

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

LIST D
S CI 2011 6777

BETWEEN

FENCEPORT PROPRIETARY LIMITED (ACN 139 604 121)
& ORS (according to the attached Schedule)

Plaintiffs

and

CON MOSHOPOLOUS
& ORS (according to the attached Schedule)

Defendants

AFFIDAVIT OF JANE CHALMERS SHERIDAN
(FENCEPORT RIGHTS PROCEEDING)

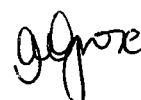
Date of document: 27 August 2012
Filed on behalf of: the Plaintiffs

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

I, **JANE CHALMERS SHERIDAN** of Level 21, 333 Collins Street, Melbourne, in the State of Victoria, Solicitor, **SAY ON OATH** that:

- 1 I am a partner of the firm Arnold Bloch Leibler (**ABL**) , the solicitors for the Plaintiffs and I have the care and conduct of this proceeding (the **Fenceport Rights Proceeding**) on their behalf. I am authorised to make this affidavit on behalf of the Plaintiffs.
- 2 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.



- 3 This affidavit is made in support of the Plaintiffs' summons dated 27 August 2012 by which (among other things), in accordance with Rule 16.01(4) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) (**Rules**), application is made to this Honourable Court for (among other things) approval of the compromise of the Fenceport Rights Proceeding reached between the parties to the proceeding.
- 4 At the first return date of the summons, the Plaintiffs intend to seek directions concerning:
- (a) the filing and service of further affidavit material in respect of the Plaintiffs' application;
 - (b) the filing and service of submissions in respect of the Plaintiffs' application; and
 - (c) the substantive hearing of the Plaintiffs' application.
- 5 Except where stated otherwise, defined terms used in this affidavit have the meaning ascribed to them in the affidavit sworn by Ross Whyte McClymont on 15 August 2012 in the Almond Land Rights Appeal Proceeding (the **McClymont Affidavit**). Now produced and shown to me marked 'JCS-1' is a true copy of the McClymont Affidavit.

Timbercorp apportionment proceedings

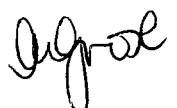
- 6 The McClymont Affidavit relevantly sets out:
- (a) at paragraphs 6 to 10, the background to the Apportionment Proceedings (including the Fenceport Rights Proceeding) and the Almond Land Rights Proceeding including, at paragraph 8, the key issue for determination in each proceeding;
 - (b) at paragraphs 11 to 15, an overview of the Almond Land Rights Proceeding, including reference to:
 - (i) the order made in that proceeding, pursuant to rule 16.01(2) of the Rules, that certain parties be appointed as Representative Growers to represent the interests of the Growers in the Timbercorp MIS the subject of the proceeding (see paragraph 12 of the McClymont Affidavit); and



- (ii) the key determination made by her Honour Justice Davies in her reasons for judgment delivered in that proceeding on 15 June 2011 (see paragraph 14 of the McClymont Affidavit);
- (c) at paragraphs 16 to 19:
 - (i) an overview of the commencement and current status of each of the Apportionment Proceedings (including the Fenceport Rights Proceeding); and
 - (ii) reference to the order made, in each such proceeding, pursuant to rule 16.01(2) of the Rules, appointing Representative Growers to represent the interests of the Growers in the Timbercorp MIS the subject of the proceeding (see paragraph 19 of the McClymont Affidavit); and
- (d) at paragraphs 20 to 22, an overview of the background and current status of the Almond Land Rights Appeal Proceeding.

Compromises

- 7 As set out at paragraphs 23 and 24 of the McClymont Affidavit, on 25 July 2012, the parties to each of the Apportionment Proceedings and the Almond Land Rights Appeal Proceeding executed a Deed of Compromise for each such proceeding providing, in each case, for the compromise of the relevant proceeding. Each Compromise is conditional on (inter alia):
- (a) the Court approving the Compromise and ordering that it shall be binding on the Growers represented by the Representative Growers in the relevant proceeding; and
 - (b) the Court approving the Compromise in each of the other Apportionment Proceedings and the Almond Land Rights Appeal Proceeding (as applicable).
- 8 Since execution of the Deeds of Compromise, notification has been provided by Timbercorp Securities Limited (in liquidation) (of which the third Plaintiff is a Liquidator and for which Arnold Bloch Leibler acts) to the Growers in the Timbercorp MIS the subject of each Deed of Compromise with respect to a number of issues including the terms and effect of the Deed of Compromise, and the necessity of, and procedure for, obtaining Court approval. In each case, the notice provided to Growers also stated



that a hearing for the approval of the Compromise is anticipated to commence in October 2012.

Referral of the Almond Land Rights Appeal Proceeding to the trial division of the Supreme Court

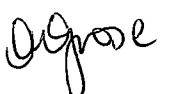
9 On 24 August 2012, I (and others) received an email from Chris Fenwick of Ashurst Australia in relation to the Almond Land Rights Appeal Proceeding. At the foot of Mr Fenwick's email was an email received by Mr Fenwick, also on 24 August 2012, from Matthew Boisseau, the Associate to the Honourable Justice Osborn, in relation to the Almond Land Rights Appeal Proceeding. In light of:

- (a) Mr Boisseau's email to Mr Fenwick;
- (b) an email dated 27 August 2012 from Ms Jenny Murray of the Supreme Court of Victoria Court of Appeal to his Honour Justice Judd in relation to the Almond Land Rights Appeal Proceeding (a copy of which was sent to the general Arnold Bloch Leibler email address, and forwarded to me) attaching an unauthenticated copy of orders by consent dated 24 August 2012 which I understand to have been made by their Honours Justices Buchanan and Osborn of the Court of Appeal on 24 August 2012,

I believe that, although an authenticated copy of the orders is not yet available, their Honours Justices Buchanan and Osborn of the Court of Appeal made orders by consent in the Almond Land Rights Appeal Proceeding on 24 August 2012 in the form attached to Ms Murray's email. By those orders, the Almond Land Rights Appeal Proceeding has been remitted to the Honourable Justice Judd of the trial division of the Supreme Court:

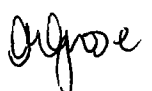
- (a) for the hearing and determination of any application to approve the Compromise of the proceeding (**Compromise Application**); or
- (b) if Justice Judd deems fit, for the purpose of making directions for the hearing and determination of the Compromise Application by another judge of the trial division.

Now produced and shown to me marked 'JCS-2' is a true copy of all emails (including attachments) referred to in this paragraph of my affidavit.



Approval applications

- 10 As noted above, by summons dated 27 August 2012, the Plaintiffs issue the Approval Application in respect of the Fenceport Rights Proceeding.
- 11 I am informed by Mr Hinchey of Allens (solicitors for Australia and New Zealand Banking Group Limited (**ANZ**)) and believe that, by summonses dated 27 August 2012, filed in the Solara Rights Proceeding and the Liparoo and Yungera Rights Proceeding, ANZ issues the Approval Application in respect of those proceedings.
- 12 I am informed by Mr McClymont of Ashurst Australia (solicitors for BOSI) and believe that, by summonses dated 27 August 2012, filed on behalf of BOSI in the BB Olives Rights Proceeding and the Almond Land Rights Appeal Proceeding, BOSI issues the Approval Applications in respect of those proceedings.
- 13 In light of the following matters, I believe that it is desirable that the Approval Application in respect of the Fenceport Rights Proceeding be managed, heard and determined concurrently with the Approval Applications in respect of the other Apportionment Proceedings and the Almond Land Rights Appeal Proceeding.
- (a) The rights of the parties arising under the constituent documents for the Timbercorp MIS the subject of the Apportionment Proceedings and the Almond Land Rights Appeal Proceeding are the same or similar in each case.
 - (b) In determining the Approval Application for each of the Deeds of Compromise, the same threshold question arises in each case, namely, whether the Compromise is for the benefit of the absent persons (i.e. the Growers represented in each proceeding by the Representative Growers) in accordance with rule 16.01(4) of the Rules. Therefore, approval of each Compromise will require consideration of a number of the same or similar questions.
 - (c) As stated above, each Deed of Compromise is conditional on (*inter alia*):
 - (i) the Court approving the Compromise and ordering that it shall be binding on the Growers represented by the Representative Growers in the relevant proceeding; and



- (ii) the Court approving the Compromise in each of the other Apportionment Proceedings and the Almond Land Rights Appeal Proceeding (as applicable).

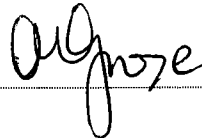
14 I respectfully request that this Honourable Court make directions for the conduct and hearing of the Approval Application in respect of the Fenceport Rights Proceeding.

SWORN at Melbourne
in the State of Victoria
by **JANE CHALMERS SHERIDAN** this
27th day of August 2012

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Before me:



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