JOINT REPLY SUBMISSIONS

IN THE MATTERS OF:

Proceeding S APCI 2011 0103 (Almond Land Rights Appeal Proceeding)

Proceeding S CI 2011 6604 (Liparoo and Yungera Rights Proceeding)

Proceeding S CI 2011 6606 (Solora Rights Proceeding)

Proceeding S CI 2010 1354 (BB Olives Rights Proceeding)

Proceeding S CI 2011 6777 (Fenceport Rights Proceeding)

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A. Summary

1. Ms Kerree Anne Bezençon has filed submissions in which she contends that the Court should not approve the Deeds of Compromise agreed by the parties to the Fenceport, BB Olives and Solora Rights Proceedings (**Olive and Citrus Proceedings**). Those submissions consist in large measure of assertions of fact which are unsubstantiated by affidavit or other evidence. Nevertheless, in these reply submissions, the secured creditors endeavour to deal briefly with the key points apparently advanced by Ms Bezençon.

2. The reasons advanced by Ms Bezençon as to why the Deeds of Compromise in the Olive and Citrus Proceedings ought not be approved fall broadly into two categories:

   (a) first, Ms Bezençon contends that the primary question for the Court to determine in the Olive and Citrus Proceedings is the value of the Growers' rights, not the nature or existence of such rights;

   (b) secondly, and relatedly, Ms Bezençon contends that the Growers' rights were valuable because, among other reasons, the Citrus and Olive Schemes were viable (whether under existing or alternate arrangements).

3. Ms Bezençon appears to submit that, on these bases, the proposed compromises concerning the Olive and Citrus Proceedings should be rejected and each case should "be given a separate rights hearing"[1].

4. For the reasons that follow, neither submission should be accepted.

B. Value first, rights second?

5. Ms Bezençon submits that it does not much matter how Growers' rights are defined (in order to share in the Funds the subject of the Olive and Citrus Proceedings) so long as the value of those rights is first established[2]. However, as the approach adopted by Davies J in the Almond Land Rights Proceeding reveals, logic dictates that unless a Grower can establish a legal basis for asserting an entitlement to share in the net sale proceeds held in the Funds, the value of the entitlement does not fall to be

[1] Submissions p 3 at [2] (where that paragraph number appears for the first time).
[2] Submissions p 3 at [2] (where that paragraph number appears for the second time).

considered[3]. The Court cannot be asked to value a putative right without first identifying what the right is which is sought to be valued.

6. This is most particularly evident in relation to the 2005 Citrus Project (which is the only scheme the subject of the Solora Rights Proceeding), the 2001, 2002 and 2008 Olive Projects, and the 2000 Olive Private Offer Projects, which were licence-based schemes. As Davies J found in the Almond Land Rights Proceeding,[4] the licences enjoyed by the Growers in these schemes did not provide them with the proprietary interest necessary to establish any entitlement to share in the net sale proceeds. In the case of these Growers, the question of value is wholly academic.

7. Further, the premise of her contention in this area[5] – namely that value of the Growers' rights is measured by the difference between the sale price achieved for the assets on an unencumbered basis and the sale price which could have been achieved if the land remained encumbered by the schemes – is false:

   (a) as appears from the evidence filed in relation to each of the schemes, there was no market for the relevant assets encumbered by the schemes, and no viable proposals for recapitalisation of the schemes were forthcoming;

   (b) as judges of this Court have observed on several occasions, given the insolvency of the Timbercorp entities and the lack of any other funding sources for continuation of the schemes, the relevant alternatives were the 'de facto' windings up effected in each case by the liquidators, which preserved the possibility of a claim by Growers on some part of the net sale proceeds, and an actual winding up by order of the Court or under section 601NC of the *Corporations Act*, which would necessarily have had the effect of terminating the Growers' interests, for no consideration;[6]

   (c) the amendments made to each scheme constitution permitting the liquidators to terminate the Grower interests under the scheme documents, for the purposes of facilitating an unencumbered sale of the assets in pursuit of the de

[3] Judgment at [9], [31] and [80].
[4] Judgment at [79].
[5] Submissions at p 4, paragraph [3]&ff.
[6] See, eg, Davies J's judgment on the application in respect of the sale of the Solora assets (*Re Timbercorp Securities Ltd (in liq)* (2010) 77 ACSR 291 at 298 [18]; Judd J's judgment on the application of the sale of the Kangara assets, which were used for both the 2004 and 2005 Citrus Projects: *Re Timbercorp Securities Ltd (in liq)* [2011] VSC 83 at [68]; Judgment at [87].

facto windings up, meant that those interests were inherently liable to termination, regardless of the wishes of the Growers;

(d) the secured creditors had security over the assets sold, such that there is no question of 'valuing' their rights; rather, their securities necessarily entitle them to satisfy their secured debts out of the sale proceeds once any entitlements of the Growers to a share of those proceeds have been satisfied.[7]

C. Did Growers hold valuable rights?

8. Ms Bezençon contends that the legal advisers to the Representative Growers, the Representative Growers themselves, and other parties to the Olive and Citrus Proceedings, have failed to take into account relevant information which shows that the Citrus and Olive Schemes were viable[8], and that the Growers' rights were therefore valuable.

9. The primary problem with this submission is that it is based on assertion, not evidence. Ms Bezençon's affidavit, filed on 18 September 2012, provides no support for propositions – now found in her submissions – such as:

(a) the Olive and Citrus Schemes each had a willing prospective RE which[9]:

(i) did not impose any conditions on its appointment;

(ii) had unilateral support from huge numbers of growers;

(iii) had analysed the viability of the schemes, and believed they could be successfully continued;

(iv) had a history and record of continuing projects successfully;

(b) little if any cash would be required to continue the Citrus Schemes[10]; and

(c) whether it was a restructure or a continuation of the Olive and Citrus Schemes, the issue of funding could be easily addressed[11].

10. Submissions of this kind have been made previously by Ms Bezençon. For example, in *Re Timbercorp Securities Limited (In liq)*[12], Ms Bezençon submitted that the Court

[7] As recognised by Davies J in the Judgment at [166]-[167].
[8] Eg. p 6 at [20] and [27], p 7 at [34]-[35], p 11 at [31],
[9] Page 11 at [29]-[31], p 12 at [36]-[43], p 18 at [99] and p 19 at [100].
[10] Page 12 at [44].
[11] Pages 14-15 at [58]-[67], p 18 at [99] and p 19 at [100].

should delay in making a direction that the liquidators of TSL were justified in procuring TSL to terminate or surrender Growers' licences in the 2004 and 2005 Citrus Projects[13]. In that case, the Court observed that Ms Bezençon had been involved in calling a meeting of Growers in August 2010 to replace TSL (as the RE) with Food and Beverage Australia Ltd, but that Food and Beverage Australia had "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."[14] The Court also noted that the proposal to replace TSL as RE had fallen away in favour of a restructuring proposal advanced in February 2011, but that proposal was "incomplete and lacked detail"[15]. No fresh evidence on any of these matters has been tendered by Ms Bezençon.

11. In determining whether to approve the Deeds of Compromise, the Court should not accept or give weight to the unsupported assertions of Ms Bezençon, particularly when those assertions are contradicted by the findings made in earlier proceedings and the evidence now filed in each of Timbercorp Apportionment Proceedings by the secured creditors. The relevant evidence, as referred to in the secured creditors' primary submissions, is that TSL was hopelessly insolvent,[16] it could not continue as RE, there was a risk of the citrus, olive and almond trees wasting if the relevant land and assets were not sold,[17] and there were no viable existing or alternate structures available to the Growers. [18]

12. It appears from her submissions that Ms Bezençon seeks to have the Court withhold its approval for the Deeds of Compromise in each of the Olive and Citrus Proceedings so that she might re-run many of the arguments she has already run unsuccessfully in

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[12] [2011] VSC 83.
[13] Conducted on the Kangara land. Ms Bezençon contented that "there was a new and meritorious option that must be considered before approval could be given to the liquidators to terminate growers rights": at [53].
[14] [2011] VSC 83 at [55].
[15] [2011] VSC 83 at [61].
[16] As to the Olive and Almond Schemes, see paragraph 26; and as to the Citrus Scheme see paragraph 27.
[17] As to the Almond Schemes, see paragraphs 31, 34 and 36; as to the Olives Schemes, see paragraphs 36 and 78(f); and as to the Citrus Scheme, see paragraph 27.
[18] In relation to the Almond Land Rights Proceeding, see paragraphs 60 to 64 and 178(b); as to the BB Olives Rights Proceeding, see paragraphs 77, 78, 190 and 191; as to the Liparoo and Yungera Rights Proceeding, see paragraphs 89(b) and 171(b); as to the Solora Proceeding, see paragraphs 95 and 176, and as to the Fenceport Rights Proceeding, see paragraph 105.

the context of earlier Timbercorp applications.[19] This should not be permitted, not only because the contentions lack merit but also because the suggested course will have the collateral and necessary effect of denying the parties to the *other* Timbercorp Apportionment Proceedings any entitlements under their Deeds of Compromise.

D. Other matters

13. Ms Bezençon repeats a number of matters already raised in her affidavit of 18 September 2012. These include an argument about important differences existing between the various Schemes[20], and there being no urgency in whether the Court should approve the Deeds of Compromise[21]. These contentions have been addressed in the secured creditors' primary submissions.

Dated: 1October 2012

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[19] This is so even though she has not been appointed a representative grower in any of the Timbercorp Apportionment Proceedings, and the Grower representatives who have been appointed have not embraced the arguments she seeks to advance.
[20] Page 17 at [84]-[95].
[21] Page 19 at [109].