

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

LIST B
S CI 2013 01477

BETWEEN

THE TRUST COMPANY (NOMINEES) LIMITED (ACN 000 154 441)

Plaintiff

and

MICHAEL FUNG IN HIS CAPACITY AS RECEIVER AND MANAGER OF ALIGN FUNDS
MANAGEMENT LIMITED (RECEIVER AND MANAGER APPOINTED) (ACN 105 684 231)
IN ITS CAPACITY AS THE RESPONSIBLE ENTITY OF THE TIMBERCORP ORCHARD
TRUST AND OTHERS ACCORDING TO THE ATTACHED SCHEDULE

Defendants

**AFFIDAVIT OF LEANNE KYLIE CHESSER
(BELLA VISTA RIGHTS PROCEEDING)**

Date of document: 27 March 2014
Filed on behalf of: Timbercorp Securities Ltd (in liquidation) (ACN 092 311 469)

Prepared by:
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(Jane Sheridan - jsheridan@abl.com.au)

I, **LEANNE KYLIE CHESSER** of Level 24, 333 Collins Street, Melbourne in the State of
Victoria, Chartered Accountant, **MAKE OATH AND SAY** that:

- 1 I am, with Mark Anthony Korda, the liquidator of Timbercorp Securities Limited (in liquidation) (ACN 092 311 469) (**TSL**).
- 2 I am authorised by Mr Korda to make this affidavit on his behalf. References in this affidavit to "we", "us", "our" or "ourselves" and "Liquidators" are references to Mr Korda and me.

- 3 Except where I otherwise indicate, I make this affidavit from my own knowledge. Where I depose to matters from information and belief, I believe those matters to be true.

Personal background and experience

- 4 I am a chartered accountant and a partner of the firm KordaMentha Pty Ltd (ACN 100 169 391) (**KordaMentha**). I am a Registered Liquidator and an Official Liquidator of the Court. I am a member of the Australian Restructuring Insolvency and Turnaround Association and a member of the Institute of Chartered Accountants. I have been practising in the area of corporate insolvency and financial reconstructions for over 20 years.

Voluntary Administration and Liquidation of TSL and the Timbercorp Group

- 5 On 23 April 2009, we were appointed as voluntary administrators of TSL. Also on 23 April 2009, one or more of us, and three other KordaMentha partners, namely Mark Francis Xavier Mentha, Craig Peter Shepard and Clifford Stuart Rocke, were appointed as voluntary administrators of the other companies in the Timbercorp group (together the **Timbercorp Group**). All of the appointments made on 23 April 2009 by those companies were pursuant to section 436A of the *Corporations Act 2001* (Cth) (**Act**).
- 6 On 29 June 2009, at the second meeting of creditors of all of the Timbercorp Group and a separate meeting of the creditors of TSL, the creditors resolved to wind up the Timbercorp Group and TSL respectively. From 29 June 2009, we have been the liquidators of TSL.

The 2004 and 2005 Timbercorp Table Grape Projects

- 7 TSL is the responsible entity of the 2004 Timbercorp Table Grape Project (ARSN 108 648 086) (the **2004 Table Grape Project**) and the 2005 Timbercorp Table Grape Project (ARSN 113 512 226) (the **2005 Table Grape Project**). Both the 2004 Table Grape Project and the 2005 Table Grape Project are registered managed investment schemes under Part 5C of the Act.
- 8 The members of the 2004 Table Grape Project and the 2005 Table Grape Project are referred to in the governing documents as "**Growers**" and I adopt that terminology

here. The purpose of the 2004 Table Grape Project and the 2005 Table Grape Project was the cultivation of table grapes for commercial sale.

Background to and issues in dispute in this proceeding

- 9 I refer to the affidavit of Clinton Charles Hinchin sworn on 25 March 2013 in this proceeding (**First Hinchin Affidavit**), a copy of which was provided to me. The background to this proceeding (the **Bella Vista Rights Proceeding**) is set out in paragraphs 4 - 9 of the First Hinchin Affidavit. At paragraph 28, Mr Hinchin states that:

"This proceeding has been commenced to determine:

*(a) what rights The Trust Company and the Growers have (if any) to the Net Sale Proceeds (the **Rights Issue**);*

*(b) what the value is of any such rights of The Trust Company and the Growers respectively (the **Valuation Issue**); and*

(c) how much (if any) of the Net Sale Proceeds The Trust Company and the Growers are entitled to receive."

- 10 Currently, another apportionment proceeding, the "**Kangara Rights Proceeding**", being proceeding no S CI 2013 1478 in this Honourable Court, which relates to the 2004 and 2005 Citrus Projects, is also being heard before this Honourable Court. Together the Kangara Rights Proceeding and the Bella Vista Rights Proceeding are referred to as the "**Current Apportionment Proceedings**".

- 11 At paragraph 67 of the First Hinchin Affidavit, Mr Hinchin states that:

"Following the appointment by the Court of representative growers for the Projects the subject of this proceeding, The Trust Company 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."

The Bella Vista Deed of Compromise

- 12 On 14 January 2014, each of the parties to the Bella Vista Rights Proceeding and TSL entered into a Deed of Compromise for the Bella Vista Rights Proceeding (**Bella**



Vista Deed of Compromise). A copy of the Deed of Compromise is exhibited to the Second Affidavit of Clinton Charles Hinchon sworn on 12 March 2014 (**Second Hinchon Affidavit**) at exhibit **CCH-3**.

- 13 Although not a party to the Bella Vista Rights Proceeding, TSL is a party to the Bella Vista Deed of Compromise.
- 14 Pursuant to clause 4 of the Bella Vista Deed of Compromise, TSL will receive, hold and distribute the "Bella Vista Settlement Amount" (as that term is defined in the Bella Vista Deed of Compromise).
- 15 Further, pursuant to clause 9 of the Bella Vista Deed of Compromise, at the request of the "**Representative Growers**" (being the second and third defendants to the Bella Vista Rights Proceeding), TSL was to perform certain administrative roles in connection with the compromise and this Application, including:
 - (a) distributing the "First Notice to Participant Growers" and the "Second Notice to Participant Growers" to "Participant Growers" (as those terms are defined in the Bella Vista Deed of Compromise);
 - (b) establishing and operating a telephone hotline facility and email facility to:
 - (i) receive and, in accordance with instructions provided by the Representative Growers, address comments and questions from Participant Growers in relation to the Bella Vista Deed of Compromise; and
 - (ii) receive any objections to the Compromise made by Participant Growers;
 - (c) in respect of Participant Growers who have raised comments, questions or made objections, recording with appropriate detail:
 - (i) the identity of those Participant Growers;
 - (ii) the comments and questions raised by those Participant Growers and the responses provided to those Participant Growers; and
 - (iii) any objections made by those Participant Growers and any response provided in relation to those objections;



- (d) acting in accordance with a protocol agreed with the Representative Growers regarding:
 - (i) the comments and questions which:
 - (A) may be answered by TSL without further reference to the Representative Growers;
 - (B) will be required to be provided by TSL to the Representative Growers for the preparation of an appropriate response;
 - (ii) the objections:
 - (A) to which TSL may respond without further reference to the Representative Growers;
 - (B) which will be required to be provided by TSL to the Representative Growers for the preparation of an appropriate response; and
 - (iii) the confidentiality of communications between TSL, the Participant Growers and the Representative Growers in relation to comments, questions and any objections raised by any Participant Growers;
- (e) providing to the Representative Growers, on a timely basis, a record, with appropriate detail, of:
 - (i) all comments, questions and answers given by TSL in accordance with the protocol which do not require preparation of a response by the Representative Growers;
 - (ii) all comments and questions requiring preparation of a response from the Representative Growers;
 - (iii) any objections by the Participant Growers to which TSL has provided a response in accordance with the agreed protocol; and
 - (iv) any objections requiring the preparation of a response by the Representative Growers; and



- (f) providing on a timely basis to relevant Participant Growers any responses to comments, questions or objections settled by the Representative Growers.

First Notice to Participant Growers and associated correspondence

- 16 Clause 6.1 of the Bella Vista Deed of Compromise provides that, as soon as practicable after execution of the deed, the Representative Growers would draft and seek the other parties' comments on the terms of the First Notice to Participant Growers. Pursuant to clause 6.1(c), the First Notice to Participant Growers was to, amongst other things:
- (a) provide information about the Bella Vista Rights Proceeding;
 - (b) explain that the interests of the Participant Growers are represented in the Bella Vista Rights Proceeding by the Representative Growers;
 - (c) refer to the Bella Vista Deed of Compromise and its key features;
 - (d) explain that the Representative Growers consider the compromise reached under the Bella Vista Deed of Compromise to be in the best interests of Participant Growers; and
 - (e) explain the various roles being undertaken by TSL at the request of, and on the instruction of, the Representative Growers in connection with this Application and pursuant to the Bella Vista Deed of Compromise.
- 17 I am informed by Jane Sheridan of Arnold Bloch Leibler (**ABL**), our solicitors, that throughout February 2014, she and the lawyers for the Representative Growers and the plaintiff in the Bella Vista Rights Proceeding settled the terms of:
- (a) a First Notice to Participant Growers in accordance with clause 6.1(c) of the Bella Vista Deed of Compromise;
 - (b) a set of frequently asked questions and answers in respect of the Bella Vista Deed of Compromise, as referred to in clause 6.1(c)(xvi) of the Bella Vista Deed of Compromise (**FAQs**);
 - (c) a short letter to Growers from the solicitors for the Representative Growers notifying Growers of the Bella Vista Deed of Compromise and the First Notice to Growers (referred to in more detail in paragraph 22 of this affidavit); and



- (d) an advertisement to be published in *The Australian* newspaper in respect of the Bella Vista Deed of Compromise, in accordance with clause 6.2(b)(iii) of the Bella Vista Deed of Compromise (referred to in more detail in paragraph 24 of this affidavit).

18 I am further informed by Ms Sheridan of ABL that, in accordance with our instructions, she prepared:

- (a) a 'Direction to Pay' form, by which a Grower whose payment under the Bella Vista Deed of Compromise is subject to a competing claim can direct TSL to pay that Grower's payment under the Bella Vista Deed of Compromise to wholly or partly satisfy the competing claim; and
- (b) a 'Bank Account Nomination Form', which a Grower can complete in order to direct TSL to make distributions under the Bella Vista Deed of Compromise to an account nominated by the Grower.

19 I refer to the documents listed in paragraphs 17 and 18 collectively as the **Grower Information Documents**. Copies of the documents listed in paragraph 17 are exhibited to the Second Hinchin Affidavit at exhibit **CCH-4**. Now produced and shown to me and marked "**LKC-1**" is a copy of the Direction to Pay form and Bank Account Nomination Form.

Upload of Grower Information Documents to Webpages

20 I am informed by Ms Sheridan that on or about 4 March 2014:

- (a) ABL established a page on its website dedicated to the compromises of the Current Apportionment Proceedings, and that the hyperlink to that page is:

< <http://www.abl.com.au/timbercorp/timbercorp.htm> >

(ABL Compromises Webpage);

- (b) an electronic copy of the Bella Vista Deed of Compromise was uploaded to the ABL Compromises Webpage; and
- (c) electronic copies of the Grower Information Documents were uploaded to the ABL Compromises Webpage.



21 I am informed by James Wagg, a manager of KordaMentha who has been assisting us in the liquidation of TSL and other Timbercorp companies and has been extensively involved in the Current Apportionment Proceedings, that on or about 3 March 2014:

- (a) KordaMentha established a page on its website dedicated to the Current Apportionment Proceedings, and that the hyperlink to that page is:

< <http://www.kordamentha.com/creditor-information/australia/51/15> >

(KordaMentha Compromises Webpage);

- (b) KordaMentha amended the 'Timbercorp Table Grape Schemes' page on its website to include a 'Table Grape Compromise Proceedings' heading. The hyperlink to that page is:

< <http://www.kordamentha.com/creditor-information/australia/51/07> >

(KordaMentha Table Grape Schemes Webpage);

- (c) an electronic copy of the Bella Vista Deed of Compromise was uploaded to the KordaMentha Compromises Webpage and the KordaMentha Table Grape Schemes Webpage; and
- (d) electronic copies of the Grower Information Documents were uploaded to the KordaMentha Compromises Webpage and the KordaMentha Table Grape Schemes Webpage.

Informing Growers of the Grower Information Documents and the Hotline

22 I am informed by Mr Wagg that on 3 March 2014, we engaged a mailing house, Direct Mail Solutions, to send the short letter to Growers referred to in paragraph 17(c) notifying them of:

- (a) the compromise the subject of the Bella Vista Deed of Compromise;
- (b) where they could obtain the Bella Vista Deed of Compromise and the Grower Information Documents; and
- (c) where inquiries about the compromise, the Bella Vista Deed of Compromise or the Grower Information Documents could be directed,



(**Short Letter to Growers**). A copy of the Short Letter to Growers is exhibited to the Second Hinchin Affidavit at exhibit **CCH-4**.

- 23 Pursuant to clause 6.2(b)(ii) of the Bella Vista Deed of Compromise, the Short Letter to Growers was sent both:
- (a) by email, to the personal and business (where known) email address(es) of Growers that had most recently been communicated to TSL; and
 - (b) by post, to the last personal or business (where known) postal address(es) of Growers that had been communicated to TSL.
- 24 I am informed by Ishbel Moodie of the Timbercorp Grower Management Team (to which I refer in more detail in paragraph 28, below) that:
- (a) a total of 484 emails in respect of the Short Letter to Growers in relation to the Bella Vista Deed of Compromise were sent to Growers, comprised of:
 - (i) 323 emails to Growers' business email addresses; and
 - (ii) 161 emails to Growers' personal email addresses;
 - (b) of the 484 emails sent, 10 "bounced back" (that is, did not send to the stipulated email address); and
 - (c) a total of 655 hard copies of the Short Letter to Growers in relation to the Bella Vista Deed of Compromise were sent to Growers, and 16 of those letters were returned to us.
- 25 I am informed by Ms Moodie, that:
- (a) in relation to the 10 email 'bounce backs', a copy of the Short Letter to Growers had also been sent to each of those Growers by post and none of the letters were returned; and
 - (b) in relation to the 16 letters that were returned, the Short Letter to Growers had also been sent to six of those Growers by email and none of these had "bounced back". The Timbercorp Grower Management Team is following up with the remaining 10 Growers to obtain current email and/or postal address details.



26 On 4 March 2014, the advertisement referred to in 17(d) was published in *The Australian* newspaper. That advertisement was titled "**Timbercorp Table Grape Projects**" and:

- (a) specified the 2004 and 2005 Timbercorp Table Grape Projects were the relevant Timbercorp projects in respect of the Bella Vista Rights Proceeding;
- (b) stated that the parties had reached a compromise of the dispute the subject of the Bella Vista Rights Proceeding; and
- (c) stated where the First Notice to Growers was available and to where Growers could direct any inquiries or comments.

A copy of the advertisement published in *The Australian* newspaper on 4 March 2014 in relation to the Bella Vista Deed of Compromise is exhibited to the Second Hinchin Affidavit at exhibit **CCH-4**.

Inquiry Hotline and Grower Email Facility

- 27 Since our appointment as administrators, we have caused TSL to maintain a telephone hotline facility and email facility through which Growers could ask questions and update personal information relating to their holdings as Growers. The telephone number for that hotline is (03) 8615 1200 (**Hotline**) and the email address is < investorqueries@timbercorp.com.au > (**Grower Email Facility**).
- 28 The Timbercorp Grower Management Team, under our ultimate supervision, manage the Hotline and Grower Email Facility. There are currently five members of the Timbercorp Grower Management Team and the team reports to Ishbel Moodie, General Manager Operations, Timbercorp Limited (in liquidation) (ACN 055 185 067). The Hotline and Grower Email Facility are monitored from 8:30 am to 5:30 pm each business day.
- 29 As the members of the Timbercorp Grower Management Team were familiar with the Growers and the database maintained by Timbercorp in relation to Growers, we considered it appropriate that we use the Hotline and Grower Email Facility as the telephone hotline facility and email facility required under the Bella Vista Deed of Compromise.



30 In February 2014, we agreed a protocol with the solicitors for the Representative Growers which sets out how the Timbercorp Grower Management Team should respond to comments, questions and objections made by Growers to the Hotline and Grower Email Facility (**Agreed Protocol**). In accordance with clause 9(d) of the Bella Vista Deed of Compromise, the Agreed Protocol sets out:

- (a) how calls and emails should be recorded;
- (b) how comments and questions should be answered;
- (c) how to respond to comments and objections; and
- (d) how to refer comments, questions and objections to Macpherson + Kelley Lawyers, the solicitors for the Representative Growers.

Now produced and shown to me and marked "LKC-2" is a true copy of the Agreed Protocol.

31 The Hotline and Grower Email Facility commenced receiving comments, questions and objections from Growers in relation to the compromise the subject of the Bella Vista Deed of Compromise on 3 March 2014 and continues to receive such communications.

32 I am informed by Ms Moodie that, in accordance with the Agreed Protocol, as a telephone call is received on the Hotline or an email is sent to the Grower Email Facility, the Timbercorp Grower Management Team document, in the Timbercorp database, that telephone call or email and the response to that telephone call or email by the Timbercorp Grower Management Team. The information documented is then downloaded into a report document in spread sheet form (**Communications Report**). The Timbercorp Grower Management Team also indicate in that Communications Report whether the telephone call or email requires a response or further action on behalf of the Representative Growers.



33 I am informed by Ms Moodie that, on 13 March 2014 and 24 March 2014, completed Communications Reports were emailed by her to Macpherson + Kelley Lawyers. Copies of the Communications Reports for the period from 3 March 2014 to 23 March 2014 are exhibited to the Second Affidavit of Yu-chiao Hsueh affirmed on 25 March 2014 at confidential exhibit YCH-5.

SWORN at Melbourne
in the State of Victoria
by **LEANNE KYLIE CHESSER**
this 27th day of March 2014

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Before me:

XU JING CHANG
Arnold Black Lister
Level 21, 333 Collins Street
Melbourne 3000
An Australian Legal Practitioner within the
meaning of the Legal Profession Act 2004

SCHEDULE

THE TRUST COMPANY (NOMINEES) LIMITED (ACN 000 154 441)

Plaintiff

and

**MICHAEL FUNG IN HIS CAPACITY AS RECEIVER AND MANAGER OF ALIGN FUNDS
MANAGEMENT LIMITED (RECEIVER AND MANAGER APPOINTED) (ACN 105 684 231)
IN ITS CAPACITY AS THE RESPONSIBLE ENTITY OF THE TIMBERCORP ORCHARD
TRUST2**

First Defendant

and

**ANTHONY CORMICK IN HIS CAPACITY AS REPRESENTATIVE OF THE GROWERS IN
THE 2004 TIMBERCORP TABLE GRAPE PROJECT (ARSN 108 648 086)**

Second Defendant

and

**JEYARASA RASIAH AND ANNE RASIAH IN THEIR CAPACITY AS THE
REPRESENTATIVES OF THE GROWERS IN THE 2005 TIMBERCORP TABLE GRAPE
PROJECT (ARSN 113 512 236)**

Third Defendant