

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

LIST E

SCI 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 EACH OF THE MANAGED INVESTMENT SCHEMES LISTED IN
SCHEDULE 1 OF THE ORIGINATING PROCESS AND IN ITS CAPACITY
AS MANAGER OF THE UNREGISTERED MANAGED INVESTMENT
SCHEME LISTED IN SCHEDULE 2 OF THE ORIGINATING PROCESS
First Plaintiff

MARK ANTHONY KORDA
Second Plaintiff

LEANNE KYLIE CHESSEY
Third Plaintiff

CERTIFICATE IDENTIFYING EXHIBIT

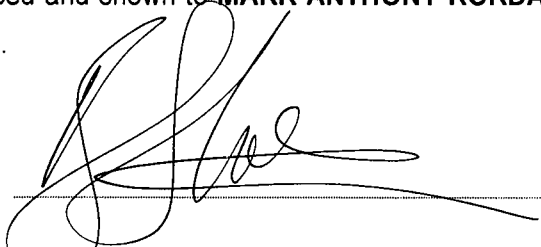
Date of document: 4 December 2009
Filed on behalf of: the Plaintiffs

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This is the exhibit marked "**MAK-11**" now produced and shown to **MARK ANTHONY KORDA** at the time of swearing his affidavit on 4 December 2009.

Before me:


BRIDGET ELLEN SLOCUM

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-11"
Judgment of Croft J

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

Not Restricted

COMMERCIAL COURT

No 9998 of 2009

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

TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)
IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE
MANAGED INVESTMENT SCHEMES LISTED IN
SCHEDULE 1

ORS ACCORDING TO THE SCHEDULE

Plaintiffs

<u>JUDGE:</u>	CROFT J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	11 November 2009
<u>DATE OF JUDGMENT:</u>	12 November 2009
<u>CASE MAY BE CITED AS:</u>	Re Timbercorp Securities Limited (No 4)
<u>MEDIUM NEUTRAL CITATION:</u>	[2009] 530

CORPORATIONS - application by liquidators for directions - managed investment schemes - responsible entity in liquidation - sale by responsible entity of schemes' interest in olive plantations - liquidators justified in agreeing to sell plantations and extinguish all the rights of the growers - application to reverse or modify the decision of the liquidators as to the preferred bidder dismissed - s 477(2B), s 511, s 568(1A) and s 1321 of the *Corporations Act 2001*.

APPEARANCES:

For the Plaintiffs	Mr L Zwier and Ms B. Toy-Cronin
For Timbercorp Growers Group	Mr G.T. Bigmore of Her Majesty's Counsel and Mr S.G. Hopper
For Kerree Anne Bezencon	Mr T.D. Cordiner
For Australian Securities and Investments Commission	Mr S J Hibble
For Westpac Banking Corporation, BOS International Australia Limited and Australia and New Zealand Banking Group Limited	Mr P.E. Anastassiou of Senior Counsel and Mr R.G. Craig

HIS HONOUR:

Primary Application

- 1 By an originating process dated 10 November 2009 the plaintiffs, who are Timbercorp Securities Ltd (in liquidation) as the responsible entity, Olive Corp. Management Ltd (in liquidation) in its capacity as manager of the Unregistered Managed Investment Scheme, Mr Korda, Mr Chesser, Mr Mentha, Timbercorp Ltd (in liquidation) and Olive Corp Lands Pty Ltd (in liquidation), seek orders and directions under s 477(2B), s 511, s 568(1)(A) of the *Corporations Act 2001*.
- 2 The orders and directions sought include orders and directions that the third and fourth plaintiffs in their capacity as liquidators of the first, sixth and eighth plaintiffs, are justified in procuring the first plaintiff as responsible entity of the managed investment schemes listed in Schedule 1 of the proposed order, to enter into and perform sale and purchase deeds between each of the plaintiffs and Boundary Bend Ltd, which form confidential Exhibits MAK18 and MAK19 of the affidavit of Mr Korda, sworn 10 November 2009 and extinguishing all the rights of growers, that is, investors in the schemes set out in Schedules 1 and 2 of the proposed order in respect of the assets, the subject of the sale and purchase deeds.
- 3 Directions are sought also that the third and fifth plaintiffs, in their capacity as liquidators of the second plaintiff, are justified in procuring the second plaintiff as manager of the unregistered Olive Scheme to enter into and perform the sale and purchase deed and extinguishing all of the growers rights.
- 4 This matter has been brought on with a degree of urgency because the Boort and Boundary Bend sale and purchase deeds contain certain conditions precedent, including obtaining a direction from the Court that the liquidators are justified in entering into the Boort and Boundary Bend sale and purchase deeds and extinguishing growers rights, originally by 2 November 2009, a date which the parties have extended by agreement to 12 November 2009, which date it now is.

- 5 Another of the conditions precedent provided for in the Boort and Boundary Bend sale and purchase deeds, is that the secured creditors, that is, CBA, now Fenceport, and the Syndicate Banks or any assignees of the holder of a replacement charge or replacement mortgage (as defined in the sale and purchase deeds), provide at completion (or by then have agreed in writing to provide) to the liquidators releases of various charges and discharges of the mortgages over the properties, which are defined in the Boort and Boundary Bend sale and purchase deeds.
- 6 The purpose of the primary application, as I have styled it, is set out in the affidavit of Mr Korda dated 10 November 2009 at paragraph 20.

The purpose of this application is to seek:

- (a) The Court's approval pursuant to s 477(2B) of the Act that we can as liquidators of TSL, [Timbercorp Securities Limited], TL [Timbercorp Limited], OLPL [Olivecorp Land Pty Ltd] and OML [Olivecorp Management Limited], enter into the SPDs and any associated agreement;
- (b) Directions pursuant to section 511 of the Act that we are justified in procuring TSL and OML to enter into and perform the SPDs, and terminate Growers interests in the Olive Schemes; and
- (c) Leave and directions regarding disclaiming the Project and Management Agreement (PMA) in respect of the 2000 Private Offer Scheme to also achieve a termination of those Grower interests in the 2000 Private Offer Scheme.

Horden Application in Opposition

- 7 An application dated 10 November 2009 is made also by John Angus Horden, under s 1321 of the *Corporations Act 2001*.
- 8 This application recites specifically that on the basis of the facts stated in the affidavits of George Kalil, dated 11 November 2009, and Michael Joseph Fernon, dated 10 November 2009, relief is sought by way of an appeal to the Court to reverse or modify the whole of the decision of the second and third plaintiffs to award Boundary Bend Limited as the preferred bidder and enter into a sale and purchase deed with Boundary Bend Limited in respect of the Olive Scheme assets and any

other orders thought fit.

- 9 This application does not purport to be made on behalf of the growers as a group or any sub-set of the growers as a group. Although the plural is used in the heading "Growers' Submissions", which was handed up to the Court, it is not submitted that this application is made other than by an individual in spite of the issue of the extent of the support for the application having been raised by another party in the proceedings during the course of the hearing.

Timbercorp Developments and the Realisation of Assets

- 10 On 23 April 2009 and pursuant to s 436A of the *Corporations Act*, Mr Chesser and Mr Korda were appointed as voluntary administrators of the first, second, sixth and seventh plaintiffs. At the same time Messrs Chesser and Korda were also appointed with Messrs Shepherd and Rocke, as voluntary administrators of the 37 other Timbercorp Group companies. On 29 June 2009 Messrs. Chesser and Korda were appointed liquidators of the first, second, sixth and seventh plaintiffs and have continued in these positions since that time.
- 11 Timbercorp Securities Ltd, the first plaintiff, is currently the responsible entity of the seven Olive Schemes which are registered as managed investment schemes under Part 5C of the *Corporations Act*. In addition there is one Olive Scheme managed by Olivecorp. Management Ltd, the second plaintiff, and which is not registered because it was offered only to sophisticated professional investors and so was not required to be registered under Part 5C of the Act.
- 12 In the course of submissions by all parties no point was made of this difference, and so for present purposes they have been treated collectively and without distinction. There are 3,265 growers in the registered Olive Schemes, and 42 in the unregistered scheme, known as the 2000 Private Offer Scheme.
- 13 The Olive Schemes are operated on land owned by either a Timbercorp company or an external landlord with some variations in the structure of the schemes entered

into at various times. The end result from the grower's point of view would be a licence and a joint venture agreement, or a sub-lease.

- 14 In this respect it is noted in the affidavit of Mr Korda that the Olive Scheme documents were consistent with the tax driven nature of managed investment schemes. At paragraph 13 of his affidavit Mr Korda states:

... They provide that the Growers have the right to occupy and use the land and that the olive crop vests directly in the Growers, but the documents also expressly provide that the rights of the Growers do not extend to an ownership interest in any land, water rights or other infrastructure, and the Growers expressly acknowledge that those assets are owned by the land owner."

- 15 It is not necessary for present purposes to repeat the history of the Timbercorp Group administration, liquidation and steps taken for the realisation of assets. Although directed to the Almond Schemes, the judgment of His Honour Robson J, in Matter No. 9408 of 2009, one of the series of these Timbercorp Group proceedings, provides a very helpful summary of this history, and I note that this judgment is now published as *Re Timbercorp Securities Limited (No 3)* [2009] VSC 510.

- 16 Additionally, the affidavit of Mr Korda in this matter provides a detailed account of the history and details of the steps taken to realise assets, directed of course to the Olive Schemes. As the controversy in the present proceedings is directed not to the factual matters but rather, to the appropriateness of the proposed asset sales, this factual historical evidence is not in issue and need not be repeated at length now.

- 17 There are, however, some matters in Mr Korda's account of past events which I will highlight, as they are relevant to the matters presently in issue. Mr Korda deals in some detail with the orderly realisation or recapitalisation, of the Timbercorp assets. At paragraphs 14 to 19 of his affidavit Mr Korda states:

14. Since shortly after the commencement of the voluntary administration of TSL and the Timbercorp Group Companies we developed a strategy for, and then managed, an orderly realisation or recapitalisation of the Olive Schemes, as well as the 11 registered and one unregistered MIS [Managed Investment Schemes] for the cultivation of eucalyptus trees

(**Forestry Schemes**) and the seven registered and one unregistered MIS for the cultivation of almonds (**Almond Schemes**). The purpose of this process has been to maximise returns to all stakeholders, including the Growers, landlords, employees, secured and unsecured creditors and to circumvent significant loss arising from wastage of the Timbercorp horticultural schemes in particular. The task has been extremely difficult because the Timbercorp Group is insolvent, its assets are secured in favour of banks, its structure is complex, key assets are leased to external landlords and the Act does not set out a comprehensive regime for the orderly winding up of managed investments schemes.

BBL [Boundary Bend Limited] transaction

15. As a result of the matters set out in detail below we have procured TSL and the other Timbercorp Group vendor companies to enter into four conditional sale and purchase deeds (SPDS). There are two SPDs with BBL to sell olive land, trees, cropping rights, and plant and equipment, one for the Boort Schemes (**Boort SPD**) and one for the Boundary Bend Schemes (**Boundary Bend SPD**). The two further SPDs are with BBL to sell the permanent water rights at Boort (**Boort Water SPD**) and Boundary Bend (**Boundary Bend Water SPD**). It is a condition precedent of the Boort SPD that BBL and the water mortgagee, which will be Fenceport Pty Ltd (as trustee for the Timbercorp Forestry Assets Sale Trust) (**Fenceport**), enter into a mortgagee contract for the sale of water shares prior to the end date (**Boort Mortgagee Water Sale**). The total sale price for all these assets is \$59.5m.
16. Importantly, the SPDs are not conditional on finance or an equity raising by BBL. Equally importantly, the SPDs provide that BBL will extend the crop sale agreements that have been in place during the liquidation of TSL and OML to ensure the Grovelots will be maintained prior to completion.
17. The SPD does have two conditions relevant to this application: the sale is conditional on the release of securities and obtaining a direction from the Court that we are justified in causing TSL and OML to enter into and perform the SPD and extinguish all the Growers rights over the Olive Schemes. The conditions precedent must be satisfied by 12 November 2009 but they will not be given effect or nearer to completion on or before January 2010.
18. The SPDs contain provisions which endure beyond three months and we do not have power to enter into such an agreement without approval of the Court or the Committee of Inspection of each Timbercorp Group vendor company.

Olive Asset security granted in favour of Banks

19. Some of the olive assets subject to the SPDs are secured in favour of BOSI Security Services Limited as security trustee for a syndicate of banks comprised of Australia and New Zealand Banking Group Ltd (ANZ), Westpac Banking Corporation (Westpac) and BOS International Australia Limited (BOSI) (Syndicate Banks). Some of the olive assets subject to the SPD were previously secured in favour of the Commonwealth Bank of Australia (CBA). As set out further from paragraph 97-106 below, the CBA Securities have now been replaced by securities in favour of Fenceport. Fenceport and the Syndicate Banks are referred to below as the “Secured Creditors”. The amount of secured debt owed to the Secured Creditors is approximately \$228m. BBL will not settle without clear title to the Olive Assets. The Secured Creditors will not be paid in full from the proceeds of sale to BBL. The Syndicate Banks will therefore not be obliged to release their securities. Fenceport will, however, be required to release its securities upon settlement of the sale to BBL. ...
18. Additionally, Mr Korda emphasised the open and transparent process maintained throughout and at paragraph 27 of his affidavit states:
27. Throughout the liquidations of the Timbercorp Group our staff have continually updated the KordaMentha website with press releases, documents and Court proceedings. ABL’s [Arnold Bloch Leibler’s] website is continually updated with the Court documents relating to all the Timbercorp Court proceedings of which they have carriage. We have also kept the TGG [Timbercorp Growers Group] regularly informed of all developments and so too the Committees of Inspection.
19. There were meetings of growers in relation to the Almond Schemes and the Olive Schemes. Mr Korda refers to these meetings in paragraphs 32 to 37 of his affidavit when he states:
32. On 31 July 2009 we caused TSL to hold concurrent meetings of the Growers in the Almond Schemes (**Almond Meetings**) independently chaired by Matthew Walsh of Gadens Lawyers.
33. On 31 July 2009 the Growers passed special resolutions to amend the constitutions of the 2001-2007 Almond Schemes. The special resolutions purported to give the RE [Responsible Entity] the power to use the proceeds of the 2009 crop for the purposes of working capital in the production of the 2010 crop and for the purposes of a long term restructure of the schemes. We briefed

Mr Scerri QC to advise whether each resolution (if passed) would be legally effective to amend the Almond Scheme Constitutions or otherwise to alter the legal rights or obligations of the Growers, or the legal rights, powers and obligations of TSL as the RE of the Almond Schemes. He advised that they would not be. We caused Mr Scerri QC's opinion to be posted on the websites prior to the meeting. ...

Meetings of Growers – Olives

34. Meetings of the Olive Scheme Growers (with the exception of the 2000 Private Offer Scheme which was not subject to the Court proceeding and subsequent meetings) were convened on 17 August 2009, also chaired by Matthew Walsh (**Olive Meetings**). In preparation for the Olive Meetings we prepared a notice of meeting, which included the resolutions, and a proxy form for each meeting. ...

35. The Olive Meetings were held in the Victory Room at Etihad Stadium. Approximately 80 Growers and interested parties attended in person. The structure of the Meeting was:

- (a) Introduction by the Chairman;
- (b) Update by the liquidators, which I presented;
- (c) Timbercorp Growers Group (TGG) presentation including comments from:
 - (i) Stephen Lynch, an agribusiness and horticulture consultant;
 - (ii) The Timbercorp Olives Committee (a committee of the TGG);
 - (iii) BBL;
 - (iv) Great Land Olives (a consortium of Growers and their financial advisers); and
 - (v) Primary Securities;
- (d) Questions;
- (e) Resolutions; and
- (f) Voting.

36. ...

37. The resolutions put forward by the TGG were similar to those put forward at the Almond Meetings, including a special

resolution to allow the RE to use the proceeds of the 2009 crop for the purposes of working capital in the production of the 2010 crop and for the purposes of a long term restructure of the scheme (**Special Resolution**). The Growers passed the Special Resolution for each of the registered Olive Schemes and adjourned the other resolutions to a meeting on a date yet to be fixed. ...

20 These meetings were followed by Court proceedings in relation to the various schemes which resulted in amendments to the Olive Scheme constitutions, to give the responsible entity the express power to terminate the sub-leases and, where relevant, the licence and joint venture arrangements.

21 There has been ongoing controversy between the growers and secured creditors. In this respect it is relevant to note paragraphs 54 and 55 of Mr Korda's affidavit where he states:

54. From the outset of the TSL insolvency there have been ongoing differences of opinion between the TGG and the Secured Creditors of the olive asset owning companies of the Timbercorp Group over a number of issues including:

- (a) The value of the olive assets;
- (b) The extent to which Growers have a proprietary interest in any, and if so which, of the olive assets;
- (c) If so, the value of the Growers' proprietary interests in the olive assets;
- (d) How proceeds of sale of olive assets may be apportioned between the Secured Creditors of the owner of the olive assets and TSL as RE of the Olive Schemes for the benefit of Growers.

55. The same dispute arose between the TGG and Secured Creditors in respect of the almond assets. We made it clear to TGG and the Secured Creditors that it was unlikely that the offers from prospective bidders would exceed the amount owed to the Secured Creditors and the amounts contributed by Growers to the Olive Schemes. We told both the TGG and Secured Creditors that they should seek to amicably resolve their different points of view about apportionment of any sale proceeds between them before it became time critical for them to do so. We also highlighted that we had conflicts of duty as the liquidators of the landowning entities and TSL. As liquidators of the land owning

entities we seek to maximise the value of its assets and would be obliged to disclaim any onerous contracts which diminish the value of its assets. As liquidators of TSL we seek to maximise the returns by the maintenance of any beneficial contracts to TSL over the assets of the land owning entities.

22 The issues noted go to the apportionment issues as they are referred to in previous proceedings. These are not issues the subject of the present primary application and are matters for the ultimate trial of the matter.

23 On this basis I move to the sale or recapitalisation process with respect to the Olive Schemes. The process is described in detail in the affidavits of Mr Korda and Mr Andrew Malarkey, who was the partner of the firm of KordaMentha who had responsibility for coordinating the expressions of interest. The process adopted is described in the affidavit of Mr Korda at paragraphs 64 to 69, where he states:

64. On 13 August 2009, we published an advertisement in the *Australian Financial Review* in which we sought expressions of interest for the possible purchase of the olive assets or the re-capitalisation of the Olive Schemes. ... This advertisement was published again in the *Australian Financial Review* on 18 August 2009.

65. Andrew Malarkey, a partner of KordaMentha, has had responsibility for coordinating the expressions of interest. Mr Malarkey has informed me of the matters which I depose to below.

66. A number of parties contacted KordaMentha, and some executed a Confidentiality Agreement (**the Interested Parties**)...

67. Upon execution, each of the Interested Parties were provided with a copy of a Confidential Information Memorandum prepared by KordaMentha (**IM**). ...

68. Each of the Interested Parties was also granted access to an on-line data room which contains confidential information about the Olive Schemes. ...

69. The assets that we offered for sale are described in the IM. ...

24 Mr Korda continues, "the information memorandum set out a clear timetable for the sale or recapitalisation process and stipulated that the closing date for the first and final bidding offers is 5 p.m. on 11 September 2009." He notes also that the timetable

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was communicated to the Timbercorp Growers Group. Four bids were received for the Olive Assets and the main terms of the bids, including allocation of price between the Olive assets and important conditions are summarised in the affidavits of Mr Korda and Mr Malarkey.

25 On 9 October 2009 Boundary Bend Ltd was selected as the preferred purchaser. In paragraphs 74 and 75 of Mr Korda's affidavit he states:

74. On 9 October 2009 BBL was selected as the preferred purchaser as the terms and conditions that BBL offered were the most favourable. The BBL offer was superior to all other offers received on price, ability to fund the assets prior to completion and completion risk. The BBL bid is fully funded through committed capital resources and is not subject to finance.

75. The BBL offer also includes a term that, within three months after completion, BBL will offer the olive Growers a priority allocation to subscribe for shares in BBL. Through this, olive Growers who wish to have an ongoing investment in Australian olive groves will have an opportunity to do so.

26 In paragraphs 80 to 85, he continues:

80. On 12 October 2009 the parties signed the SPDs. ... I consider that the SPDs should remain confidential as if bidders or the market are able to see the bids other parties have made, and the agreement with BBL does not reach completion, it may prejudice any subsequent realisation. I have set out in this affidavit the key provisions of the SPDs so that the interested parties are informed of all terms and conditions relevant to their interest.

81. ...

82. Completion (as defined) will occur 5 days after the conditions precedent have been fulfilled. It is expected by 10 January 2010 but may be sooner.

Conditions Precedent

83. The conditions precedent of the Boort and Boundary Bend SPD are set out in clause 3.1 of the Boort and Boundary Bend SPD.

84. The deadline for the satisfaction of certain conditions precedent, including obtaining a direction from the Court that the liquidators are justified in entering into the Boort and Boundary Bend SPDs and extinguish Growers' rights, was 2 November 2009, however the parties have extended this date, by agreement, to 12 November 2009 (**Immediate Conditions Precedent**). (If the Court directs that we are justified in doing so, we will not extinguish the Growers' rights until

immediately before Completion.)

Release of Securities over Olive Assets

85. Another of the conditions precedent of the Olive Asset sale (clause 3.1(c) of the Boort and Boundary Bend SPDs) is that the Secured Creditors (CBA (now Fenceport) and the Syndicate Banks) or any assignees or the holder of a Replacement Charge or Replacement Mortgage (as defined in the Boort and Boundary Bend SPDs) provide at completion (or having agreed in writing to provide) to the Liquidators executed:

- (a) releases of their charges releasing any of the Boort or Boundary Bend Olive Assets (as defined in the Boort and Boundary Bend SPDs) encumbered by the Lenders' Charges; and
- (b) discharges of the mortgages over the Properties (as defined in the Boort and Boundary Bend SPDs).

27 The affidavit of Mr Korda also sets out in detail the range of securities over the relevant vendor entities and assets and agreements and arrangements that have been made and which will be made for the realisation of assets as proposed. It is not necessary to say anything further about this material at this stage.

28 Finally, Mr Korda deposes to the urgency of steps being taken to attend to olive grove maintenance and to avoid wastage and the issues in relation to maintenance and wastage. These matters are set out in paragraphs 125 to 135 of Mr Korda's affidavit where he states:

Crop Maintenance and Wastage

125. The olive groves require ongoing maintenance, and therefore expenditure, to produce a harvestable crop. ...

126. I am informed by Darren Lipton, General Manager of Horticulture, October, November and December is a critical period for the olive trees.

127. Flowering commenced in the last week of October at Boundary Bend and at Boort in the first week of November. Flowering is the first step to crop production. In the event that irrigation at both Boort and Boundary Bend, and fertiliser application (especially at Boundary Bend) were neglected, the stress on the trees during the flowering period would decimate the crop for 2010. There is an expectation of a 50,000+ tonne crop on Boort and Boundary Bend for 2010 with in excess of 9 million litres of olive oil expected to be produced. This equates to approximately \$40m of production. This value would be materially reduced if irrigation and fertilization did not occur.

128. November and December are the key time for the growth of wood on the trees that will produce a crop in 2011. If these sites are not irrigated during these months, growth is compromised and the crop potential for 2011 is adversely affected.
129. A major risk to the site is fire and if no weedicide and slashing program are in place, the overgrown foliage will present a major fire risk.
130. It is therefore critical to maintain the Boort and Boundary Bend properties throughout November and December to ensure growth and therefore revenues are not adversely affected.

BBEM [Boundary Bend Estate Management Pty Ltd] Crop Sale Agreement

131. In order to ensure that the olive groves were maintained pending a sale and that TSL continued to have access to the olive groves, the land owning entities entered into arrangements with BBEM in respect of each of the Boundary Bend Schemes. Under the arrangements, BBEM agreed to provide maintenance services for a defined period (**Relevant Period**), the relevant land owning entity agreed to continue to provide access to BBEM for the Relevant Period and we, as liquidators of the relevant land owning entity, agreed not to disclaim the leases for the Relevant Period. Given that TSL has no funds with which to pay for the services provided, TSL sold a portion of the crop to BBEM and to the relevant land owning entity as consideration (**Crop Sale Agreements**).
132. Under the Crop Sale Agreement, BBEM and the land owning entities are each entitled to a portion of the 2010 crop from the relevant Olive Scheme. The portion sold to BBEM is that part of the crop as will give rise, when sold, to net proceeds equal to the costs incurred by BBEM in maintaining the olive groves for the Relevant Period. The portion sold to the relevant land owning entity is that part of the crop as will give rise, when sold, to net proceeds equal to an agreed use and occupancy fee. That fee is calculated by reference to the licence fee or rent that the Growers would normally be required to pay in respect of the Relevant Period. ... The terms of the Crop Sale Agreements for the other Boundary Bend Olive Schemes vary slightly in their terms to reflect the structure, project documents and land ownership of each Olive Scheme but are materially identical.
133. TSL, OML, OLPL and BBMB entered into a materially identical agreement in respect of the Boort schemes (including the 2000 Private Offer Scheme). ...
134. BBEM and BBMB agreed to maintain the olive groves on this basis, originally until 30 September 2009. This was later extended to 11 October 2009.

BBL Transition avoids wastage

135. The Boort and Boundary Bend SPDs include an agreement that as soon as possible after signing, the parties must use their best

endeavours to procure an extension of the Crop Sale to operate between signing and completion. The extension to the Crop Sale Agreement was agreed on 14 October 2009 and has now been documented in an amendment deed. ... Materially identical amendment deeds were entered into in respect of the other Olive Schemes.

Submissions

29 The submissions in support of the primary application are summarised helpfully in the concluding paragraph of Mr Korda's affidavit. In summary he says, at paragraph 139:

- (a) From the time that Timbercorp Securities was placed into voluntary administration on 23 April 2009, some of the olive growers represented by the Timbercorp Growers Group, wanted to recapitalise the Olive Schemes.
- (b) The Timbercorp Growers Group was given every opportunity to recapitalise the Olive Schemes in general and as a result of the orders and directions made by Robson J in the winding up application in particular.
- (c) Notwithstanding the aspirational goals of the Timbercorp Growers Group to recapitalise the Olive Schemes, they have been unable to do so.
- (d) When we commenced our sale and recapitalisation process we openly and transparently foreshadowed the timetable for its completion.
- (e) The Timbercorp Growers Group was aware of that timetable and actively participated in the sale and recapitalisation process.
- (f) We have concluded a robust sale or recapitalisation process and attracted a financially able purchaser, Boundary Bend Ltd, willing to pay ... for the olive assets.
- (g) The sale purchase deeds include an extension of the crop sale agreement to ensure maintenance of the grove lots and avoid wastage.
- (h) We are unable to inject further funds to maintain the Olive Schemes, and
- (i) We will hold the proceeds of sale on trust pending the outcome of a proceeding to determine apportionment between the growers and secured creditors.

30 At this point it is helpful to note and emphasise that the role of the Court in proceedings of this nature is not to venture into the commercial arena and to substitute its own commercial judgment for that of a liquidator. Liquidators are

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appointed for their commercial expertise and experience in asset realisation in the interests of all relevant parties in the difficult circumstances of insolvency. As the authorities indicate, in the absence of evidence of breach of duty the Court will not interfere and, even then, the remedy would not involve the Court substituting its views on commercial matters for the commercial views of those expert and experienced in the field.

- 31 Reference was made to a number of authorities in this respect but I think the position is conveniently summarised in the following passage from the judgment of Austin J, in *Corporate Affairs Commission v ASC Timber Pty Ltd*.¹ I refer to his Honour's judgment:

"If it were the Court's function to reconsider all of the issues which have been weighed up by the liquidator in developing the proposal and to substitute its determination for his in, as it were, a hearing de novo, then a much more substantial evidentiary and investigatory process would be needed than has been embarked upon so far in the present proceedings. However, if the Court's function in granting approval under s.477(2)B is simply to review the liquidator's proposal, paying due regard to his or her commercial judgment and knowledge of all the circumstances of the liquidation, satisfying itself there is no error of law or ground for suspecting bad faith or impropriety and weighing up whether there was any good reason to intervene in terms of the expeditious and beneficial administration of the winding up, approval can be granted in rather more circumscribed proceedings. On the latter view the Court's approval is not an endorsement of the proposed agreement but is merely a permission for the liquidator to exercise his or her own commercial judgment in the matter."

- 32 The secured creditors were represented at the hearing and their position is that they do not appose the making of the orders sought in the primary application on the basis that the rights of the secured creditors to the net proceeds produced by the realisation of the Olive Scheme assets as proposed under the sale and purchase deeds will not be prejudiced and would be determined subsequently at the trial of the matter.
- 33 The point was also made in submissions that there is a commonality of interest between the growers and the secured creditors in the sense that both seek to

¹ (1998) 29 Australian Corporations and Securities Reports, p.109 at 118.

maximise the proceeds of realisation of assets, though subsequently their respective rights, hence entitlement to proceeds will need to be determined if they cannot be agreed.

34 The secured creditors indicated no difficulty with the steps taken to realise the assets, nor for the provisions of the proposed sale and purchase deeds. Also, the Australian Securities and Investment Commission (ASIC), which was also represented at the hearing, indicated no opposition to the primary application or the orders sought.

35 Opposition to the primary application comes by way of the Horden application. This application was supported by an affidavit of George Kalil, sworn 11 October 2009, and affidavits of Nigel Lesley Cox and Michael Joseph Fernon, both sworn 11 October 2009. The primary application was also opposed on the basis of an affidavit of Kerry-Anne Bezencon, sworn on 11 November 2009, although without any formal process by way of application issued at the time of the hearing. Nevertheless, the substance of this opposition is clear from the affidavit and from the submissions in support.

36 The submissions made in the Horden application were made for two reasons (as stated in paragraph 3 of the submissions in support). These submissions, quoting from paragraph 3, are said to be made for two reasons:

- (a) In support of an application under s 1321 of the *Corporations Act* to set aside the decision of the liquidators to accept a bid by Boundary Bend Pty Ltd and enter into the conditional sale and purchase deeds with Boundary Bend and
- (b) In opposition to an application made by the liquidators in this proceeding seeking approval from the Court under s 4772B, 511 and 5681A of the *Corporations Act* of their entering into the sale and purchase deeds, (thus fulfilling the conditions subsequent).

37 As appears from Mr Kalil's affidavit the bid by Great Land Olives Ltd, to which I will refer as GLO, was originally prepared and submitted to KordaMentha on 11 September 2009. On 16 September 2009 there was a discussion between Mr Kalil and Mr Malarkey, during which Mr Malarkey pointed out weaknesses in the bid.

There was subsequent email and other correspondence in relation to the bid between Mr Kalil and Mr Malarkey. As a result of these discussions a revised bid was submitted by GLO on 2 October 2009. This was followed by a letter and email correspondence between Mr Kalil and Mr Malarkey, as well as with Mr Ryan of KordaMentha. Concerns were raised by Mr Malarkey. Mr Kalil responded to these concerns. In paragraphs 25 and 26 of Mr Kalil's affidavit he states:

25. On 9 October 2009 I received a letter from Malarkey. In this letter, Mr Malarkey raised the following concerns in relation to the Revised GLO Bid:

- (a) the short-term management of the olive groves prior to completion of the sale and recapitalisation process;
- (b) the compensation of growers that did not wish to continue their involvement in the scheme; and
- (c) the absence of an underwriter willing to underwrite the equity participation offer to Growers.

...

26. On 12 October 2009 I sent a letter to Mr Malarkey addressing the issues raised in his letter of 9 October 2009. These included:

- (a) a further offer to immediately undertake the care and maintenance of the olive groves until the capital was raised from growers in order to give the growers the opportunity to acquire the Grove; and
- (b) confirmation that the GLO Revised Bid was not predicated upon a change of responsibility entity of the schemes; and
- (c) an explanation of what GLO proposed would happen with defaulting grovelots.

38 On 12 October 2009, Mr Kalil was informed that a sale and purchase deed had been executed with Boundary Bend Ltd with respect to both the Boort and Boundary Bend olive assets. Subsequently a letter was received by Mr Kalil from Mr Malarkey. At paragraph 29 of his affidavit Mr Kalil states:

29. On 15 October 2009 I received a letter from Mr Malarkey outlining the reasons that the liquidators considered the Boundary Bend Limited offer superior to the GLO Revised Bid, including:

- (a) a limited amount of funding for the immediate care and maintenance of the olive groves;
- (b) a change of responsible entity which did not provide compensation to growers who did not wish to continue the schemes; and
- (c) that it was conditional on raising capital as there was no underwriter willing to underwrite the capital raising.

...

39 The agreement with Boundary Bend Ltd is criticised extensively in Mr Kalil's affidavit. The criticism is followed by details of the new GLO proposal, which he says GLO wishes to put to the liquidators and which is set out in paragraph 46 of his affidavit.

40 Furthermore, Mr Kalil says that the new GLO proposal is more beneficial to the creditors and growers for the reasons set out in paragraph 48 of his affidavit. This point is taken up further in the submissions on behalf of Mr Horden at paragraph 7. In this respect I also note the issues raised in sub-paragraphs (g) and (h) with respect to Mr Fernon's affidavit, issues which are also reflected in the affidavit of Mr Cox.

41 In summary these points are that the new GLO proposal would be sufficiently superior to the Boundary Bend bid to avoid the litigation between growers and secured or other creditors and would also avoid litigation between forestry growers and olive growers. Mr Cox makes a similar point. Of course all this assumes that even if it were appropriate now to introduce the new GLO proposal late into the bidding process established by the liquidators, and to which I have referred already, that it is a real proposal in the sense that it has been fully negotiated and agreed, with arrangements financial and otherwise to deliver what is offered.

42 In the course of the hearing Mr Kalil was called as a witness and gave evidence with respect to this issue. He supported his evidence as to availability of finance by a letter dated 11 November 2009 from Mr Chris Knauer, Executive Director Equities, of Novus Capital Limited.

- 43 In cross-examination Mr Kalil was unable to indicate any agreed funding arrangements from any bank or other financial institution or the existence of any fund in any bank account or otherwise which would finance fully the new GLO proposal. Furthermore, when it became clear that a substantial part of the funding was to be provided by way of underwriting of a share issue rather than by way of loan, he conceded that no agreement for underwriting existed, and that the arrangements were still the subject of negotiation.
- 44 Consequently, in my opinion, it is clear that the new GLO proposal is no more than a possibility which is subject to all the difficulties and disappointments often inherent in negotiations. It follows that any perceived advantages that are said to flow from the new GLO proposal are no more than possibilities which cannot be given anything like the same weight as a "bird in the hand", to borrow from Robson J in *Re Timbercorp Securities Limited (No 3)*, in the form of the fully negotiated and agreed sale and purchase deeds.
- 45 The same applies in relation to the EB Capital proposal, the subject of the affidavit of Ms Bezenco. This proposal is also no more than a possibility, which is subject to all the exigencies of negotiation and agreement of terms and conditions.
- 46 In the context of reference to the discussion of these proposals I should reaffirm the position that it is not the role of the Court to compare proposals or bids of this nature; it is for the commercial judgment of the liquidators in this instance.
- 47 Finally, it was submitted in support of the Horden application that the liquidators have a conflict of duty in that they hold a 19.4 per cent equity interest in Boundary Bend Ltd, and I refer to paragraph 69(f) of Mr Korda's affidavit.
- 48 Reference was made to a number of authorities in support of the proposition that the liquidators have a duty to act in the best interests of creditors and others interested in the winding up of all companies of which they are liquidators, referring particularly to the case of *Timbercorp Securities in Liquidation v Western Australian Chip*

*& Pulp Co.*².

49 In terms of conflicting duties particular reference is made to the judgment of His Honour Finkelstein J, in the Federal Court in a case of *re Greight Pty Ltd*.³ His Honour said:

... If there are, or are likely to be disputes between companies in liquidation that are under the control of one liquidator, then as a general rule different persons should be appointed as liquidator to each company. This is not to say that it is inappropriate to appoint one person as liquidator of a group of companies or of companies that are closely connected, but once the likelihood of conflict becomes apparent it is necessary to take action.

50 The conflict in the present circumstances is said to arise as a result of the disposal of this 19.4 per cent interest in Boundary Bend Ltd by another company in which the liquidators act as liquidators. Furthermore, it is said that this problem was sought to be overcome in orders made by His Honour Robson J, on 18 September 2009 in proceeding 9408 of 2009, whereby Mr Ian Carson was appointed an additional liquidator.

51 In response it was submitted in opposition to the Horden application, that the position with respect to the 19.4 per cent equity in Boundary Bend Pty Ltd had been disclosed fully in the information memorandum, which was provided to interested parties following the request for expressions of interest which was published on 13 August 2009, and I refer to paragraphs 64 to 69 of Mr Korda's affidavit. It was said further that no objection has been raised previously.

52 Secondly, it was submitted that it is simply too late to raise these matters following an open and transparent bidding process which has been characterised by regular recourse to the assistance of this Court.

53 Thirdly, it was submitted that there has been no breach of any orders of the Court and that Mr Carson's appointment as an additional liquidator was limited to

² (2009) FCA 901, [8] – [11].

³ (2006) FCA 17, [14].

negotiating with Olivecorp Land Pty Ltd on behalf of Timbercorp Securities Ltd for the extinguishment of the leases and sub-leases and licence and joint venture agreements.

54 In my opinion this position is supported by the judgment of His Honour Robson J in *Re Timbercorp Securities Limited (No 3)*, at [28] to [31]. Finally it was submitted that any potential problems with respect to the conflict of duties of the liquidators have been resolved by the regular recourse by the liquidators to this Court for directions and other assistance during the course of the liquidation.

Conclusions

55 I turn first to the Horden application. In relation to the grounds relied upon in support of the application I am not satisfied on either basis. First, for the reasons given I am of the opinion that the new GLO proposal is no more than a possibility and that its superiority or otherwise to any of the existing bids, including the Boundary Bend Pty Ltd bid, is in any event a matter for commercial judgment of the liquidators.

56 Furthermore, the original and revised GLO bids were considered by the liquidators and rejected and in my opinion, there is no basis, on the evidence and circumstances of this matter to impugn their commercial judgment.

57 The new GLO proposal is of course late, on the basis of the bidding arrangements established by the liquidators. Although there may be circumstances where this would not properly be a decisive consideration, in the present circumstances agreement has been reached already with another bidder in the course of a carefully structured and transparent bidding process which the liquidators established. Consequently, lateness would seem to me to weigh much more heavily in the present circumstances.

58 In any event, in my view the issue does not arise because, for the reasons indicated, the new GLO proposal is a mere possibility and not a matter which might be

expected to upset a settled commercial arrangement with Boundary Bend Ltd. In my view the same position applies with respect to the EB Capital proposal.

59 In relation to the conflict of duty issue I accept the submissions in opposition to the Horden application, particularly having regard to the fact that the issue has not been raised previously and having regard to the carefully structured and transparent bidding process to which I have referred.

60 In relation to these issues I am also conscious of the evidence of Mr Korda in relation to the lack of available funds in the Timbercorp group of companies and the consequences of delay in relation to the adverse consequences for the maintenance and care of the olive plantations; the key asset with which these proceedings are concerned.

61 As indicated the sale and purchase deeds are subject to a condition precedent which must be satisfied today in the form of the making of the draft orders sought in the primary application if this agreed and financed commercial arrangement is not to be lost in favour of mere possibilities.

62 For these reasons I would refuse the Horden application under s 1321 of the *Corporations Act*, even if it were made within the time limited by Order 14 of the Supreme Court Corporation Rules 2003.

63 Furthermore, and for the same reasons, I refuse leave to extend the time for the making of such an application under Order 14.1, paragraph 2 of the Rules, to the extent that such an application has been made.

64 I turn now to the primary application. Having rejected the basis of opposition to that application and for the reasons indicated, particularly having regard to the carefully constructed and transparent bidding process established by the liquidators to which I have referred, I am of the opinion that the liquidators in their capacity as liquidators of the first, sixth and eighth plaintiffs are justified in procuring the first plaintiff as responsible entity of the managed investment schemes listed in

Schedule 1 of the proposed order, to enter into and perform sale and purchase deeds between each of the plaintiffs and Boundary Bend Ltd, which form confidential exhibits MAK18 and MAK19 of the affidavit of Mr Korda, sworn 10 November 2009, and extinguishing all the rights of the growers, that is, the investors in the schemes set out in Schedules 1 and 2 of the proposed order in respect of the assets, the subject of the sale and purchase deeds.

65 I am also of the opinion that the liquidators are justified in their capacity as liquidators of the second plaintiff in procuring the second plaintiff as manager of the unregistered Olive Scheme to enter into and perform the sale and purchase deed and extinguishing all of the growers rights.

66 Consequently, subject to any further submissions as to the form of the orders I propose to make orders in the form of the draft submitted yesterday with the revision of paragraph 7 as discussed.

THE COURT ORDERS:

1. The Third (Korda) and Fourth (Chesser) Plaintiffs (in their capacity as Liquidators of the First Plaintiff (TSL)) 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 SPDs and extinguishing all of the rights of Growers' (investors in the schemes set on in schedules 1 and 2 of this order) in respect of the assets the subject of the SPDs (**Grower Rights**).
2. The Third (Korda) and Fifth (Mentha) Plaintiffs (in their capacity as liquidators of the Second Plaintiff (OML)) are justified in procuring the Second Plaintiff as manager of the Unregistered Olive Scheme to enter into and perform the SPDs 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 SPDs.
4. The Third and Fifth 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 SPDs.
5. The Third (Korda) and Fifth (Mentha) Plaintiffs (in their capacity as Liquidators of the Second Plaintiff (OML)) are justified in disclaiming in respect of the unregistered managed investment scheme listed in Schedule 2 of this order (**Unregistered Olive Scheme**) the Project and Management Agreement as defined in the Affidavit (**PMA**) and the Licence and Joint Venture Agreements (as defined in the Affidavit) and to the extent necessary have leave to do so pursuant to section 568 of the *Corporations Act 2001(Cth)*.

THE COURT ORDERS, DECLARES AND DIRECTS THAT:

1. The:

- (a) Third (Korda) and Fourth (Chesser) Plaintiffs in their capacity as liquidators of the First (TSL), Sixth (Timbercorp) and Eighth (Almond Land) Plaintiffs; and
- (b) Third (Korda) and Fifth (Mentha) Plaintiffs in their capacity as liquidators of the Second (OML), Seventh (OLPL), Ninth (BBO), Tenth (Olivecorp Processing) and Eleventh (Boort Estate) Plaintiffs -

may enter into and perform:

- (i) the SPDs; and
 - (ii) any document referred to, in connection with, or necessary to give effect to the SPDs.
- 2. Upon completion of any sale under the Boort SPDs 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 and Sixth to Eleventh Plaintiffs referable to the preservation and realisation of the assets the subject of the SPDs, as approved by the committee of inspection of the Seventh Plaintiff and the Secured Creditors (as that term is defined in paragraph 19 of the Affidavit), or order of the Court) (**Net Boort Proceeds**) are to be held by the Seventh 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 to determine which person or persons have any rights to all or any part of the Net Boort 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.
- 3. Upon completion of any sale under the Boundary Bend SPDs 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 and Sixth to Eleventh Plaintiffs referable to the preservation and realisation of the assets the subject of the SPDs, as approved by the committee of inspection of the Ninth Plaintiff and the Secured Creditors (as that term is defined in paragraph 19 of the Affidavit), or order of the Court) (**Net Boundary Bend Proceeds**) are to be held by the Ninth 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 of a proceeding to determine which person or persons have any rights to all or any part of the Net Boundary Bend 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.
- 4. Insofar as each of the Secured Creditors have any rights to the assets the subject of the SPDs, whether under their securities over those assets or otherwise, nothing in the release of those securities upon completion of the SPDs will prejudice those rights for the purposes of their claim to all or any part of the Net Boort Proceeds and/or Net Boundary Bend Proceeds.
- 5. Insofar as the Growers have any rights to the assets the subject of the SPDs nothing in orders 1-5 above, or any action taken thereunder by the Third, Fourth and Fifth Plaintiffs, will prejudice those rights for the purposes of their claim to all or

any part of the Net Boort Proceeds and/or Net Boundary Bend Proceeds.

6. Exhibits MAK- 14, MAK-15, MAK-17, MAK-18, MAK-19, MAK-30, MAK-31 and MAK-32 to the Affidavit be kept confidential.
7. The interlocutory process of John Angus Horden dated 10 November 2009 be dismissed.
8. Costs be reserved.

CERTIFICATE

I certify that this and the 24 preceding pages are a true copy of the reasons for Judgment of Croft J of the Supreme Court of Victoria delivered on 12 November 2009.

DATED this twelfth day of 2009.

.....
Associate