. Your Honour, again the second order is a
21 procedural one in relation to proceeding by way of
22 originating motion.

23 The third order in each proceeding is the one
24 relating to representation. It specifically identifies
25 the individuals to act on behalf of the grower interests
26 and Your Honour might note that the grower
27 representatives put forward in relation to the various
28 schemes are the same I think in each case as those in the
29 earlier proceeding to the extent that there is overlap
30 between the schemes the subject of each proceeding.

31 The fourth order then just formalises their joinder

1 as defendants and the fifth would facilitate an amendment
2 to the originating motion to take account of their
3 potential interest as stakeholders, so seeking a
4 declaration as to the extent of their interests in the
5 proceeding.

6 The sixth order in each set is the one I
7 foreshadowed earlier about the two sets of proceedings
8 being heard and managed together. Then the seventh order
9 in each case relates to the position of the receivers.

10 Your Honour has heard from me this morning that it's
11 not proposed by any party that the receivers play
12 anything other than the stakeholders role, effectively an
13 interpleader, so that they would be excused from taking
14 any step in the proceeding subject to the three matters
15 that are there set out which they have identified as
16 being matters that they may wish to be heard.

17 HER HONOUR: Yes.

18 MS HARRIS: Then there is interposed in the Solora orders, an
19 Order 8, which as I foreshadowed contemplates the service
20 of all documents filed in the proceeding on Herbert Geer
21 as agent for the TGG Citrus Committee, so that they may
22 be kept apprised of what's happening in the proceeding
23 and seek to intervene or be heard as they consider
24 appropriate.

25 The following order in each set relates to the costs
26 of the grower representatives. Your Honour, there is a
27 redundant comma in (b) after the words "qualified costs
28 consultant". Would Your Honour mind removing that comma
29 please so that it's clear that what's to be agreed by the
30 parties is the identify of the costs consultant?

31 Thereafter Your Honour, there's an order with

1 respect to further directions on 24 February. That date
2 has been chosen for two reasons. Your Honour I think
3 conducted a directions hearing in the Boundary Bend
4 proceeding last week, where Mr Anasstasiou appeared for I
5 think the Bossi interests.

6 HER HONOUR: Yes.

7 MS HARRIS: And alerted Your Honour to the fact that
8 discussions are currently on foot and propose to be
9 ongoing in relation to settlement not only of that
10 proceeding but potentially all of the proceedings
11 concerning the Timbercorp assets and the apportionment of
12 the sale proceeds of those assets. As Mr Hinchin deposes
13 in his affidavit that's our proposal to seek to explore
14 the possibility of a global settlement.

15 HER HONOUR: Yes.

16 MS HARRIS: And to use the next couple of months in order to
17 further that end. So what we propose is that these
18 matters would come back before Your Honour on
19 24 February, which is the same day as the Boundary Bend
20 proceedings. We would also propose that there be no
21 other orders for substantive steps in the meantime, so
22 that we can focus our efforts as it were on giving a
23 compromise a red hot go.

24 That's why Your Honour won't see any further orders
25 in relation to the exchange of contentions or the like in
26 the orders. So what we would propose to come back before
27 Your Honour on the 24th and let Your Honour know how
28 we're going and whether we need some further directions
29 from Your Honour on that.

30 Can I just go back to the issue of the grower's
31 costs in Order 8 Liparoo and 9 of Solora. The order

1 there is in reasonably conventional form in relation to
2 the grower's representatives having their costs out of
3 the fund.

4 It's proposed Your Honour though to record in other
5 matters, matters that have been communicated by my client
6 to the proposed grower representatives lawyers in order
7 to make clear that it does ultimately reserve its rights
8 to review the costs and to make any submissions as it
9 might see fit on their reasonableness. Now that might
10 not happen until the end of the proceeding Your Honour,
11 because it mightn't be apparent until then that there is
12 an issue or not as the case may be in that regard.

13 HER HONOUR: Yes.

14 MS HARRIS: But we thought it prudent to place that on the
15 record so that no one's in any doubt about that. It
16 wouldn't prevent the payment of costs in the interim, so
17 Your Honour will see that the regime provides for payment
18 of invoices on their submission by the receivers, so the
19 receiver's don't need to worry about whether there is or
20 is not a dispute. They will pay the invoice and then any
21 dispute will be sorted out if it ultimately arises down
22 the track.

23 Now we apprehend that that aspect of the orders
24 causes Mr Bigmore's client some grief, so Mr Bigmore will
25 no doubt address you on that. But we would submit
26 Your Honour that that's not an appropriate matter to flag
27 at this stage so that everyone knows that it's not just a
28 blank cheque as it were. Your Honour, they're the
29 matters that I wanted to address you on in relation to
30 the orders. Was there anything further I can - - -

31 HER HONOUR: No, thank you, that was very helpful Ms Harris.

1 MS HARRIS: Thank you.

2 MR BIGMORE: It might be convenient Your Honour if we go next.

3 HER HONOUR: Yes.

4 MR BIGMORE: We thought it might be helpful for Your Honour to

5 have a copy of the revised ruling that Your Honour made

6 - the ruling was on 22 December 2009 and it was revised

7 on 19 February 2010. The written submissions that we put

8 forward in support of the orders in the almond case - - -

9 HER HONOUR: Yes.

10 MR BIGMORE: - - - particularly two issues, the one about

11 multiple representation of growers and the second issue

12 which is why there would be an order for pre-emptive

13 costs. As Your Honour has heard it's a matter of common

14 ground between us, the parties, at least the principle

15 protagonists at the Bar table, that there be an order for

16 pre-emptive costs. But we thought it might be convenient

17 to remind Your Honour of the basis of why such an order

18 is appropriate in these sorts of cases.

19 I won't say anymore about that aspect unless someone

20 else raises it. But as far as the first aspect is

21 concerned, we accept that it's appropriate for

22 Ms Bezencon's group to be provided with notice, as

23 Your Honour ruled in the almond's case. We don't support

24 an order for separate representation of a different group

25 of growers and we're not quite sure what Ms Bezencon

26 proposes today. But if Your Honour went to the Proposed

27 Order 8 in the Solora proceeding, it may be sufficient

28 that the order be for provision of the documents to TGG

29 Citrus Committee Inc, care of whatever address Ms

30 Bezencon wishes to advise Your Honour.

31 We don't cavil with Mr May's potential involvement

1 in the matter, but it might require some further
2 reflection and perhaps it might be inappropriate to as it
3 were provide an endorsement in the form of the order for
4 his involvement.

5 Certainly our learned friend makes a case for Mr May
6 not being involved. We don't want to be heard to support
7 that submission as to Mr May's involvement, it's probably
8 a matter for him and for Ms Bezencon and we don't really
9 want to intrude upon that. By the same token it might be
10 that on reflection it's better to provide for service on
11 the TGG Citrus Committee Inc.

12 Finally and the only other thing in which we have
13 anything particular to say Your Honour is in relation to
14 the other matters that are proposed for the reservation
15 of rights. There's very little between us. In the other
16 cases, the almonds and the Boundary Bend Olives, there
17 has been no such expressed reservation of rights in other
18 matters. But we recognised and we actually brought the
19 transcript reference from the almonds case.

20 It was on the 22 March 2010, p.21 of the transcript.
21 It was quite clear between Mr Anasstasiou and myself that
22 at the end of the day there's got to be a taxation. It
23 may be that all of the people interested in the fund are
24 able to agree and dispense with taxation, but that's
25 another thing. There's got to be a taxation of these
26 costs at the end because they're costs being incurred on
27 behalf of representatives in relation to a pooled fund.

28 What we don't want to have is intervention in the
29 process and I didn't hear my learned friend suggest that
30 there was going to be an intervention in the process on
31 the way through. We don't want to exclude them from

1 involvement in the taxation process, but we do want to be
2 able to get on with our business by complying with the
3 regime which is getting the tax consultant to provide the
4 certificate and then providing that in the usual way to
5 the receivers or the holders of the fund for payment as
6 we go.

7 We're quite content with the reservation of rights.

8 It may be sufficient to put that on the transcript and
9 leave it out of other matters. In our submission that
10 would be preferable.

11 HER HONOUR: Well when I look at Order 9 it's framed in terms
12 of an obligation on the 2nd and 3rd defendants to pay the
13 invoices within 14 days of presentation, so that is the
14 order.

15 MR BIGMORE: Yes.

16 HER HONOUR: And reservation of rights, although referred to in
17 other matters is not - doesn't operate on the terms that
18 the order - - -

19 MR BIGMORE: No, it doesn't.

20 HER HONOUR: - - - (indistinct) any right to form a view or
21 challenge the invoice - - -

22 MR BIGMORE: Quite so, Your Honour. We don't want to interfere
23 with the reservation of a right. By the same token the
24 expression of it in other matters is, we would submit not
25 entirely clear. It should be clear that the reservation
26 is the right to participate in the ultimate taxation of
27 the costs.

28 HER HONOUR: Yes.

29 MR BIGMORE: That's all we have to say on that subject
30 Your Honour.

31 DR BIGOS: If Your Honour pleases it may make sense if we were

1 to go next.

2 HER HONOUR: Yes, Dr Bigos.

3 DR BIGOS: (Indistinct) follows the same format as the other
4 aforementioned proceedings. There's one key difference
5 Your Honour, in the Supreme Court Proceeding 6777.

6 HER HONOUR: Sorry, I'm just trying to locate the file. Yes.

7 DR BIGOS: If Your Honour looks at the originating motion and
8 the schedule of parties, there's one key difference and
9 that is that the 1st plaintiff, which is a secured
10 creditor, is actually not a bank. So unlike in the Bossi
11 v. ANZ proceedings it actually is a trustee for the
12 forestry growers and that's because in the olive - in the
13 bought olive land case the forestry growers were the ones
14 that financed part of the payment of securities and so
15 they stand as financiers with securities. Those
16 securities were discharged in order to allow the sale to
17 take place.

18 Your Honour will see that the other plaintiff's, the
19 2nd, 3rd and 4th are necessary parties, but again will
20 play a minimal role in the proceedings and its likely
21 that at the next directions hearing we'll seek an order
22 that they be excused, in a similar way to what Ms Harris
23 said. The 4th plaintiff's name, unfortunately it omits
24 his surname and we'll correct that. Your Honour, can I
25 hand up a form of order and that's been provided to
26 Mr Bigmore.

27 HER HONOUR: Yes.

28 DR BIGOS: Your Honour, will see that again there's a
29 procedural matter in Paragraph 1 of the orders.
30 Paragraph 2 seeks a representative order in relation to
31 the five relevant schemes. There are four registered and

1 one unregistered scheme. Those grower representatives
2 have been (indistinct) by Clarendon's. There hasn't been
3 any opposition to those.

4 HER HONOUR: Yes.

5 DR BIGOS: The next order is that they be added as defendants,
6 so the olive growers will be on the other side of the
7 ledger. The fourth paragraph is a similar costs order.

8 HER HONOUR: Yes.

9 DR BIGOS: Again, there is a reservation of rights in other
10 matters that matches the reservation of rights in the
11 other proceeding. In my submission if Your Honour made
12 some reservation of rights in the other proceedings, it
13 would be appropriate to make a matching one here for
14 consistency. Then Paragraph 5 again is a procedural
15 order about an originating motion. We will amend the
16 originating motion to conform with Form 5C, at the moment
17 it's Form 5D. We'll list the new defendants and amend
18 the relief to incorporate them.

19 Finally, in Paragraph 7 there's a discharge of a
20 previous confidentiality order that His Honour
21 Justice Croft made about the sale agreement, that's no
22 longer confidential. So that order is sought to be
23 discharged. Again the matter would come back before
24 Your Honour for directions on the same date as all the
25 other matters.

26 HER HONOUR: Yes.

27 DR BIGOS: If Your Honour pleases.

28 HER HONOUR: Thank you, Dr Bigos.

29 MR BIGMORE: I should just say something very briefly about
30 that matter Your Honour. Clarendon's and I - Mr Hopper
31 was not involved at that stage, were retained on behalf

1 of the forestry growers and I appeared before
2 Justice Pagone when that sale agreement was approved and
3 it was in that sale agreement that the provision for the
4 establishment effectively of Fenceport was provided for.

5 We don't see that there's any difficulty, so long as
6 Fenceport, Mr Bigos' client, is representing the
7 interests of those growers. It's to a certain extent
8 grower against grower, but we're mindful of that and we
9 don't think that interferes with our putting the case on
10 behalf of the nominated representative growers in this
11 case.

12 DR BIGOS: Your Honour, my client doesn't have any difficulty
13 with that.

14 HER HONOUR: Yes, thank you. Yes, Mr Tang.

15 MR TANG: Thank you, Your Honour. In relation to our client's
16 position in Proceeding 6604 and 6606, I'd just say that
17 we adopt Ms Harris' learned submissions in all respects,
18 subject to one qualification if I may. Just to note our
19 client's interests in the proceedings as were articulated
20 by Ms Harris' landowner and as described as a pool of
21 fund, we're at the back of the queue and any diminution
22 of the pool of fund will adversely affect our client.

23 So as to the involvement of Herbert Geer we say that
24 for the arguments made about efficiency and efficiency as
25 it goes to costs, certainly our client opposes the
26 involvement of Herbert Geer as enacted for the same
27 reasons as suggested that Clarendon's may be a more
28 efficient actor for the grower representatives in those
29 two proceedings.

30 HER HONOUR: Yes, thank you, Mr Tang.

31 MS PASCOE: Your Honour, the receivers are satisfied with the

1 orders in the current form. There was just two very
2 minor issues I would like to raise. One is Order 7,
3 where the receivers are excused from participating
4 further, they would still like to be served with all
5 court documents given that they may have an interest in
6 some of the issues that come along down the track. It's
7 not excluded there and I don't think it needs to be
8 included in the orders, it's just something for the
9 parties.

10 HER HONOUR: Yes.

11 MS PASCOE: On the basis of the comments that have been made in
12 relation to order a payment to Clarendon Lawyers out of
13 the fund for costs, the receivers are satisfied that the
14 orders are clear and can remain in the form that they
15 are.

16 HER HONOUR: Yes, thank you. That leaves Ms Bezencon.

17 MS BEZENCON: (Indistinct).

18 HER HONOUR: If you could - Ms Pascoe, move out of the way, so
19 that you can use a microphone.

20 MS BEZENCON: Sorry, is that better?

21 HER HONOUR: Yes.

22 MS BEZENCON: Your Honour, we actually disagree strongly with
23 not being presented with the legal representative of our
24 choice. I'm talking on behalf of the citrus growers.
25 From our point of view we've used Tom May and Herbert
26 Geer on a number of occasions and that's over the last
27 two years. If I might just reiterate what has been said
28 by Tom, we think it's probably pretty unlikely that the
29 growers will call him. There are others who can give
30 evidence.

31 At the time when we were calling those meetings we

1 had to call them off under pressure, certainly from
2 KordaMentha and ABL and they were dropped. We agreed to
3 make them invalid and then we recalled those meetings and
4 we had an appropriate RE.

5 We've done an extensive and I mean more than just a
6 little bit, a really extensive lot of work about cash
7 flows, about the viability of the schemes. There are
8 quite distinct differences, without going into those
9 details there are quite distinct differences about the
10 citrus projects.

11 We've spent a lot of time, as I said, doing a lot of
12 homework in regards to not just the structures, the cash
13 flows analysis. We've talked to industry people,
14 contacts there. We've been at the forefront dealing with
15 - on the COI communing and inspection front as well as
16 with KordaMentha. We think that we really do represent
17 much more fairly the interests of the citrus growers and
18 therefore want to put their case forward.

19 HER HONOUR: I'm sorry, I don't understand that last statement,
20 that you represent the interests - - -

21 MS BEZENCON: Well from the citrus growers point of view we're
22 saying that we represent more of the citrus growers than
23 anybody else in the matter, so the TGG Citrus Committee
24 should be nominating the legal representative. In that
25 regard I personally hold citrus interests. Our clients
26 have one of the biggest holdings. Other committee
27 members - it's not just myself, other committee members,
28 such as Angus Hordan, he's got 78 lots. There were other
29 advisors and growers too and we actually communicate.
30 We've got a database where we communicate with all the
31 growers. There's some 265, we've got almost all of their

1 phone and emails and we're in regular touch.

2 Whereas I think with all due respect, Chris Garner,
3 whose instructing Clarendon doesn't have that rapport and
4 in fact we actually act for some of his clients who
5 against his wishes have opted for what we're suggesting
6 or recommending.

7 That can be reflected if I might say, that's
8 reflected in the - I've got some - sorry, I haven't got
9 copies of all of that, but that just shows you the number
10 of percentage that our group if you like - and I call it
11 (indistinct) team because it's not just me, but the TGG
12 Committee altogether represent on the 05, up to 86 per
13 cent of the growers there. On the 04 it's about - I
14 think it's 73 per cent, compared to Chris Garner where
15 there's none of the people own directly any citrus and
16 certainly are only representing a smaller amount there.

17 We also would like to note that in terms of the
18 involvement from Chris Garner and the TGG, we formed it
19 together actually, Chris and myself, then there was a
20 difference of opinion. He went his way. We had
21 subcommittees for different interests where he didn't
22 have an interest and clearly noted that.

23 He hasn't attended any meetings that have been run.
24 He's never attended any court appearances. He's not been
25 involved in any proposals whereas we clearly have and
26 have been doing so all along. We'd also like to mention
27 that we are dealing with the debenture holders, which
28 it's not just the banks. These questions about
29 apportionment will reflect back on what happens with the
30 debenture holders. We're in talks with them to try and
31 see whether there's some resolution that can be achieved

1 there.

2 We'd also just mention that Yungara and Solora - the
3 05 growers, have an interest both in Solora property and
4 Yungara property. So to separate them out we think is
5 perhaps a little bit premature and you may even want to
6 wait till the appeal comes. But certainly we think we
7 represent again the growers in that respect and we'd like
8 to have the choice of our legal representative being
9 Herbert Geer essentially.

10 Let me think. We also would like just to raise two
11 - one of the issues from our point of view is obviously
12 ANZ is represented here. I understand that the Garnow
13 and Ms Delini have involvement with property syndicates
14 and may have a conflict there as well. Again, from the
15 citrus committee and growers point of view we would
16 prefer to have the legal representative of our choice
17 with no such conflict would come into any play. I think
18 I've just about mentioned everything I should. Yes,
19 there was - we had a meeting with Clarendon's sometime
20 ago with Michael (indistinct) and there has been an
21 agreement anyway between Clarendon's and ourselves -
22 Chris Garner being one side of growers or advisers rather
23 than growers and ourselves.

24 There was certainly an agreement there that we would
25 be representing the citrus growers. I think we really
26 object to ANZ trying to dictate who we should have as the
27 representative and we shouldn't be at the table on behalf
28 of the citrus growers, because that's who we've worked
29 for, for the last two years.

30 HER HONOUR: Yes, thank you. Ms Harris.

31 MS HARRIS: Your Honour, can I just respond briefly to some of

1 the matters that have just been raised. Your Honour, I
2 didn't object to the evidence from the Bar table but
3 Ms Bezencon has been represented by lawyers and really if
4 there were to be evidence about any of these matters it
5 should have been brought before Your Honour in the proper
6 way.

7 Having said that I should make clear that the first
8 point that was made was about Ms Bezencon's entitlement
9 or there be an entitlement of the TGG Citrus Committee to
10 have their lawyer of choice. We have nothing to say
11 about that. The question is who should act for the
12 grower representative in this proceeding and the grower
13 representative identified by Mr May was a man whose name
14 now escapes me. But the difficulty we see is in Mr May
15 acting for that person.

16 HER HONOUR: Yes, I understand.

17 MS HARRIS: We have no difficulty with him acting for the TGG.

18 In fact the submissions that have just been made really
19 just highlight the difficulty that's created if Mr May is
20 to act for that grower representative. There is no
21 evidence before Your Honour at all about representation
22 of growers and we're reminded of what Mr Justice Kaye
23 said in Clark v. University of Melbourne [1978] V.R. 457
24 at 476-477, where His Honour said and I apologise I don't
25 have the report in court. But he said, "It seems to me
26 that the ...(reads)... is of little moment".

27 We say Your Honour that that's where we're at. We
28 have secured a grower representative of the 2005 citrus
29 scheme. It's notable that there was nothing in the
30 submissions that have just been made that indicate that
31 that person is not appropriate. It's not Mr Garner, who

1 will be the representative, it's Mr and Mrs Bugden and
2 they undoubtedly own interests in the schemes.

3 We have explained at some length why it's most
4 efficient that there be common representatives across the
5 proceedings and in effect there's no challenge to that in
6 any of the submissions that have been made. For the
7 reasons that I endeavoured to explain to Your Honour
8 before, we are still at the view that it's in the
9 interests of all the stakeholders for the orders to be
10 made in the terms put forward.

11 Ms Bezencon didn't address why the regime that we've
12 proposed for service of documents upon her wouldn't be an
13 appropriate way of making sure that her interest remain
14 apprised of the issues in the proceeding and can have
15 their say if they wish. As Your Honour pleases.

16 HER HONOUR: Thank you, Ms Harris.

17 MS BEZENCON: Your Honour, may I just reply to that. Tom isn't
18 here because of ANZ's position and we certainly weren't
19 in the position of incurring extra costs for him to
20 appear, so that's the reason he isn't appearing and we're
21 trying to do our damndest to put forward the view.

22 The other thing is that whilst I hear what Ms Harris
23 says about the Bugden's presenting as representatives of
24 growers. It's clear that Chris Garner is the one who
25 instructs Clarendon's. They said that to us just
26 yesterday. We think that that's not appropriate, that
27 it would be better to have the input from Timbercorp
28 Grower Group Citrus Committee and all the work that we've
29 done that can be added with the representative that we
30 have chosen.

31 That person has been at all those meetings and has

1 participated and has an added interest. The Bugden's
2 have never participated. So I think it would clearly be
3 better that the representative we're suggesting is the
4 one involved and clearly we don't think that Tom is going
5 to have any issue with the proceedings.

6 HER HONOUR: Yes, thank you.

7 (RULING FOLLOWS)

(Unrevised)

(Davies J)

R U L I N G

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1 MS BEZENCON: Excuse me, Your Honour, sorry, I'm not sure if
2 I'm doing it in the right order. Is it possible that we
3 apply for at least - I think from the previous
4 proceedings that costs be covered for what we have
5 already done in - up to date?

6 HER HONOUR: Well that's an application which would have to be
7 put on notice.

8 MS BEZENCON: Yes.

9 HER HONOUR: And if you sought to pursue it, so it's not an
10 application that can be made today.

11 MS HARRIS: Thank you, Your Honour. I take it that subject to
12 the amendments that Your Honour has foreshadowed that
13 Your Honour is prepared to make the orders set out in the
14 proposed minutes and if it's suitable to Your Honour
15 we'll make those small changes and send them up to
16 Your Honour's associate for authentication.

17 HER HONOUR: Yes, thank you.

18 MS HARRIS: Thank you, Your Honour.

19 HER HONOUR: I'll make the form of orders proposed by Dr Bigos
20 in the other proceeding.

21 DR BIGOS: If Your Honour pleases.

22 - - -

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:

25 September 2012

Filed on behalf of:

the Fourth Defendant

Prepared by:

Clarendon Lawyers

Level 17, Rialto North Tower

525 Collins Street

MELBOURNE VIC 3000

Tel: 03 8681 4400

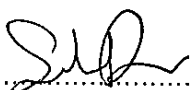
Fax: 03 8681 4499

Solicitors Code: 101294

Ref: MJF:1100563

michael.fernon@clarendonlawyers.com.au

This is the exhibit marked "CJA-23" now produced and shown to **CELIA JANE ARMSTRONG** at the time of swearing her affidavit on 25 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-23

**Orders of Davies J dated 16 December 2011 in SCV
Proceeding No S CI 2011 6606**

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

LIST D
S CI 2011 06606

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 ORS ACCORDING
TO THE SCHEDULE ATTACHED

Defendants

GENERAL FORM OF ORDER

JUDGE OF THE COURT: The Honourable Justice Davies

DATE MADE: 16 December 2011

ORIGINATING PROCESS: Originating Motion

HOW OBTAINED: On application by summons filed 6 December 2011

ATTENDANCE: Ms. W. Harris of Senior Counsel with
Mr. M. Rush of Counsel for the Plaintiff.
Mr. S. Tang, the Solicitor for the First Defendant.
Ms. L. Pascoe, the Solicitor for the Second and
Third Defendants.
Mr. G. Bigmore of Queens Counsel with
Mr. S. Hopper of Counsel for Robert Bugden and
Elizabeth Bugden.

OTHER MATTERS: In relation to paragraph 9 of this order, the Plaintiff
reserves its right to:

- (i) review the legal costs and disbursements
incurred by the Fourth Defendants in
this proceeding;
- (ii) form a view about the reasonableness of
those legal costs and disbursements; and
- (iii) challenge any such legal costs and
disbursements which the Plaintiff
regards as not being reasonably
incurred.



THE COURT ORDERS THAT:

1. Pursuant to Rule 45.05 of the *Supreme Court (General Civil Procedure) Rules* 2005, the requirements of Rules 5.03(1) and 8.02 are dispensed with.
2. Pursuant to rule 45.05 of the *Supreme Court (General Civil Procedure) Rules* 2005, the Plaintiff has leave to proceed by originating motion in form 5C.
3. Pursuant to rule 16.01(2) of the *Supreme Court (General Civil Procedure) Rules* 2005, Robert Bugden and Elizabeth Bugden are appointed as representatives of the Growers in the 2005 Timbercorp Citrus Project (ARSN 114 091 299).
4. The persons appointed as representatives pursuant to paragraph 3 are joined as the Fourth Defendants in the proceeding pursuant to Rule 9.02 and/or Rule 9.06(b) of the *Supreme Court (General Civil Procedure) Rules* 2005.
5. The Plaintiff is granted leave to file and serve an amended originating motion on the Defendants on a date to be fixed:
 - (a) incorporating a declaration as to what, if any, right the Growers represented by the Fourth Defendants have to the sale proceeds held on trust by the Second and Third Defendants pursuant to paragraph 4 of the orders made by the Honourable Justice Davies on 26 February 2010 in proceeding No. SCI 2010 398 (*Orders*); and
 - (b) amending paragraph 5 of the originating motion to read "A declaration as to how the sale proceeds held on trust by the Second and Third Defendants pursuant to paragraph 4 of the orders ought to be distributed between the Plaintiff and the First and Fourth Defendants".
6. Subject to any further order of the Court, this proceeding is managed and heard together with proceeding number S CI 2011 6604.
7. Until further order, the Second and Third Defendants are excused from taking any step in the proceeding, including court appearances, but may do so in relation to the following matters:
 - (a) their rights to be paid their remuneration and expenses from the sale proceeds held on trust by the Second and Third Defendants pursuant to paragraph 4 of the orders (the *Funds*) (to the extent that remuneration and those expenses have not already been paid);
 - (b) any allegations made about the Second and Third Defendants' personal conduct during their appointment and, in particular, with respect to the sale of the assets the proceeds of which represent the Funds; and

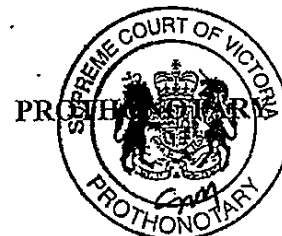


- (c) To ensure disposal in full of the Funds currently held on trust by the Second and Third Defendants including the Funds and the money payable under the Crop Sale Agreement.
8. Each party serve a copy of all documents filed in this proceeding on the TGG Citrus Committee Inc. at the same time as the document is served upon a party to the proceeding.
9. The Second and Third Defendants, being the receivers of the First Defendant, pay from the Funds to Clarendon Lawyers, the solicitors for the Fourth Defendants, the legal costs and disbursements incurred in this proceeding by the Fourth Defendants on a solicitor and client basis pursuant to Rule 63.32(2)(a) of the *Supreme Court (General Civil Procedure) Rules 2005* within 14 days of presentation to the Second and Third Defendants by Clarendon Lawyers of:
- (a) a tax invoice for Clarendon Lawyers' legal costs and disbursements in relation to this proceeding; and
- (b) a bill of costs on a solicitor and client basis, prepared and certified by an appropriately qualified costs consultant to be agreed by the parties.
10. The proceeding is listed for further directions at 10.00am on 24 February 2012.
11. The costs of today are reserved.
12. There is liberty to apply

DATE AUTHENTICATED:

30 December 2011

KK301211



SCHEDULE OF PARTIES

S CI 2011 06606

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

Firstnamed 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

Secondnamed 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

Thirddnamed 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:

25 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-24" now produced and shown to CELIA JANE ARMSTRONG at the time of swearing her affidavit on 25 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-24

**Extract of Affidavit of Mark Anthony Korda dated 13
December 2011 and filed in SCV Proceeding No S CI
2011 6777**

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

S CI 2011

IN THE MATTER OF an application by
FENCEPORT PORT PROPRIETARY LIMITED (ACN 139 604 121),
OLIVECORP LAND PTY LTD (IN LIQUIDATION) (ACN 090 141 512),
MARK ANTHONY KORDA (in his capacity as liquidator of Olivecorp Land Pty Ltd (in
liquidation), and
MARK FRANCIS XAVIER
for declarations as to rights to moneys held on trust

**FENCEPORT PROPRIETARY LIMITED (ACN 139 604 121)
& ORS (according to the attached Schedule)**

Plaintiffs

AFFIDAVIT OF MARK ANTHONY KORDA

Date of document: 13 December 2011
Filed on behalf of: The Plaintiffs

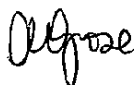
Prepared by:
ARNOLD BLOCH LEIBLER
Lawyers and Advisers
Level 21
333 Collins Street
MELBOURNE 3000

Solicitor's Code: 54
DX 38455 Melbourne
Tel: 9229 9999
Fax: 9229 9900
Ref: 01-1601361

(Leonie Thompson - lthompson@abl.com.au)

I, **MARK ANTHONY KORDA**, of Level 24, 333 Collins Street, Melbourne, in the state of
Victoria, Chartered Accountant, **MAKE OATH AND SAY** that:

- 1 I am the sole director and secretary of Fenceport Proprietary Limited, the first plaintiff
in this proceeding (**Fenceport**). Now produced and shown to me and marked "**MAK-
1**" is a current and historical extract of the records maintained by the Australian
Securities and Investments Commission in respect of Fenceport.
- 2 I and my colleague, Mark Francis Xavier, are the liquidators of the second plaintiff in
this proceeding, Olivecorp Land Pty Ltd (in liquidation) (ACN 090 141 512) (**OLPL**).
Mr Xavier and I are the fourth and third plaintiffs in this proceeding respectively, in our
capacities as liquidators of OLPL.



document will prejudice Fenceport's entitlement to be repaid the Advance or any other amount owing to it under the Loan Agreement."

- 27 I am informed by Bryan Webster of my office that, as at 8 December 2011, the balance of the proceeds of sale of the Boort SPD and the Boort Water SPD are held on trust by OLPL in the following proportions and in the following accounts:

(a)

Account name	Olivecorp Land Pty Ltd (In Liquidation)
Bank	Westpac
BSB	033-002
Account number	29-0647
Amount	\$3,667,521.91

(b)

Account name	THE LIQUIDATORS OLIVECORP LAND PTY LTD
Bank	BankWest
Deal number	1024278
Amount	\$35,996,413.14

(c)

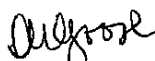
Account name	Olivecorp Land Pty Ltd (In Liquidation) Sale Deposit Account
Bank	Macquarie
BSB	183-334
Account number	3017-58876
Amount	\$6,654.30

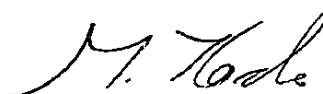
- 28 I am also informed by Mr Webster that costs of the Liquidators in preserving and realising the Olive Assets pursuant to the Boort SPD and the Boort Water SPD have not yet been deducted from those proceeds.

Representation of Growers

- 29 This proceeding has been commenced to determine:

- (a) what rights Fenceport, OLPL and the Growers (if any) have to the Net Boort Proceeds;


ABL/1663685v5



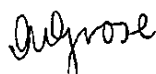
- (b) what the value is of any such rights of Fenceport, OLPL and the Growers; and
- (c) how much (if any) of the Net Sale Proceeds each of Fenceport, OLPL and the Growers are entitled to.

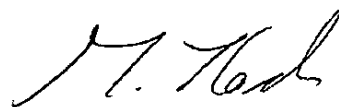
Representation of Growers in the BB Olives Rights Proceeding

- 30 Similar matters as the present are the subject of Supreme Court of Victoria proceeding number SCI 2010 1354 (**BB Olives Rights Proceeding**). The BB Olives Rights Proceeding relates to the sale proceeds of the two additional sale and purchase deeds (discussed in paragraph 19 above) the subject of the Olive Sale Application.
- 31 At the commencement of the BB Olives Rights Proceeding, the Honourable Justice Davies made orders appointing representative growers in that proceeding in the same form as the orders sought in paragraphs 2 and 3 of the summons dated 13 December 2011 in this proceeding. Now produced and shown to me and marked "MAK-10" is a true copy of the orders made by the Honourable Justice Davies on 22 March 2010 in the BB Olives Rights Proceeding.

Representation of Growers in this proceeding

- 32 The number of Growers that hold investments in each of the Boort Schemes is:
- (a) 42 in the 2000 Private Olive Scheme;
 - (b) 770 Growers in the 2001 Olive Scheme;
 - (c) 606 Growers in the 2002 Olive Scheme;
 - (d) 532 Growers in the 2003 Olive Scheme; and
 - (e) 95 Growers in the 2004 Olive Scheme.
- 33 Some Growers hold investments in multiple Boort Schemes, such that the total number of Growers in all of the Boort Schemes is less than the total number of Growers set out in paragraph 32 above. Even so, there are several hundred Growers that hold investments in the Boort Schemes, and as such may have an interest in this proceeding.


ABL/1683885v5

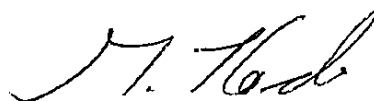


- 34 The grower representatives in the BB Olives Rights Proceeding are represented by Clarendons.
- 35 I am informed by Leonie Thompson of ABL that ABL wrote to Clarendons on 28 November 2011 in order to identify Growers of the Boort Schemes that would be willing to participate in this proceeding. Now produced and shown to me and marked "MAK-11" is a true copy of the letter from Arnold Bloch Leibler to Clarendons dated 28 November 2011.
- 36 I am informed by Ms Thompson that, on 12 December 2011, ABL received a reply from Clarendons to its letter dated 28 November 2011. Now produced and shown to me and marked "MAK-12" is a true copy of the letter from Clarendons to ABL dated 12 December 2011. In that letter, Clarendons confirmed that it had identified a Grower from each of the Boort schemes who is willing to be a party to this proceeding, subject to payment of those Grower's legal costs associated with this proceeding.
- 37 Due to the number of Growers holding investments in each of the Boort Schemes, and the commonality of interests held amongst Growers in each of the Boort Schemes, Fenceport seeks an order that the five Growers identified by Clarendons - being Growers from each of Boort Schemes - be appointed as representatives of all other Growers with investments in the respective Boort Schemes in which those Growers hold interests (as specified in the letter exhibited to this affidavit as MAK-12). That order is sought on the basis that it would be expedient for Growers' interests to be represented by representative Growers pursuant to rule 16.01(2)(c) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).
- 38 As noted in paragraph 31 above, the Honourable Justice Davies made similar orders in the BB Olives Rights Proceeding.

Progress of this proceeding

- 39 Assuming that orders are granted by the Court to have the five nominated Growers from each of the Boort Schemes joined as defendants and appointed as representatives in this proceeding, the plaintiffs intend to then enter into without prejudice negotiations with those Growers with a view to seeking a compromise of the dispute as to the parties' entitlement to the Boort Net Proceeds. It is intended that, if such a compromise is reached, Court approval would be sought for orders that the


ABL/1683885v5



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

S CI 2011

IN THE MATTER OF an application by
FENCEPORT PORT PROPRIETARY LIMITED (ACN 139 604 121),
OLIVECORP LAND PTY LTD (IN LIQUIDATION) (ACN 090 141 512),
MARK ANTHONY KORDA (in his capacity as liquidator of Olivecorp Land Pty Ltd (in
liquidation), and
MARK FRANCIS XAVIER
for declarations as to rights to moneys held on trust

**FENCEPORT PROPRIETARY LIMITED (ACN 139 604 121)
& ORS (according to the attached Schedule)**

Plaintiffs

CERTIFICATE IDENTIFYING EXHIBIT

Date of document: 13 December 2011
Filed on behalf of: The Plaintiffs

Prepared by:

ARNOLD BLOCH LEIBLER

Lawyers and Advisers

Level 21

333 Collins Street

MELBOURNE 3000

Solicitor's Code: 54

DX 38455 Melbourne

Tel: 9229 9999

Fax: 9229 9900

Ref: 01-1601361

(Leonie Thompson - lthompson@abl.com.au)

This is the exhibit marked "MAK-10" now produced and shown to **MARK ANTHONY KORDA** at the time of swearing his affidavit on 13 December 2011.

MEAGAN LOUISE GROSE Before me:

Arnold Bloch Leibler
Level 21, 333 Collins Street
Melbourne 3000
An Australian Legal Practitioner within the
meaning of the Legal Profession Act 2004

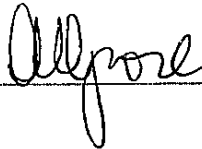


Exhibit "MAK-10"

**Orders made by the Honourable Justice Davies
on 22 March 2010 in Supreme Court of Victoria
proceeding number 1354 of 2010**

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

LIST E
No.SC1 2010 1354

BETWEEN:

BOSI SECURITY SERVICES LIMITED (A.C.N. 009 413 852) Plaintiff
as trustee for
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
(A.C.N. 005 357 522) and BOS INTERNATIONAL (AUSTRALIA)
LIMITED (A.C.N. 066 601 250) and WESTPAC BANKING
CORPORATION (A.C.N. 007 457 141)

- and -
B.B OLIVES PTY LTD (IN LIQUIDATION) Defendants
(A.C.N. 083 992 367) & ORS (according to the attached Schedule)

MINUTE OF ORDER

JUDGE:	The Honourable Justice Davies	
DATE MADE:	22 March 2010	
ORIGINATING PROCESS:	Originated Motion filed 16 March 2010	
HOW OBTAINED:	On application by Summons filed 16 March 2010	
ATTENDANCE:	Mr P. Anastassiou S.C. with Mr R.G Craig	Counsel for the Plaintiffs
	Mr P Crutchfield SC with Oren Bigos	Counsel for the First, Second, Third, Fourth, Fifth and Sixth Defendants
	Mr G. Bigmore QC with Mr S.Hopper	Counsel for Michael Charles Vicary, Pamela Jan Dry and David Butterfield

OTHER MATTERS: Not applicable

THE COURT ORDERS THAT:

1. Pursuant to rule 45.05 of the *Supreme Court (General Civil Procedure) Rules 2005*
(Vic) the requirements of Rules 5.03(1) and 8.02 are dispensed with.

2. Pursuant to rule 45.05 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) the plaintiff has leave to proceed by originating motion in Form 5C.
3. Pursuant to rule 16.01(2) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic):
 - (a) Michael Charles Vicary be appointed as the representative of the Growers in the 2006 Timbercorp Olive Project (ARSN 119 182 179);
 - (b) Pamela Jan Dry be appointed as the representative of the Growers in the 2007 Timbercorp Olive Project (ARSN 123 155 715); and
 - (c) David Butterfield be appointed as the representative of the Growers in the 2008 Timbercorp Olive Project (ARSN 129 307 722).
4. The persons appointed pursuant to paragraph 3 above, be joined as the seventh, eighth, and ninth defendants in the proceeding pursuant to rule 9.02 and/or rule 9.06(b) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).
5. The plaintiff is granted leave to file and serve an amended originating motion on the defendants on or before 4pm on 26 March 2010:
 - (a) incorporating a declaration as to what, if any, right the Growers represented by the seventh, eighth, and ninth defendants have to the sale proceeds held on trust by the first defendant pursuant to paragraph 8 of the Orders; and
 - (b) amending paragraph 5 of the Originating Motion to read "A declaration as to how the sale proceeds held on trust by the first defendant pursuant to paragraph 8 of the Orders ought to be distributed between the plaintiff and the second, seventh, eighth and ninth defendants."
6. The plaintiff is granted leave to proceed against Almond Land Pty Ltd A.C.N. 091 460 992 (in liquidation), B.B. Olives Pty Ltd A.C.N 083 992 367 (in liquidation) and Timbercorp Limited A.C.N. 055 185 067 (in liquidation) pursuant to s.471B of the *Corporations Act 2001* (Cth).

7. Paragraph 11 of the orders made by the Honourable Justice Croft in proceeding No.9998 of 2009 be discharged, insofar as it relates to exhibit MAK-19 to the affidavit of Mark Anthony Korda sworn 10 November 2009 in proceeding No.9998 of 2009.
8. On or before 4pm on 23 April 2010 the plaintiff serve on the defendants a draft list of the documents on which the plaintiff intends to rely in relation to the Rights Issue (**the Draft List**).
9. On or before 4pm on 7 May 2010, the defendants serve on the plaintiff a list of any documents which are not already identified in the Draft List and on which the defendants intend to rely in relation to the Rights Issue (**Further Documents**).
10. On or before 4pm on 14 May 2010, the plaintiff files and serves a List of Documents incorporating those documents identified in the Draft List and the Further Documents.
11. On or before 4pm on 21 May 2010 the parties file and serve:
 - (a) written contentions of fact and law addressing the issue of what right, if any, right they have to the net sale proceeds (**the Funds**) to be held on trust by the first defendant pursuant to paragraph 8 of the Orders (**the Rights Issue**) (**the Rights Contentions**);
 - (b) any affidavit material upon which they wish to rely in relation to the Rights Issue.
12. On or before 4pm on 4 June 2010 the parties file and serve:
 - (a) written contentions of fact and law in reply to the Rights Contentions;
 - (b) any affidavit material upon which they wish to rely by way of reply in relation to the Rights Issue.
13. Each party serve a copy of the documents referred to in paragraphs 8, 9, 10, 11 and 12 upon Herbert Geer, solicitors of Level 20/385 Bourke Street, Melbourne, 3001 (marked to the attention of Mr Tom May) for TGG Almond Committee Inc and Ms

Kerree Bezencon and any other document filed in the proceeding from the date of this order at the same time as the document is served upon a party to the proceeding.

14. The Liquidators of the first defendant pay from the Funds to Clarendon Lawyers, the solicitors for the seventh, eighth and ninth defendants, the legal costs and disbursements of the seventh, eighth and ninth defendants of and incidental to this proceeding on a solicitor and client basis pursuant to rule 63.32(2)(a) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) within 14 days of presentation to the Liquidator by Clarendon Lawyers of:
 - (i) a tax invoice for Clarendon Lawyers' legal costs and disbursements in relation to this proceeding; and
 - (ii) a bill of costs on a solicitor and client basis, prepared and certified by an appropriately qualified costs consultant, to be agreed by the parties (the Consultant).
15. The proceeding be listed for further directions at 10:00am on 18 June 2010.
16. All other questions of costs are reserved.
17. Liberty to apply.

DATE AUTHENTICATED: **March 2010**

JUDGE

SCHEDULE

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

No.

BETWEEN:

**BOSI SECURITY SERVICES LIMITED (A.C.N. 009 413 852) as trustee for
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
(A.C.N. 005 357 522) and BOS INTERNATIONAL (AUSTRALIA) LIMITED
(A.C.N. 066 601 250) and WESTPAC BANKING CORPORATION (A.C.N.007 457
141)**

Plaintiff

and

**B.B OLIVES PTY LTD (IN LIQUIDATION)
(A.C.N. 083 992 367)**

First Defendant

and

ALMOND LAND PTY LTD (IN LIQUIDATION) (A.C.N 091 460 392)

Second Defendant

and

TIMBERCORP LIMITED (IN LIQUIDATION) (A.C.N. 055 185 067)

Third Defendant

and

**MARK ANTHONY KORDA
(in his capacity as liquidator of Almond Land Pty Ltd (in liquidation))
(in his capacity as liquidator of B.B. Olives Pty Ltd (in liquidation))**

Fourth Defendant

and

**LEANNE KYLIE CHESSER
(in her capacity as liquidator of Almond Land Pty Ltd (in liquidation))**

Fifth Defendant

and

**MARK FRANCIS XAVIER MENTHA
(in his capacity as liquidator of B.B. Olives Pty Ltd (in liquidation))**

Sixth Defendant

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

S CI 2011

IN THE MATTER OF an application by
FENCEPORT PORT PROPRIETARY LIMITED (ACN 139 604 121),
OLIVECORP LAND PTY LTD (IN LIQUIDATION) (ACN 090 141 512),
MARK ANTHONY KORDA (in his capacity as liquidator of Olivecorp Land Pty Ltd (in
liquidation), and
MARK FRANCIS XAVIER
for declarations as to rights to moneys held on trust

**FENCEPORT PROPRIETARY LIMITED (ACN 139 604 121)
& ORS (according to the attached Schedule)**

Plaintiffs

CERTIFICATE IDENTIFYING EXHIBIT

Date of document: 13 December 2011
Filed on behalf of: The Plaintiffs

Prepared by:

ARNOLD BLOCH LEIBLER

Lawyers and Advisers

Level 21

333 Collins Street

MELBOURNE 3000

Solicitor's Code: 54

DX 38455 Melbourne

Tel: 9229 9999

Fax: 9229 9900

Ref: 01-1601361

(Leonie Thompson - lthompson@abl.com.au)

This is the exhibit marked "**MAK-11**" now produced and shown to **MARK ANTHONY KORDA** at the time of swearing his affidavit on 13 December 2011.

MEAGAN LOUISE GROSE
Arnold Bloch Leibler
Level 21, 333 Collins Street
Melbourne 3000
An Australian Legal Practitioner within the
meaning of the Legal Profession Act 2004

Before me:

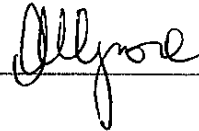


Exhibit "MAK-11"
Letter from Arnold Bloch Leibler to Clarendon
Lawyers dated 28 November 2011

Arnold Bloch Leibler

Lawyers and Advisers

28 November 2011

By email
Confidential & privileged communication

Michael Fernon
Director
Clarendon Lawyers
Michael.Fernon@clarendonlawyers.com.au

Our Ref MLG LRT
File No. 011601361

Contact
Meagan Grose
Direct 61 3 9229 9657
Facsimile 61 3 9916 9531
mgrose@abl.com.au

Partner
Leonie Thompson
Direct 61 3 9229 9726
lthompson@abl.com.au



Level 21
333 Collins Street
Melbourne
Victoria 3000
Australia
DX38455 Melbourne
www.abl.com.au
Telephone
61 3 9229 9999
Facsimile
61 3 9229 9900

Dear Michael

Proposed Supreme Court of Victoria proceeding - apportionment of Boort olive sale proceeds

Further to our recent discussion, we confirm that our client, Fenceport Pty Ltd, intends to soon commence proceedings in the Supreme Court of Victoria (**Proposed Boort Proceeding**). In the Proposed Boort Proceeding, our client intends to seek declarations as to the entitlement to the proceeds of the sale of land and assets that were previously associated with various Timbercorp olive schemes. Those schemes are the:

- 1 2000 Timbercorp Olive Project (unregistered private offer scheme);
- 2 2001 Timbercorp Olive Project (ARSN 094 383 082);
- 3 2002 Timbercorp Olive Project (ARSN 098 233 455);
- 4 2003 Timbercorp Olive Project (ARSN 104 648 473); and
- 5 2004 Timbercorp Olive Project (ARSN 108 744 378) (together the **Boort Olive Schemes**).

Our client seeks to join a grower from each of the Boort Olive Schemes to the Proposed Boort Proceeding as representative parties pursuant to Order 16 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).

It is envisaged that the Proposed Boort Proceeding will involve at least one directions hearing on 16 December 2011 and subsequent court dates in February 2012.

We understand that there are members of the Timbercorp Growers Group (**TGG**) that may be willing and available to act as grower representatives in the Proposed Boort Proceeding. We ask that you indicate whether, and (if so) the details of, members of the TGG who are willing to join the Proposed Boort Proceeding by Friday 2 December 2011 as representative parties.

ABL/1685769v1

MELBOURNE SYDNEY

Partners
Mark M Leibler AC
Henry D Langer
Joseph Boronsztajn
Leon Zwiier
Philip Chester
Ross A Paterson
Stephen L Sharp
Kenneth A Gray
Kevin F Frawley
Michael N Dodge
Jane C Sheridan
Leonie R Thompson
Zaven Markrossian
Jonathan M Weng
Paul Sokolowski
Paul Rubenstein
Peter M Seidel
Alex King
John Mitchell
Nicole Gordon
Ben Mahoney
Sam Ollard
Lily Tell
Henry Skene
Andrew Silberberg
Lisa Mennweather
Jonathan Milner
John Mengolian
Caroline Goulden
Matthew Lees
Genevieve Saxton
Jeremy Leibler
Rick Narey
Nathan Biner
Jonathan Caplan

**Senior Litigation
Counsel**
Robert J Heathcote

Special Counsel
Simonne Einfield

Senior Associates
Sue Kee
Jorja Clelland
Benjamin Marshall
Kristina Verrey
Seaton Theobald
Teresa Ward
Jason Blankfield
Christine Fleer
Nancy Collins
Susanna Ford
Kimberley MacKay
Amanda Hutchings
Clint Harding
Gary Segal
Tiffany Barmann
Clara Varghese
Andrea Towson
Jennifer Collins
Lisa Lane
Daniel Mole
David Speiser
Katie Logan

Consultants
Alan Fels AO

Michael Fernon
Clarendon Lawyers

Arnold Bloch Leibler
Page: 2
Date: 28 November 2011

Please contact us should you have any questions.

Yours faithfully
Arnold Bloch Leibler



Leone Thompson
Partner

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

S CI 2011

IN THE MATTER OF an application by
FENCEPORT PORT PROPRIETARY LIMITED (ACN 139 604 121),
OLIVECORP LAND PTY LTD (IN LIQUIDATION) (ACN 090 141 512),
MARK ANTHONY KORDA (in his capacity as liquidator of Olivecorp Land Pty Ltd (in
liquidation), and
MARK FRANCIS XAVIER
for declarations as to rights to moneys held on trust

**FENCEPORT PROPRIETARY LIMITED (ACN 139 604 121)
& ORS (according to the attached Schedule)**

Plaintiffs

CERTIFICATE IDENTIFYING EXHIBIT

Date of document: 13 December 2011
Filed on behalf of: The Plaintiffs

Prepared by:

ARNOLD BLOCH LEIBLER
Lawyers and Advisers
Level 21
333 Collins Street
MELBOURNE 3000

Solicitor's Code: 54
DX 38455 Melbourne
Tel: 9229 9999
Fax: 9229 9900
Ref: 01-1601361

(Leonie Thompson - lthompson@abl.com.au)

This is the exhibit marked "**MAK-12**" now produced and shown to **MARK ANTHONY KORDA** at the time of swearing his affidavit on 13 December 2011.

MEAGAN LOUISE GROSE
Arnold Bloch Leibler
Level 21, 333 Collins Street
Melbourne 3000
An Australian Legal Practitioner within the
meaning of the Legal Profession Act 2004

Before me: _____

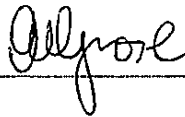


Exhibit "MAK-12"
**Letter from Clarendon Lawyers to Arnold Bloch
Leibler dated 12 December 2011**



Level 17 Rialto North Tower
525 Collins Street Melbourne
Victoria 3000 Australia

T 03 8681 4400 F 03 8681 4499
www.clarendonlawyers.com.au
ABN 43 704 593 249

12 December 2011

Our ref: CMC/MJF:1000182

Ms Leonie Thompson
Arnold Bloch Leibler
Level 21
333 Collins Street
MELBOURNE VIC 3000
By email: LThompson@abl.com.au

Dear Leonie

Proposed Supreme Court of Victoria proceeding – Apportionment of Boort Olive sale proceeds (Boort Proceeding)

We refer to your letter of 28 November 2011 in relation to grower representatives for the proposed Boort proceeding.

We confirm that, subject to the last paragraph below, the Timbercorp Growers Group is prepared to nominate the following individual growers as representatives of all growers in the affected olive schemes:

- Mr Con Moshopoulos has confirmed that he is prepared to act as representative grower for the 2000 unregistered scheme.
- Ms Pauline Hammer has confirmed that she is prepared to act as representative grower for the 2001 registered scheme.
- Mr David Butterfield has confirmed that he is prepared to act as representative grower for the 2002 registered scheme.
- Mr Graham Goldenberg has confirmed that he is prepared to act as representative grower for the 2003 registered scheme.
- Mr Shun King Li (whose investment was in the name of Manissa Pty Ltd (Elders Security) atf Manissa Trust) has confirmed that he is prepared to act as representative grower for the 2004 registered scheme.

Clarendon Lawyers and counsel engaged by them are prepared to act on behalf of the representative growers.

The preparedness of the nominee growers to be appointed representatives is conditional upon their legal fees, including costs and disbursements, being paid out of the fund constituted by the proceeds of sale on the same basis as the legal costs for the Almond Land proceedings were paid.

Yours faithfully

Michael Fernon
Director

Direct Tel: 03 8681 4419
Email: michael.fernon@clarendonlawyers.com.au

GAR001_1000182_008

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

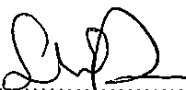
OIM#2 PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) as trustee for TIMBERCORP ORCHARD TRUST #2 & ORS (according to the attached Schedule)

Defendants

EXHIBIT NOTE

Date of document:	25 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-25" now produced and shown to **CELIA JANE ARMSTRONG** at the time of swearing her affidavit on 25 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-25

**Orders made by Davies J dated 16 December 2011
in SCV Proceeding No S CI 2011 6777**

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

LIST D
S CI 2011 06777

IN THE MATTER OF an application by FENCEPORT PORT PROPRIETARY LIMITED
(ACN 139 604 121), OLIVECORP LAND PTY LTD (In Liquidation) (ACN 090 141 512),
MARK ANTHONY KORDA (in his capacity as liquidator of OLIVECORP LAND PTY
LTD (In Liquidation); and MARK FRANCIS XAVIER
For declarations as to rights to money held on trust

FENCEPORT PROPRIETARY LIMITED (ACN 139 604 121)
& ORS (according to the attached Schedule)

Plaintiffs

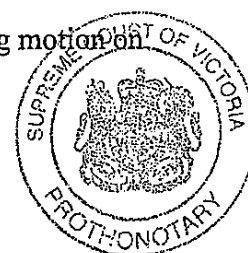
GENERAL FORM OF ORDER

JUDGE OF THE COURT:	The Honourable Justice Davies
DATE MADE:	16 December 2011
ORIGINATING PROCESS:	Originating Motion
HOW OBTAINED:	On the directions hearing of the Originating Motion filed 13 December 2011
ATTENDANCE:	Dr O. Bigos of Counsel for the Plaintiffs Mr G. Bigmore, one of Her Majesty's Counsel with Mr S. Hopper of Counsel for Ms Pauline Emma Hammer and Messrs Con Moshopolous, David Sydney Butterfield, Graham Goldenberg and Shun King Li
OTHER MATTERS:	In respect of paragraph 4 of this Order, the Plaintiffs reserve their rights to: (i) review the legal costs and disbursements incurred by the Grower Defendants (as that term is defined in paragraph 3 of this Order) in this proceeding; (ii) form a view about the reasonableness of those legal costs and disbursements; and (iii) challenge any such legal costs and disbursements which the Plaintiffs regard as not being reasonably incurred.



THE COURT ORDERS THAT:

1. Pursuant to Rule 45.05 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) the requirements of Rules 5.03(1) and 8.02 are dispensed with.
2. Pursuant to Rule 16.01(2) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic):
 - (a) Con Moshopolous is appointed as representative of the Growers in the 2000 Timbercorp Olive Project (Private Offer) (Unregistered);
 - (b) Pauline Emma Hammer is appointed as representative of the Growers in the 2001 Timbercorp Olive Project (ARSN 094 383 082);
 - (c) David Sydney Butterfield is appointed as representative of the Growers in the 2002 Timbercorp Olive Project (ARSN 098 233 455);
 - (d) Graham Goldenberg is appointed as representative of the Growers in the 2003 Timbercorp Olive Project (ARSN 104 648 473); and
 - (e) Shun King Li is appointed as representative of the Growers in the 2004 Timbercorp Olive Project (ARSN 108 744 378).
3. Pursuant to Rules 9.02 and/or 9.06(b) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic), the five persons appointed pursuant to paragraph 2, above, are joined as the First, Second, Third, Fourth, and Fifth Defendants (**Grower Defendants**) respectively in this proceeding.
4. The Third and Fourth Plaintiffs (**Liquidators**) pay from the Net Boort Proceeds (as that term is defined in paragraph 7 of the orders made by the Honourable Justice Croft on 12 November 2009 in Supreme Court of Victoria proceeding no. 9998 of 2009) to Clarendon Lawyers (the solicitors for the Grower Defendants) the legal costs and disbursements incurred in this proceeding by the Grower Defendants on a solicitor and client basis pursuant to Rule 63.32(2)(a) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) within 14 days of presentation to the Liquidators by Clarendon Lawyers of:
 - (a) a tax invoice for those legal costs and disbursements in relation to this proceeding; or
 - (b) a bill of costs on a solicitor and client basis prepared and certified by an appropriately qualified costs consultant, as agreed by the Liquidators and the Grower Defendants.
5. Pursuant to Rule 45.05 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) the Plaintiffs have leave to proceed by originating motion in Form 5C.
6. The Plaintiffs are granted leave to file and serve an amended originating motion on the Defendants on or before 4.00pm on 20 December 2011:



- (a) that conforms with Form 5C;
 - (b) that lists the Grower Defendants as the First, Second, Third, Fourth, and Fifth Defendants in this proceeding;
 - (c) seeking a declaration as to what (if any) rights the Growers represented by the Grower Defendants have to the net sale proceeds held on trust by the First Defendant pursuant to paragraph 7 of the orders of the Honourable Justice Croft on 12 November 2009 in Supreme Court of Victoria proceeding no. 9998 of 2009; and
 - (d) amending paragraph 4 of the Originating Motion to read, "A declaration as to how the Net Boort Proceeds should be distributed between the First Plaintiff, the Second Plaintiff, and the Growers represented by the First, Second, Third, Fourth and Fifth Defendants."
7. Paragraph 11 of the orders made by the Honourable Justice Croft in Supreme Court proceeding no. 9998 of 2009 (confidentiality order) is discharged in relation to exhibit MAK-18 to the affidavit of Mark Anthony Korda filed on 10 November 2009 in that proceeding.
8. The proceeding is listed for further directions at 10.00am on 24 February 2012.
9. Costs otherwise be reserved.

DATE AUTHENTICATED:

6 January 2012

KK060112



SCHEDULE OF PARTIES

S CI 2011 06777

FENCEPORT PROPRIETARY LIMITED (ACN 139 604 121)

First Plaintiff

**OLIVECORP LAND PTY LTD (IN LIQUIDATION)
(ACN 090 141 512)**

Second Plaintiff

**MARK ANTHONY KORDA
(in his capacity as Liquidator of Olivecorp Land Pty Ltd
(In Liquidation))**

Third Plaintiff

**MARK FRANCIS XAVIER
(in his capacity as Liquidator of Olivecorp Land Pty Ltd
(In Liquidation))**

Fourth Plaintiff



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:

25 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-26" now produced and shown to CELIA JANE ARMSTRONG at the time of swearing her affidavit on 25 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-26

**Chain of emails between C Armstrong and Ms
Bezencon dated between 24 January 2012 and 3
February 2012**

Celia Armstrong

From: Celia Armstrong
Sent: Friday, 3 February 2012 5:33 PM
To: Kerree Bezencon
Cc: 'Rex Booker'; Michael Fernon
Subject: RE: Citrus Apportionment and Global Timbercorp Settlement [1100412 and 1100563]

Follow Up Flag: Follow up
Flag Status: Flagged

SaveToDatabase: 0

Dear Kerree

Thank you for your email. We have discussed your concerns with counsel and agree that there is some scope for reimbursing you for any photocopy costs you incur in providing us with copies of the documents we have requested. Your significant contribution to the cause of the growers has not gone unnoticed, however, I am sure that you appreciate the difficult position we are in with respect to funding. At this stage we have received confirmation that we have limited funds to participate in the settlement discussions. However, counsel agree that, depending on how the matter progresses, it may be necessary for the growers to engage Rex as an expert consultant. This will of course be subject to our ability to confirm additional funding at a later point in time.

Please let me know if you are willing to provide the documents and information requested.

Kind regards
Celia.

Celia Armstrong | Senior Associate

Clarendon Lawyers | Level 17, Rialto North Tower, 525 Collins Street, Melbourne 3000
T + 61 3 8681 4411 | F + 61 3 8681 4499 | M + 61 431 658 651
www.clarendonlawyers.com.au

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From: Kerree Bezencon [<mailto:kerree@siger.com.au>]
Sent: Tuesday, 31 January 2012 5:43 PM
To: Celia Armstrong; samuel.hopper@vicbar.com.au; garry_bigmore@vicbar.com.au
Cc: 'Rex Booker'
Subject: RE: Citrus Apportionment and Global Timbercorp Settlement [1100412 and 1100563]

Dear Celia,

My apologies for not getting back to you yesterday - we arrived late last night.

We are happy to help and indeed very much wish to provide what we believe will be very beneficial and substantive points for growers. However there is an issue - time. Both Rex & I have spent so many, many unpaid hours - whilst he has supported me greatly as Chair, a great deal of the substantiation has been headed up and undertaken/initiated by me with a wealth of information now in my possession. It has costed my business dearly, as I ran up 12-14 hours a day including weekends, and building up material and contacts from scratch, changing RE's, as well as communicating with growers. For all 2010 and up to June 2011, my main occupation has been pursuing a citrus outcome that involved

growers; prior to that from June 2009 to December, I had worked on other horticultural projects. We do have a wealth of information from all this. Rex had accumulated some 3000 hours before he stopped counting, whilst I have put in well over 9000 hours.

I, like Rex, and others am exhausted by the process and desperately need to address our own issues and get back to normal. In all this, if others like yourselves and other consultants have rightly been paid for your time, I have not sought nor received payment for any of my time, nor has Rex and various others. But we cannot continue this. If I were retired, it might be different.

Whilst I wish to help, and hold much of the information, if I do so, it is at the detriment to my business. We have discussed how this might be overcome, as we passionately believe that there is a strong argument to be had otherwise we wouldn't have spent so much time. I therefore ask if there is any way in which time to provide such information might be remunerated, so that there is no further cost to my business in terms of unpaid time. This is by far, not a grab for money, but simply trying to find a practical way to help that is not detrimental to myself, nor Rex. Many others have not put in any way near the time and whilst I & Rex & others chose to do so, we are now just simply unable to continue doing it for "love" - and it is unfair of other growers to expect that we will, when so many have simply moved on.

We suggest that we might be considered as providing consulting services, as it will greatly reduce the costs to yourselves and counsel of getting this information from scratch, as well as give counsel a heads up about the whole project as we know it inside out. My involvement in all the cases, bar the apportionment case when citrus cases were running concurrently means that I have a good appreciation of many of the arguments and issues and have some feel for the process that should quicken the time required. Both Rex & I have been on the COI as well.

I hope you can understand and appreciate the position. We do not ask for this lightly, nor are we trying to take advantage of the situation - we simply cannot just continue without some financial assistance for giving our time to this matter instead of business. I await your reply, hoping we can assist as we so clearly would like to do.

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),
SSA (Specialist SMSF Advisor)

PO Box 1147, Healesville, Vic, 3777
Tel 03 59 626 097, Fax 03 59 626 086
Email : kerree@siger.com.au

From: Celia Armstrong [<mailto:Celia.Armstrong@clarendonlawyers.com.au>]
Sent: Wednesday, 25 January 2012 8:10 AM
To: Kerree Bezencon
Cc: 'Rex Booker'; Michael Fernon
Subject: RE: Citrus Apportionment and Global Timbercorp Settlement [1100412 and 1100563]

Dear Kerree

Thank you for letting me know. I look forward to hearing from you further.

Kind regards
Celia.

Celia Armstrong | Senior Associate

Clarendon Lawyers | Level 17, Rialto North Tower, 525 Collins Street, Melbourne 3000
T + 61 3 8681 4411 | F + 61 3 8681 4499 | M + 61 431 658 651
www.clarendonlawyers.com.au

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From: Kerree Bezencon [<mailto:kerree@siger.com.au>]
Sent: Tuesday, 24 January 2012 10:27 PM
To: Celia Armstrong
Cc: 'Rex Booker'
Subject: RE: Citrus Apportionment and Global Timbercorp Settlement [1100412 and 1100563]

Dear Celia,

thanks for this email. We had anticipated getting back to you tomorrow, but our meeting has been delayed. I will respond as soon as possible, probably Monday at this stage. Feel free to channel any other points through to me should you think of anything further.

Regards

Kerree Bezencon
Chair, TGG Citrus Committee

B.Ec (Accounting & Finance),
ASIA (Grad Dip Applied Finance & Investment),
CPA(Certified Practising Accountant) PFP (Specialist in Financial Planning),
CFP (Certified Financial Planner),
SSA (Specialist SMSF Advisor)

PO Box 1147, Healesville, Vic, 3777
Tel 03 59 626 097, Fax 03 59 626 086
Email : kerree@siger.com.au

From: Celia Armstrong [<mailto:Celia.Armstrong@clarendonlawyers.com.au>]
Sent: Tuesday, 24 January 2012 9:10 PM
To: Kerree Bezencon; Rex Booker
Cc: Michael Fernon
Subject: Citrus Apportionment and Global Timbercorp Settlement [1100412 and 1100563]

Dear Kerree and Rex,

We refer to our teleconference with you both yesterday. We thank you for your time and confirm the following points as requested:

1. We would be grateful if you would provide us with information you and your group of interested investors have obtained in relation to:
 - a. the viability of the Timbercorp Citrus Projects (2004 and 2005);
 - b. any proposals developed for changing the RE;

c. current and future pricing of the citrus products; and
d. current and future pricing of the water allocations,
If you agree to provide this information, we will arrange for a meeting with you and counsel to enable you to lead counsel through and clarify the material to assist counsel with understanding it.

2. We would also be grateful if you would provide us with a list of potential experts together with brief details about their qualifications. As discussed we will pass this on to counsel for their consideration.
3. We will only provide the information you provide to counsel, subject to the proviso that, after counsel has considered the material, if counsel needs to seek instructions from our clients or from experts in relation to any matter that involves the material, copies of relevant parts of the material may be provided to our clients or the experts but only to the extent necessary to secure the required instructions or opinion.

During our conference you asked for some further particulars regarding the ongoing proceedings. Set out below is a list of the upcoming court dates in the apportionment proceedings (including the Appeal):

- 24/2/2012 – Directions hearing for Boundary Bend Olives (S CI 2010 1354), Boort Olives (S CI 2011 6777), TPIF Almonds (S CI 2011 6604) and TPIF Citrus (Solara Rights Proceeding) (S CI 2011 6606).
- 13/3/2012 – Further directions hearing for Almonds Appeal (S APCI 2011 0103).

Please confirm by return email that you intend to provide the material requested and advise the timeframe by which this may be achieved.

Kind regards,

Celia Armstrong | Senior Associate

and

Catherine Curtain | Lawyer

Clarendon Lawyers | Level 17, Rialto North Tower, 525 Collins Street, Melbourne 3000
T + 61 3 8681 4442 | F + 61 3 8681 4499 | M 0422 615 535
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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:	25 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-27" now produced and shown to CELIA JANE ARMSTRONG at the time of swearing her affidavit on 25 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-27

**Email to T May and Ms Bezencon dated 23
September 2012**

Celia Armstrong

From: Celia Armstrong
Sent: Sunday, 23 September 2012 2:26 PM
To: tmay@herbertgeer.com.au; Kerree Bezencon
Cc: Michael Fernon; Alexandra Gleed
Subject: Timbercorp - BB Olives Rights Proceeding S CI 2010 1354
Attachments: Affidavit of Celia Jane Armstrong sworn 30.08.12.pdf; Second Affidavit of Celia Jane Armstrong sworn 30.08.12 with Exhibits CJA-4 to CJA-8.pdf; Third Affidavit of Celia Jane Armstrong sworn 19.09.12 with exhibit CJA-10.pdf

SaveToDatabase: 0

Dear Tom and Kerree

We refer to the orders in the above proceeding dated 22 March 2010.

Pursuant to paragraph 13 of those orders, please now find attached by way of service on the TGG Olives Committee Inc (we note that the orders refer to the TGG Almond Committee Inc, however, we assume this is supposed to be a reference to the TGG Olives Committee Inc) and Ms Bezencon:

- the Affidavit of Celia Jane Armstrong sworn 30 August 2012;
- the Second Affidavit of Celia Jane Armstrong (including exhibits CJA-4 to CJA-8) sworn 30 August 2012; and
- the Third Affidavit of Celia Jane Armstrong (including exhibit CJA-10) sworn 19 September 2012.

Regards
Celia

Celia Armstrong | Senior Associate

Clarendon Lawyers | Level 17, Rialto North Tower, 525 Collins Street, Melbourne 3000
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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:	25 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-30" now produced and shown to **CELIA JANE ARMSTRONG** at the time of swearing her affidavit on 25 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-30

**Bundle of correspondence between Clarendon
Lawyers and either or both T May and Ms Bezencon**

Celia Armstrong

From: Kerree Bezencon [kerree@siger.com.au]
Sent: Friday, 9 March 2012 5:04 PM
To: Celia Armstrong
Subject: FW: Citrus Apportionment and Global Timbercorp Settlement [1100412 and 1100563]

Hi Celia,

could you kindly keep us informed on court matters as I had made the trip down for the 24th met with Sam Hopper to find that it had been deferred for a month. I think the court had said that we were to be notified as an interested party and we'd appreciate not making unnecessary trips. I spoke with Sam re experts and will get back shortly

Regards
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),
SSA (Specialist SMSF Advisor)

*PO Box 1147, Healesville, Vic, 3777
Tel 03 59 626 097, Fax 03 59 626 086
Email : kerree@siger.com.au*

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Celia Armstrong

From: Celia Armstrong
Sent: Tuesday, 20 March 2012 7:47 AM
To: Kerree Bezencon
Cc: Michael Fernon
Subject: RE: Citrus Apportionment and Global Timbercorp Settlement [1100412 and 1100563]
Attachments: RE: Citrus Apportionment and Global Timbercorp Settlement [1100412 and 1100563]

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Hi Kerree

I cannot see any orders requiring us to keep you informed in respect of the current proceedings. If you have some, please let me see copies. Regardless, I'll endeavour to update you on changes to the court timetable.

I note that you have not responded to my last email to you (copy attached) in which case I assume that you refuse to provide the material counsel has requested.

Regards
Celia.

Celia Armstrong | Senior Associate

Clarendon Lawyers | Level 17, Rialto North Tower, 525 Collins Street, Melbourne 3000
T + 61 3 8681 4411 | F + 61 3 8681 4499 | M + 61 431 658 651
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Sent: Friday, 9 March 2012 5:04 PM
To: Celia Armstrong
Subject: FW: Citrus Apportionment and Global Timbercorp Settlement [1100412 and 1100563]

Hi Celia,

could you kindly keep us informed on court matters as I had made the trip down for the 24th met with Sam Hopper to find that it had been deferred for a month. I think the court had said that we were to be notified as an interested party and we'd appreciate not making unnecessary trips. I spoke with Sam re experts and will get back shortly

Regards
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),
SSA (Specialist SMSF Advisor)

PO Box 1147, Healesville, Vic, 3777
Tel 03 59 626 097, Fax 03 59 626 086

Email : kerree@siger.com.au

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Celia Armstrong

From: Celia Armstrong
Sent: Friday, 22 June 2012 8:14 AM
To: Kerree Bezencon; tmay@herbertgeer.com.au
Cc: Michael Fernon
Subject: Timbercorp Directions hearings [1100412]

Tom and Kerree

I refer to the directions hearings in the various Timbercorp rights proceedings that were scheduled for today and note that they have been adjourned until 20 July 2012.

Kind regards
Celia.

Celia Armstrong | Senior Associate

Clarendon Lawyers | Level 17, Rialto North Tower, 525 Collins Street, Melbourne 3000
T + 61 3 8681 4411 | **F** + 61 3 8681 4499 | **M** + 61 431 658 651
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Celia Armstrong

From: Celia Armstrong
Sent: Monday, 2 July 2012 4:06 PM
To: Celia Armstrong
Subject: RE: T/I Tom May 9641 8917 [1100412]

SaveToDatabase: 0

T/I Tom May 3.40pm

Tom returned my call. He asked about the nature of the hearings that had been adjourned. I said that they were the directions hearing in the apportionment proceedings. I also indicated that the settlement negotiations were progressing and that the parties were hopeful that they would have something to report back to the court on 20 July 2012. Tom reminded me that he has a claim for costs in respect of the citrus matter.

Celia.

From: Celia Armstrong
Sent: Monday, 2 July 2012 2:39 PM
To: Celia Armstrong
Subject: T/O Tom May 9641 8917 [1100412]

2/7/2012 2.39pm

I returned Tom's call from last week and left a message for him to return my call.

Celia.

Celia Armstrong

From: Celia Armstrong
Sent: Tuesday, 17 July 2012 4:53 PM
To: tmay@herbertgeer.com.au; Kerree Bezencon
Cc: Michael Fernon
Subject: Timbercorp directions hearings [1100412]

Tom and Kerree

Please note that the directions hearings scheduled for this Friday, 20 July 2012 in the Timbercorp Rights Proceedings will now take place on **Friday, 3 August 2012** at 10:00am in Old High Court 2.

Regards
Celia

Celia Armstrong | Senior Associate

Clarendon Lawyers | Level 17, Rialto North Tower, 525 Collins Street, Melbourne 3000
T + 61 3 8681 4411 | F + 61 3 8681 4499 | M + 61 431 658 651
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Celia Armstrong

From: Jenny Bogie
Sent: Thursday, 2 August 2012 5:34 PM
To: tmay@herbertgeer.com.au; kerree@siger.com.au
Cc: Celia Armstrong
Subject: Directions Hearing

SaveToDatabase: 0

Dear Tom and Kerree,

Celia has asked me to let you know that there is no Timbercorp directions hearing tomorrow.

Kind regards

Jenny Bogie | Personal Assistant

Clarendon Lawyers | Level 17, Rialto North Tower, 525 Collins Street, Melbourne 3000
T + 61 3 8681 4426 | F + 61 3 8681 4499
www.clarendonlawyers.com.au

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Celia Armstrong

From: Tom May [TMay@herbertgeer.com.au]
Sent: Thursday, 2 August 2012 5:36 PM
To: Jenny Bogie
Subject: RE: Directions Hearing

Thanks. Can you please advise us of the new date and why the matters were adjourned

From: Jenny Bogie [mailto:Jenny.Bogie@clarendonlawyers.com.au]
Sent: Thursday, 2 August 2012 5:34 PM
To: Tom May; kerree@siger.com.au
Cc: Celia Armstrong
Subject: Directions Heari
Dear Tom and Kerree,

Celia has asked me to let you know that there is no Timbercorp directions hearing tomorrow.

Kind regards

Jenny Bogie | Personal Assistant

Clarendon Lawyers | Level 17, Rialto North Tower, 525 Collins Street, Melbourne 3000
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<http://www.mailguard.com.au>

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Celia Armstrong

From: Celia Armstrong
Sent: Friday, 3 August 2012 8:54 AM
To: tmay@herbertgeer.com.au
Cc: Jenny Bogie
Subject: RE: Directions Hearing [1100412]

SaveToDatabase: 0

Tom

The need for the hearing has been avoided. We expect the next step to be a directions hearing before the Judge assigned to hear the applications for approval of the compromises.

Celia.

Celia Armstrong | Senior Associate

Clarendon Lawyers | Level 17, Rialto North Tower, 525 Collins Street, Melbourne 3000
T + 61 3 8681 4411 | F + 61 3 8681 4499 | M + 61 431 658 651
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From: Jenny Bogie
Sent: Thursday, 2 August 2012 5:34 PM
To: tmay@herbertgeer.com.au; kerree@siger.com.au
Cc: Celia Armstrong
Subject: Directions Hearing

Dear Tom and Kerree,

Celia has asked me to let you know that there is no Timbercorp directions hearing tomorrow.

Kind regards

Jenny Bogie | Personal Assistant

Clarendon Lawyers | Level 17, Rialto North Tower, 525 Collins Street, Melbourne 3000
T + 61 3 8681 4426 | F + 61 3 8681 4499
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Celia Armstrong

From: Tom May [TMay@herbertgeer.com.au]
Sent: Friday, 3 August 2012 9:25 AM
To: Celia Armstrong
Subject: RE: Directions Hearing [1100412]

Any idea when?

From: Celia Armstrong [mailto:Celia.Armstrong@clarendonlawyers.com.au]
Sent: Friday, 3 August 2012 8:54 AM
To: Tom May
Cc: Jenny Bogie
Subject: RE: Directions Hearing [1100412]

Tom

The need for the hearing has been avoided. We expect the next step to be a directions hearing before the Judge assigned to hear the applications for approval of the compromises.

Celia.

Celia Armstrong | Senior Associate

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From: Jenny Bogie
Sent: Thursday, 2 August 2012 5:34 PM
To: tmay@herbertgeer.com.au; kerree@siger.com.au
Cc: Celia Armstrong
Subject: Directions Hearing

Dear Tom and Kerree,

Celia has asked me to let you know that there is no Timbercorp directions hearing tomorrow.

Kind regards

Jenny Bogie | Personal Assistant

Clarendon Lawyers | Level 17, Rialto North Tower, 525 Collins Street, Melbourne 3000
T + 61 3 8681 4426 | F + 61 3 8681 4499
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Celia Armstrong

From: Celia Armstrong
Sent: Friday, 3 August 2012 9:27 AM
To: Tom May
Subject: RE: Directions Hearing [1100412]

SaveToDatabase: 0

Tom.

In the next few months. I'll let you know when the dates are set.

Celia.

Celia Armstrong | Senior Associate

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To: Celia Armstrong
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Any idea when?

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Sent: Friday, 3 August 2012 8:54 AM
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Celia.

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Celia Armstrong

From: Celia Armstrong
Sent: Monday, 13 August 2012 4:19 PM
To: Tom May
Cc: Kerree Bezencon
Subject: RE: Directions Hearing [1100412]

SaveToDatabase: 0

Tom

The directions hearing will now be at 10am on 31 August 2012.

If this changes, we will update the Timbercorp page on our website.

Kind regards
Celia.

Celia Armstrong | Senior Associate

Clarendon Lawyers | Level 17, Rialto North Tower, 525 Collins Street, Melbourne 3000
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Celia Armstrong

From: Tom May [TMay@herbertgeer.com.au]
Sent: Tuesday, 14 August 2012 10:17 AM
To: Celia Armstrong
Cc: Kerree Bezencon
Subject: RE: Directions Hearing [1100412]

Would you be kind enough to email me if there is any change

From: Celia Armstrong [mailto:Celia.Armstrong@clarendonlawyers.com.au]
Sent: Monday, 13 August 2012 4:19 PM
To: Tom May
Cc: Kerree Bezencon
Subject: RE: Directions Hearing [1100412]

Tom

The directions hearing will now be at 10am on 31 August 2012.

If this changes, we will update the Timbercorp page on our website.

Kind regards
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Celia Armstrong | Senior Associate

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Celia Armstrong | Senior Associate

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Celia Armstrong

From: Kerree Bezencon [kerree@siger.com.au]
Sent: Friday, 31 August 2012 11:29 AM
To: Celia Armstrong
Subject: RE: Request for Advice [1100412] - CONFIDENTIAL AND PRIVILEGED

Hi Celia,

can you tell me the timeframes that came out of the directions hearing please?

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),
SSA (Specialist SMSF Advisor)

PO Box 1147, Healesville, Vic, 3777
Tel 03 59 626 097, Fax 03 59 626 086
Email : kerree@siger.com.au

Celia Armstrong

From: Tom May [TMay@herbertgeer.com.au]
Sent: Friday, 31 August 2012 3:16 PM
To: Celia Armstrong
Subject: Timbercorp

Please inform me of the outcome of the proceedings today

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Celia Armstrong

From: Celia Armstrong
Sent: Friday, 31 August 2012 5:09 PM
To: Tom May; Kerree Bezencon
Cc: Alexandra Gleed
Subject: Timbercorp [1100412]
Attachments: 222179970_1_BB Olives - minute of proposed orders (31.8.12).docx

SaveToDatabase: 0

Tom and Kerree

Today Justice Judd set down the approval applications for 4 October 2012 with an estimate of 2 (to 3) days.

I am attaching the form of proposed orders for the Boundary Bend Rights Proceeding for your information which shows the dates for the exchange of relevant material. The dates are the same for all other Timbercorp Rights Proceedings. We expect authenticated orders to be provided on Monday. We will upload the authenticated orders for all proceedings as soon as possible after we receive them.

Please let me know if you have any questions about the orders.

Kind regards
Celia.

Celia Armstrong | Senior Associate

Clarendon Lawyers | Level 17, Rialto North Tower, 525 Collins Street, Melbourne 3000
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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

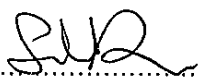
OIM#2 PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691
997) as trustee for TIMBERCORP ORCHARD TRUST #2 & ORS (according
to the attached Schedule)

Defendants

EXHIBIT NOTE

Date of document:	25 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-29" now produced and shown to **CELIA JANE ARMSTRONG** at the time of swearing her affidavit on 25 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-29

**Pair of emails from E Adams to Ms Bezencon
dated 21 September 2012**

Celia Armstrong

From: Adams, Elyse [Elyse.Adams@allens.com.au]
Sent: Friday, 21 September 2012 4:02 PM
To: kerree@timbercorp growers.com
Cc: Celia Armstrong; Michael Fernon; Philip.Jones@maddocks.com.au; Steven.Tang@maddocks.com.au; david.porter@nortonrose.com; kirk.warwick@nortonrose.com; JSheridan@abl.com.au; mgrose@abl.com.au; Hinchin, Clint; Joseph, Jonathan
Subject: Supreme Court of Victoria proceeding number S CI 2011 6606 - Solora Rights Proceeding
Attachments: S - Affidavit of CCH dated 27 August.pdf; S - CCH-3.pdf; S- CCH-2.pdf; S - Sealed summons.pdf

Dear Ms Bezencon

Further to Clint Hinchin's conversation with you at 2:30pm today, we **attach** by way of service:

1. sealed copy summons filed on behalf of ANZ on 27 August 2012 in Supreme Court of Victoria proceeding number SCI 2011 6606 (the **Solora Rights Proceeding**); and
2. a copy of the affidavit sworn in support of that summons by Clint Hinchin dated 27 August 2012, together with the exhibits to that affidavit.

Please note that, due to the size of the first exhibit to Clint's affidavit (being Ross McClymont's affidavit and accompanying exhibits sworn on 15 August 2012 in the Almond Land Rights Appeal Proceeding), it will follow in a separate email.

Also to follow by way of service in four additional emails in respect of the Solora Rights Proceeding is:

1. a copy of the affidavit sworn by Celia Jane Armstrong dated 30 August 2012 (excluding confidential exhibits to CJA-1 to CJA-3);
2. a copy of the (second) affidavit sworn by Celia Jane Armstrong dated 30 August 2012 with exhibits CJA-4 to CJA-8;
3. a copy of the (second) affidavit sworn by Clint Hinchin dated 19 September 2012 (see below in relation to the exhibits to this affidavit);
4. a copy of the (third) affidavit sworn by Celia Armstrong dated 19 September 2012 with exhibit CJA-10 (excluding confidential exhibit CJA-9);
5. a copy of the affidavit sworn by Mark Korda dated 18 September 2012 with exhibits MAK-1 to MAK-5 (excluding confidential exhibit MAK-6);
6. a copy of the affidavit sworn by Alan Fisher dated 20 September 2012 with exhibits ADF-1 to ADF-5.

We confirm there will be, including this email, six separate emails serving these documents.

The exhibits to the affidavit of Clint Hinchin sworn 19 September 2012 are contained on three CD-ROMs, being Exhibit CCH-1, Exhibit CCH-2 and Exhibit CCH-3 respectively. Exhibit CCH-1 and Exhibit CCH-2 will be sent to you at the address below by registered post this afternoon together with copies of each of the documents referred to above (other than the confidential exhibits). Exhibit CCH-3 is a confidential exhibit.

The address you have provided us for the service of the CD-ROMs is:

Unit 1
4 Portside Court
Noosaville QLD 4566

We are copying into this email the solicitors of parties to the Solora Rights Proceeding and the solicitors of TSL. We do not propose to copy those solicitors into the emails that follow.

Please contact us if you have any queries in relation to the above.

Regards

Clint Hinchin and Elyse Adams

Elyse Adams
Law Graduate
Allens

Allens > < Linklaters

DL +61 3 9613 8534
101 Collins Street
Melbourne VIC 3000 Australia
www.allens.com.au

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<http://www.allens.com.au/experts>

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Celia Armstrong

From: Adams, Elyse [Elyse.Adams@allens.com.au]
Sent: Friday, 21 September 2012 8:15 PM
To: kerree@siger.com.au
Cc: Celia Armstrong; Michael Fernon; Philip.Jones@maddocks.com.au; Steven.Tang@maddocks.com.au; david.porter@nortonrose.com; kirk.warwick@nortonrose.com; JSheridan@abl.com.au; mgrose@abl.com.au; Hinchin, Clint; Joseph, Jonathan
Subject: Supreme Court of Victoria proceeding number S CI 2011 6606 - Solara Rights Proceeding
Attachments: S - Affidavit of CCH dated 27 August.pdf; S - CCH-3.pdf; S- CCH-2.pdf; S - Sealed summons.pdf

Dear Ms Bezencon

I refer to our telephone conversation at 5:47pm this evening in which you requested that the documents served on you today under cover of my email below at the email address kerree@timbercorp growers.com be resent to your attention at kerree@siger.com.au. You also requested that any future correspondence be sent by the parties to this proceeding to kerree@siger.com.au.

As requested, I confirm that this is the first of six emails attaching the documents referred to in my email below (other than the confidential exhibits).

I do not propose to copy the solicitors for the other parties into the five emails that will follow.

Regards

Elyse Adams
Law Graduate
Allens

Allens > < Linklaters

DL +61 3 9613 8534
101 Collins Street
Melbourne VIC 3000 Australia
www.allens.com.au

From: Adams, Elyse
Sent: Friday, 21 September 2012 4:02 PM
To: kerree@timbercorp growers.com
Cc: celia.armstrong@clarendonlawyers.com.au; Michael.Fernon@clarendonlawyers.com.au; Philip.Jones@maddocks.com.au; Steven.Tang@maddocks.com.au; david.porter@nortonrose.com; kirk.warwick@nortonrose.com; JSheridan@abl.com.au; mgrose@abl.com.au; Hinchin, Clint; Joseph, Jonathan
Subject: Supreme Court of Victoria proceeding number S CI 2011 6606 - Solara Rights Proceeding

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

25 September 2012
the Fourth Defendant

Tel: 03 8681 4400
Fax: 03 8681 4499
Solicitors Code: 101294
Ref: MJF:1100563

michael.fernon@clarendonlawyers.com.au

This is the exhibit marked "CJA-28" now produced and shown to CELIA JANE ARMSTRONG at the time of swearing her affidavit on 25 September 2012.

Before me:.....


SARAH DORAN
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-28

**Email from C Armstrong to Ms Bezencon dated 21
September 2012**

Celia Armstrong

From: Celia Armstrong
Sent: Friday, 21 September 2012 12:16 PM
To: Kerree Bezencon
Cc: Alexandra Gleed; Michael Fernon
Subject: Solara Rights Proceeding - S CI 2011 6606 [1100412]
Attachments: Affidavit of Celia Jane Armstrong sworn 30.08.12.pdf; Second Affidavit of Celia Jane Armstrong sworn 30.08.12 with Exhibits CJA-4 to CJA-8.pdf; Third Affidavit of Celia Jane Armstrong sworn 19.09.12 with exhibit CJA-10.pdf

SaveToDatabase: 0

Dear Kerree

We refer to the orders in the above proceeding dated 16 December 2011.

Pursuant to paragraph 8 of those orders, please now find attached by way of service on the TGG Citrus Committee Inc the Third Affidavit of Celia Jane Armstrong (including exhibit CJA-10) sworn 19 September 2012.

Please also find attached by way of service on the TGG Citrus Committee the following affidavits which exhibit material you have previously been provided with or had access to:

- the Affidavit of Celia Jane Armstrong sworn 30 August 2012;
- the Second Affidavit of Celia Jane Armstrong (including exhibits CJA-4 to CJA-8) sworn 30 August 2012; and

Kind regards
Celia

Celia Armstrong | Senior Associate

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