

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

List E
S CI 2010 1354

B E T W E E N

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

Plaintiff

and

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

Defendant

**AFFIDAVIT OF ROSS WHYTE MCCLYMONT
(BB Olives Rights Proceeding)**

Date of document: 20 September 2012

Filed on behalf of: The Plaintiff

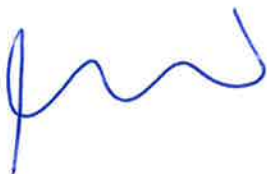
Prepared by:

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Ref: RWM 03 2010 2555

I, **ROSS WHYTE MCCLYMONT** of Ashurst Australia, Level 26, 181 William Street, Melbourne, in the State of Victoria, solicitor, do solemnly, sincerely and truly declare and affirm that:

1. I am a partner in the firm Ashurst Australia. I have the care and conduct of this proceeding (the **BB Olives Rights Proceeding**) on behalf of the plaintiff (**BOSI**). BOSI is the security trustee for a syndicate of banks comprised of Australia and New Zealand Banking Group




Limited (**ANZ**), Westpac Banking Corporation and BOS International Australia Limited (the **Syndicate Banks**).

2. I am authorised to make this affidavit on behalf of BOSI. I make this affidavit from my own knowledge, save where otherwise stated. Where I depose to matters from information or belief, I believe those matters to be true

A. INTRODUCTION

3. On 16 March 2010, BOSI commenced the BB Olives Rights Proceeding seeking declarations as to its and various other parties' rights, if any, to the net sale proceeds (**Net Sale Proceeds**) arising from the sale of certain assets owned by B.B Olives Pty Ltd (in liquidation) (**BB Olives**) and Almond Land Pty Ltd (in liquidation) (**Almond Land**), both companies in the Timbercorp Group. Now produced and shown to me and marked "**RWM-1**" is a true copy of the Summons and Originating Motion filed in the BB Olives Rights Proceeding on 16 March 2010.
4. The BB Olives Rights Proceeding concerns the land and assets used in the following olive schemes:
- (a) the 2006 Timbercorp Olive Project ARSN 119 182 179 (**2006 Olive Scheme**);
 - (b) the 2007 Timbercorp Olive Project ARSN 123 155 715 (**2007 Olive Scheme**); and
 - (c) the 2008 Timbercorp Olive Project ARSN 129 307 722 (**2008 Olive Scheme**)
- (together, the **Olive Schemes**).
5. The purpose of the BB Olives Rights Proceeding is to determine how the Net Sale Proceeds are to be apportioned between:
- (a) BOSI as the secured creditor;
 - (b) the grower investors in the Olive Schemes (the **Growers**); and
 - (c) other interested parties claiming an interest in the net sale proceeds.



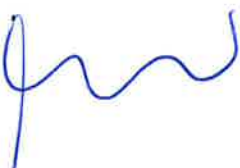
6. On 22 March 2010, the Court, *inter alia*, made orders in this proceeding pursuant to Rule 16.01(2) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) (**Rules**) that certain parties be appointed as representatives (**Representative Growers**) of the growers in the Olive Schemes (**Growers**) as follows:

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

Now produced and shown to me and marked "**RWM-2**" is a true copy of the orders dated 22 March 2010.

7. The other parties to this proceeding are BB Olives, Almond Land and Timbercorp Limited (**Timbercorp**) and their liquidators, Mark Korda, Mark Mentha and Leanne Chesser (the **Liquidators**). BB Olives and Almond Land were the entities that owned the land on which the Olive Schemes were conducted. The Liquidators hold the Net Sale Proceeds on trust pending resolution of this dispute.
8. Following the appointment of the Representative Growers by the Court on 22 March 2010, no further steps were taken in this proceeding pending the hearing and determination of the Almond Land Rights Proceeding (defined below). Judgment was ultimately handed down in the Almond Land Rights Proceeding on 15 June 2011. In these circumstances, this proceeding was then relisted for directions before the Honourable Justice Davies on 26 August 2011 at which further directions were made by the Court for the future conduct of the proceeding.

Now produced and shown to me and marked "**RWM-3**" is a true copy of the orders of the Honourable Justice Davies made on 26 August 2011.



9. In accordance with the directions made by the Court on 26 August 2011, the Representative Growers filed and served an outline of their contentions of fact and law in the proceeding dated 7 October 2011 (**Contentions**).
- Now produced and shown to me and marked "**RWM-4**" is a true copy of the Contentions.
10. No further steps were thereafter taken in this proceeding as the parties conferred about a possible compromise of the proceeding.
11. On 25 July 2012, the parties to this proceeding executed a deed of compromise (**BB Olives Deed of Compromise**) providing for the compromise of the proceeding (**Compromise**). The Compromise is conditional on (*inter alia*) the Court approving the Compromise and ordering that it shall be binding on the Growers represented by the Representative Growers in this proceeding.
12. This affidavit is made, in accordance with Rule 16.01(4) of the *Supreme Court (General Civil Procedure) Rules* 2005 (Vic), in support of BOSI's application for (*inter alia*) approval of the Compromise (**Application**).
13. Pursuant to clause 8 of the BB Olives Deed of Compromise, the parties have agreed that, if the condition precedent in clause 3.1 of the Deed is not satisfied by 31 December 2012, then the Deed ceases to have any effect and, in that event (among other things), the Deed, any documents prepared or circulated pursuant to the Deed, and any other documents prepared or circulated in anticipation of, or for the purpose of, the Application (including, among other things, this affidavit) may not be referred to or tendered in evidence in the BB Olives Rights Proceeding or the related proceedings to which I refer below.
14. Throughout this affidavit, I refer to the following affidavits which *inter alia* set out certain matters relevant to the Application:
- (a) Affidavit of Mark Anthony Korda sworn on 3 March 2010 and filed in Supreme Court of Victoria Proceeding No S CI 2009 10699 (**3 March 2010 Affidavit**);

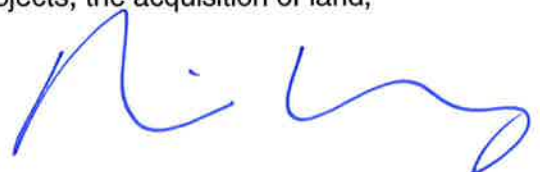


- (b) Affidavit of Mark Anthony Korda sworn on 10 November 2009 and filed in Supreme Court of Victoria Proceeding No S CI 2009 9998 (**10 November 2009 Affidavit**);
 - (c) Affidavit of Ross Whyte McClymont sworn on 16 March 2010 and filed in Supreme Court of Victoria Proceeding No S CI 2010 1354 (**16 March 2010 Affidavit**);
 - (d) Affidavit of Mark Anthony Korda sworn on 4 June 2009 and filed in Supreme Court of Victoria Proceeding No S CI 2009 7114 (**4 June 2009 Affidavit**);
 - (e) Affidavits of Mark Anthony Korda sworn on 9 July 2009 and filed in Supreme Court of Victoria Proceeding No S CI 2009 7114 in respect of:
 - (i) the 2006 Olive Scheme (**2006 Olive Affidavit**);
 - (ii) the 2007 Olive Scheme (**2007 Olive Affidavit**); and
 - (iii) the 2008 Olive Scheme (**2008 Olive Affidavit**); and
 - (f) Affidavit of Michael Dawkins sworn on 7 January 2011 and filed in Supreme Court of Victoria Proceeding No S CI 2009 10699 (**Dawkins Affidavit**)
- (together, the **Background Affidavits**).

Now produced and shown to me and marked "RWM-5" to "RWM-12" are true copies of the Background Affidavits excluding exhibits. A CD containing copies of the Background Affidavits including exhibits, is produced and marked "RWM-13" to this affidavit. Where relevant, I have identified information that I have obtained from the Background Affidavits by noting the source in parenthesis.

B. BACKGROUND TO THE BB OLIVES RIGHTS PROCEEDING

- 15. Timbercorp was the parent entity of the Timbercorp Group of companies and was a publicly listed company on the Australian Securities Exchange (3 March 2010 Affidavit at [7]).
- 16. The Timbercorp Group's primary business activities were the establishment, development, marketing and management of primary industry based projects, the acquisition of land,

water rights and infrastructure and the provision of finance to "Growers" in projects. The Timbercorp Group invested more than \$2 billion in agribusiness projects on behalf of 18,500 investors since 1992 (3 March 2010 Affidavit at [8]).

17. In summary, the Timbercorp Group structure comprised 4 corporate entities, 7 forestry entities and 29 horticulture entities. The operations of the Timbercorp Group could broadly be categorised as follows: corporate (including a head office located at 461 Bourke Street, Melbourne), forestry, almonds, olives, other crops and a loan book (3 March 2010 Affidavit at [10]).
18. At the time of the appointment of administrators (23 April 2009), the Timbercorp Group operated 33 registered managed investment schemes (**Schemes**). Timbercorp Securities Limited (**TSL**), a wholly owned subsidiary of Timbercorp, was the responsible entity (**RE**) for each of the Schemes, including relevantly the Olive Schemes (3 March 2010 Affidavit at [12]).
19. Boundary Bend Estate Management Pty Ltd (**BBEM**) acted as the farm manager for the Olive Schemes (10 November 2009 Affidavit at [12]).
20. The purpose of the Olive Schemes was the cultivation of olives for the production of olive oil for commercial sale. Each of the Olive Schemes was governed by a complex suite of constituent documents (10 November 2009 Affidavit at [9]). Those documents relevantly include:
 - (a) a head lease between BB Olives (as lessor) and TSL (as lessee) dated 27 April 2006 in relation to the 2006 Olive Scheme, pursuant to which BB Olives leases the properties described as "Grove 58, Kooloongong", "Grove 200, Andersons" and "Grove 452, Kooloongong" to TSL;
 - (b) a head lease between BB Olives (as lessor) and TSL (as lessee) dated 19 January 2007 in relation to the 2007 Olive Scheme, pursuant to which BB Olives leases the properties described as "Andersons" and "Suttons" to TSL;

- (c) a head lease between BB Olives (as lessor) and TSL (as lessee) dated 25 February 2008 and a head lease dated 6 March 2008 in relation to the 2008 Olive Scheme, pursuant to which the properties described as "Suttons", "Andersons", "Westmore", "Ryans" and "Boundary Bend, Grove 520" were leased to TSL;
- (d) a sub-lease agreement between BB Olives (as land owner), TSL (as lessor) and each Grower (as lessee) in the 2006 Olive Scheme in relation to the 2006 Olive Scheme;
- (e) a sub-lease agreement between BB Olives (as land owner), TSL (as lessor) and each Grower (as lessee) in the 2007 Olive Scheme in relation to the 2007 Olive Scheme; and
- (f) a number of licence agreements between BB Olives, TSL and each Grower in relation to the 2008 Olive Scheme.

Now produced and shown to me and marked "**RWM-14**" are copies of exemplar copies of the constituent documents for the Olive Schemes.

- 21. On 23 April 2009, the Liquidators were appointed as voluntary administrators of *inter alia* Timbercorp, TSL, Almond Land and BB Olives (10 November 2009 Affidavit at [5]).
- 22. On 29 June 2009, at the second meeting of the creditors of each company in the Timbercorp Group (other than TSL) and a separate meeting of the creditors of TSL, the creditors resolved to wind up each company in the Timbercorp Group, and TSL respectively. From 29 June 2009, the Liquidators have been the liquidators of *inter alia* Timbercorp, TSL, Almond Land and BB Olives (10 November 2009 Affidavit at [6]).
- 23. From and upon their appointment, Ms Chesser and Mr Korda undertook the following investigations in relation to the financial position of the Timbercorp Group:

- (a) examining the flow of funds through the various Timbercorp Group and the use of intercompany accounts;
- (b) assessing the process for receipt and distribution of harvest proceeds to the Timbercorp Group and Growers;
- (c) preparation of corporate and operational cash flows to understand the Timbercorp Group monthly commitments;
- (d) assessing each Scheme to understand the underlying viability of the Scheme from both a Grower and Timbercorp Group perspective; and
- (e) analysis of the Grower loan arrears

(3 March 2010 Affidavit at [54]).

24. The Liquidators' preliminary investigations indicated that the Timbercorp Group had combined liabilities of \$661 million owing to secured lenders, \$250 million owing in other loans and debts, \$14 million owing to unsecured creditors and \$5 million owing in respect of employee entitlements (including redundancy payments) (3 March 2010 Affidavit at [55]).
25. On 4 June 2009, the Liquidators filed an originating process seeking a direction from this Honourable Court that they were justified in applying to wind up *inter alia* the Olive Schemes. The Liquidators submitted to the Court in that application that TSL (the RE) was hopelessly insolvent and that they did not have the money required to continue maintaining the Olive Schemes (10 November 2009 Affidavit at [22]).
26. Mr Korda summarised TSL's financial position as at 4 June 2009 as follows:
- (a) TSL had no funds on hand, in its own capacity. To the extent that it did come into funds, such funds would be insignificant compared to the funds required by TSL to meet its obligations as RE;
 - (b) TSL, in its own right, had no significant assets;



(c) TSL had no employees; and

(d) TSL had no infrastructure

(3 March 2010 Affidavit at [57]).

27. Mr Korda also deposed that as at 4 June 2009:

- (a) the quantum and timing of harvest proceeds of a number of the Schemes was uncertain;
- (b) the majority of head leases of the land which was utilised in relation to the Schemes (including the Olive Schemes) (many of which were with the Timbercorp Group and some of which were with third party landowners) were only paid until 30 June 2009;
- (c) due to direct and joint venture ownership in a number of Schemes, the Timbercorp Group was required to contribute to ongoing Scheme costs and the Timbercorp Group did not have the financial capacity to meet these ongoing obligations;
- (d) Timbercorp had historically borne a portion of the management costs of many of the Schemes pending receipt of harvest proceeds or payment by Growers of management fees in arrears, but Timbercorp was not in a position to do so in the future; and
- (e) Timbercorp Finance, a Timbercorp subsidiary, had historically provided finance to certain Growers, to enable them to pay their ongoing Scheme obligations, and Timbercorp Finance was no longer in a position to continue to finance Growers

(3 March Affidavit at [58]).

28. Specifically in relation to the financial position of the Olive Schemes, Mr Korda deposed as follows:

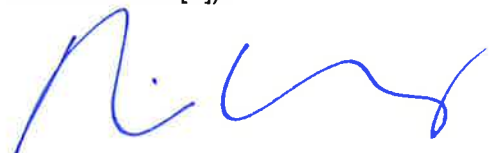


- (a) TSL was hopelessly insolvent and unable to continue managing the Olive Schemes (10 November 2009 Affidavit at [8]);
- (b) approximately \$62 million was required for operations, rental and other expenditure (**opex**) for the 2010 crop management and harvest. TSL did not have \$62 million in available funds. Under the Olive Schemes' constitutions, TSL was not permitted to borrow \$62 million, or any funds (4 June 2009 Affidavit at [30]);
- (c) even if TSL invoiced the Growers for the opex for the 2010 crop management and harvest, it would not be paid in full by them (4 June 2009 Affidavit at [31]);
- (d) the 2006 Olive Scheme was insolvent because:
 - (i) there was an estimated "Cumulative Scheme Cashflow - Before CAPEX" deficit of \$793,000 to the end of September 2009; and
 - (ii) TSL did not have the capacity to fund the capital expenditure of \$1,962,000 identified as necessary to the end of September 2009
 (2006 Olive Affidavit at [8.8]);
- (e) the 2007 Olive Scheme was insolvent because:
 - (i) there was an estimated "Cumulative Scheme Cashflow - Before CAPEX" deficit of \$590,000 to the end of September 2009; and
 - (ii) TSL did not have the capacity to fund the capital expenditure of \$2,156,000 identified as necessary to the end of September 2009
 (2007 Olive Affidavit at [8.8]);
- (f) The 2008 Olive Scheme was insolvent because:
 - (i) there was an estimated "Cumulative Scheme Cashflow - Before CAPEX" deficit of \$2,332,000 to the end of September 2009; and

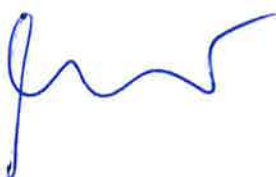
- (ii) TSL did not have the capacity to fund the capital expenditure of \$3,292,000 identified as necessary to the end of September 2009

(2008 Olive Affidavit at [8.8]).

29. On 17 June 2009 Justice Robson of this Honourable Court made the direction that the Liquidators were justified in procuring TSL to apply to wind up *inter alia* the Olive Schemes (10 November 2009 Affidavit at [26]).
30. On 21 August 2009 Justice Robson made a direction that the Liquidators were justified in causing TSL to amend the constitutions of the registered Almond Schemes to give TSL the explicit power to "assign, terminate, surrender or otherwise deal with any Sublease/Licence and Joint Venture Agreement" (10 November 2009 Affidavit at [49]). No like direction was made in respect of the Olive Schemes.
31. As no party had offered to take up the role of replacement RE on a permanent basis of *inter alia* the Olive Schemes by 28 August 2009, the Liquidators had the application to wind up the Olive Schemes listed for mention. The Liquidators were also concerned about wastage to the olive crop and that TSL was hopelessly insolvent (10 November 2009 Affidavit at [50]).
32. As the Liquidators had already obtained directions that they were justified in causing TSL to amend the constitutions of the registered Almond Schemes to give TSL the explicit power to "assign, terminate, surrender or otherwise deal with any Sublease/Licence and Joint Venture Agreement", the Liquidators simply made the same amendments in respect of the Olive Schemes. This course of action was not opposed by ASIC or the Timbercorp Growers Group (10 November 2009 Affidavit at [51]-[52]).
33. On 12 October 2009, Timbercorp, TSL, Almond Land and BB Olives together with the Liquidators (Mark Korda, Mark Mentha and Leanne Chesser), entered into a conditional sale and purchase deed (**Land SPD**) with Boundary Bend Limited (**BBL**) to sell the "Olive Assets" as they are defined in the Land SPD (16 March 2010 Affidavit at [8]).



34. The Land SPD is part of an exhibit made confidential by paragraph 11 of the orders made by the Honourable Justice Croft on 12 November 2009 in proceeding No.9998 of 2009 (MAK-19 to the affidavit of Mark Anthony Korda sworn 10 November 2009). Now produced and shown to me marked "**Confidential RWM-15**" is a confidential copy of the Land SPD.
35. Also on 12 October 2009, BB Olives together with its liquidators Mark Korda and Mark Mentha, entered into a conditional sale and purchase deed (**Water SPD**) with BBL to sell the "Water Shares" as they are described in the Water SPD (16 March 2010 Affidavit at [9]).
36. The Water SPD is also part of an exhibit made confidential pursuant to paragraph 11 of the orders made by the Honourable Justice Croft on 12 November 2009 in proceeding No.9998 of 2009 (MAK-19 to the affidavit of Mark Anthony Korda sworn 10 November 2009). Now produced and shown to me marked "**Confidential RWM-16**" is a confidential copy of the Water SPD.
37. Certain of the Water Shares and Olive Assets sold pursuant to the Water SPD and Land SPD respectively were, until completion, subject to securities in favour of BOSI (16 March Affidavit at [10]) .
38. Specifically:
- (a) twelve of the thirteen titles comprising the land owned by BB Olives and sold pursuant to the Land SPD were the subject of registered land mortgage No: AG323075S dated 30 December 2008 in favour of BOSI (the **Real Property Mortgage**);
 - (b) eleven of the twelve "Water Shares" sold pursuant to the Water SPD were the subject of registered water mortgage No MOR001534 dated 30 December 2008 in favour of BOSI (the **Water Mortgage**) (16 March 2010 Affidavit at [12]); and
 - (c) the Olive Assets also included shares in BBL owned by Timbercorp. Those shares are "Charged Property" pursuant to a Featherweight Fixed and Floating Charge



granted by Timbercorp to BOSI and dated 15 December 2006 (the **Charge**)
(16 March 2010 Affidavit at [13]).

Now produced and shown to me marked "**RWM-17**" to "**RWM-19**" are true copies of the Real Property Mortgage, the Water Mortgage and the Charge respectively.

39. The Syndicate Banks advanced principal of \$200 million to Timbercorp. Almond Land and BB Olives guaranteed to BOSI the due and punctual payment of that amount, which was secured, *inter alia* by the Real Property Mortgage, the Water Mortgage and the Charge. As at 9 December 2010, the outstanding balance owed to the Syndicate Banks was \$229,278,804.93 (including interest) (Dawkins Affidavit at [46]).
40. Save for the receipt of BOSI's entitlement to the net proceeds of sale (\$82,864,365.00) the subject of the Almond Land Rights Proceeding (defined below), I am informed by Matthew Taylor of BOSI that as at 13 September 2012, BOSI has not received payment, in part or at all, of that balance such that the amount now owed to the Syndicate Banks stands in the sum of \$183,627,796.80.
41. The sale the subject of the Land SPD was conditional upon *inter alia*:
 - (a) the release of BOSI's securities in accordance with the Land SPD; and
 - (b) obtaining the directions from the Court referred to in the Land SPD
 (16 March 2010 Affidavit at [17]).
42. In order to satisfy the condition precedent identified in paragraph 41(b) above, the Liquidators issued an application in this Honourable Court on 10 November 2009 (in proceeding no. 9998 of 2008). In view of the decision of Robson J in *Re Timbercorp Securities Limited (In Liquidation) (No 3)* (2009) 74 ACSR 626 the Liquidators did not press for an order for the allocation of the Net Sale Proceeds but, rather, a direction that such Proceeds be held on trust pending the determination of the claims or rights to those proceeds.

43. After a hearing on 11 November 2009, the Honourable Justice Croft made orders on 12 November 2009 which satisfied the condition precedent identified in paragraph 41(b) above and required the Liquidators of BB Olives to hold the Net Sale Proceeds under the Land SPD and Water SPD on trust pending the hearing and determination of a proceeding to determine which (if any) person had a right to share in the Proceeds (**Orders**). Now produced and shown to me marked "**RWM-20**" is a true copy of the Orders.
44. BOSI released its Real Property Mortgage, Water Mortgage and Charge (in part), in accordance with the Land SPD and the Water SPD immediately prior to completion of the Land SPD and the Water SPD on 11 January 2010

(16 March 2010 Affidavit at [19]).
45. On or about 18 February 2010 I received a letter from John Stragalinis of Corrs Chambers Westgarth (who act for the vendors under the Land SPD and Water SPD) informing me that Net Sale Proceeds from the Land SPD and Water SPD were as at 10 February 2010:
- (a) held by BB Olives in an account with Westpac, in the sum of \$1,940,791.61; and
 - (b) held by BB Olives in a 90 day term deposit with Westpac, in the sum of \$21,500,000.00.
- (together, the **Fund**).
- Now produced and shown to me marked "**RWM-21**" is a true copy of the letter I received from John Stragalinis of Corrs Chambers Westgarth dated 18 February 2010.
46. I am further informed by Meagan Grose of Arnold Bloch Leibler, the solicitors for the Liquidators, that the value of the Fund as at 18 September 2012 is \$26,681,274.58 and that the costs of the Liquidators in preserving and realising the assets the subject of the Land SPD and the Water SPD have not yet been deducted from that sum .
47. In addition to the BB Olives Rights Proceeding, the following proceedings were commenced to determine how the net sale proceeds the subject of each relevant sale transaction were

to be apportioned between the land owners, the secured creditors, the investors and other interested parties claiming an interest in those proceeds:

- (a) Supreme Court of Victoria Proceeding No S CI 2009 10699 (**Almond Land Rights Proceeding**);
- (b) Supreme Court of Victoria Proceeding No. S CI 2011 6604 (**Liparoo and Yungera Rights Proceeding**);
- (c) Supreme Court of Victoria Proceeding No. S CI 2011 6606 (**Solara Rights Proceeding**); and
- (d) Supreme Court of Victoria Proceeding No. S CI 2011 6777 (**Fenceport Rights Proceeding**).

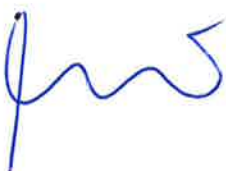
I define the Liparoo and Yungera Rights Proceeding, the Solara Rights Proceeding, the Fenceport Rights Proceeding and this proceeding as, collectively, the "**Apportionment Proceedings**".

48. As each of the Almond Land Rights Proceeding and the Apportionment Proceedings involves similar issues, it was considered appropriate for one such proceeding to be heard and determined first, with the intention that the result in that proceeding would then form the basis for determination of the other proceedings. This led to the hearing and determination of the Almond Land Rights Proceeding.

C. THE ISSUES ARISING IN THE BB OLIVES RIGHTS PROCEEDING AND ITS LIKELY RESOLUTION

49. The BB Olives Rights Proceeding was commenced to determine:

- (a) what, if any rights BOSI, Almond Land and the Growers have to share in the Fund;
and
- (b) how the Fund ought be distributed.




50. In the 4 June 2009 Affidavit, Mr Korda deposed to the fact that:

- (a) 351 Growers invested in the 2006 Olive Scheme;
- (b) 471 Growers invested in the 2007 Olive Scheme; and
- (c) 815 Growers invested in the 2008 Olive Scheme.

51. While it is likely that certain Growers invested in more than one of the Olive Schemes, it was apparent that there were potentially several hundred Growers who may have an interest in this proceeding. The process of locating and serving each of the affected Growers was expected to be expensive and time consuming and accordingly, BOSI sought an order pursuant to Rule 16.01(2) of the Rules that the Representative Growers be appointed as representatives of the Growers.

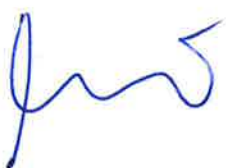
52. As referred to above, on 22 March 2010, the Court made orders pursuant to Rule 16.01(2) of the Rules appointing the Representative Growers.

53. Based on:

- (a) the Contentions;
- (b) the issues raised for determination in the Almond Land Rights Proceeding and Justice Davies' judgment in that proceeding (see further paragraphs 56 to 59 below); and
- (c) the position adopted by the appellant representative growers in the Almond Land Rights Appeal Proceeding in their grounds of appeal filed in that proceeding,

the following are likely to be the key issues addressed at any trial of the BB Olives Rights Proceeding:

- (i) what rights (if any) does BOSI, Almond Land and the Growers have to the Fund (the **Rights Issue**);



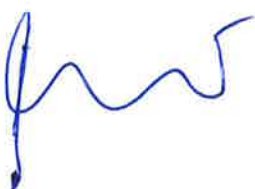
- (ii) what the value is of any such rights of BOSI, Almond Land and the Growers respectively (the **Valuation Issue**); and
 - (iii) how much (if any) of the Fund, BOSI, Almond Land and the Growers are entitled to receive.
- 54. In respect of the Rights Issue, the relevant matters which will arise for consideration in determining the entitlements of the parties to the are as follows:
 - (a) the nature and extent of the rights (if any) of BOSI, Almond Land and the Growers in respect of the assets the subject of the Land SPD and Water SPD; and
 - (b) the extent to which such rights gave rise to an entitlement to any part of the proceeds of the sale of the assets.
- 55. In respect of the Valuation Issue, to the extent that the Growers held rights (whether proprietary or contractual in nature) which entitle them to make a claim against the Fund, for the purpose of valuing those rights, relevant matters which will arise for consideration are as follows:
 - (a) What is the appropriate valuation methodology to adopt?
 - (b) To what extent were the Olive Schemes the subject of the proceeding viable?
 - (c) What was the value of the Growers' rights (if any)?
 - (d) How, having regard to the foregoing, should the proceeds available for distribution from the Fund be apportioned between the Growers, BOSI and Almond Land?
- 56. Similar issues to those that are the subject of the BB Olives Proceeding were raised for determination in the Almond Land Rights Proceeding.
- 57. I had conduct of the Almond Land Rights Proceeding on behalf of BOSI. The structure of the Schemes and the issues raised in the Almond Land Rights Proceeding closely resemble the structure of the Olive Schemes and the issues arising in the BB Olives Rights

Proceeding. A summary of the factual background to the Almond Land Rights Proceeding, as agreed between the parties to the proceeding, is set out in section B of the agreed summary for the Court of Appeal dated 12 December 2011 filed by the parties in the Almond Land Rights Appeal Proceeding (defined below). Now produced and shown to me marked "**RWM-22**" is a true copy of the summary.

58. As Mr Hinchin deposes in his affidavit sworn on 19 September 2012 on behalf of ANZ in support of the application to approve the compromise of the Liparoo and Yungera Rights Proceeding (**Hinchin Affidavit**):

- (a) There were a large number of complex facts and issues in dispute in the Almond Land Rights Proceeding in connection with managed investment schemes for the cultivation of almonds for commercial sale. Many of these issues concerned matters within specialised fields of knowledge in respect of which expert opinion was provided to the Court. In advance of the trial of the proceeding, the issues were addressed by the parties by way of:
 - (i) contentions and reply contentions of in excess of 300 pages;
 - (ii) lay evidence from 10 witnesses in the form of 14 affidavits; and
 - (iii) expert evidence from 5 witnesses in the form of 13 affidavits and six joint expert reports.
- (b) The expert evidence spanned the following fields of expertise:
 - (i) the appropriate revenue and cost inputs necessary to model the value of the relevant growers' rights (including, among other things, almond prices, almond yields, operating expenditure, inflation, responsible entity fees, licence/rental fees, capital expenditure, water requirements and the cost of temporary and permanent water), together with the adoption of the appropriate discount rate to adopt in the valuation exercise;

- (ii) water allocation, availability and cost;
 - (iii) estimated future operating costs and almond yields; and
 - (iv) the valuation of the rights of the relevant growers and secured lenders in connection with the relevant managed investment schemes.
- (c) The trial itself took place over 12 sitting days in February and March 2011. At the trial, evidence was given by four lay witnesses and four expert witnesses. Justice Davies delivered her 69 page reasons for judgment in the Almond Land Rights Proceeding on 15 June 2011 (**Justice Davies' Judgment**). Her Honour found that the Growers were unsuccessful in their claims against the fund of net sale proceeds the subject of that proceeding (**Almond Fund**) and that ANZ and BOSI were entitled to the entire amount of those net sale proceeds. Justice Davies' Judgment is reported at (2011) 84 ACSR 341.
- (d) By orders made by Justice Davies in the Almond Land Rights Proceeding on 27 June 2011, the net sale proceeds the subject of that proceeding were to be distributed to BOSI and ANZ, subject to certain ancillary orders.
59. Having regard to the specific issues arising in the BB Olives proceeding, I share the view expressed in the Hinchin Affidavit, that the key findings made in Justice Davies' Judgment are those set out below (including in parenthesis the relevant paragraph in Justice Davies' Judgment):
- (a) to share in the Almond Fund, Growers needed to establish rights of a proprietary nature in, and with respect to, the Almond Assets that were converted into the Almond Fund constituted by the net sale proceeds (paragraph 30 of the Judgment);
 - (b) for licence-based Schemes, the Growers acquired rights of a contractual nature only and did not obtain a proprietary interest in the Almond Assets (paragraph 48) – so Growers in those Schemes had no right to share in the Almond Fund;




- (c) for lease-based Schemes, the Growers held rights of a proprietary nature in the land, trees and capital works (but of a contractual nature in the water licences) – so Growers in those Schemes had a right to share in the Almond Fund only to the extent it consisted of the net proceeds of sale of the land, trees and capital works, and only if and to the extent their proprietary rights were valuable on extinction (paragraphs 73 and 79);
 - (d) if the (lease-based) Schemes in which Growers held proprietary rights were not viable at the time those rights were extinguished by the Court (either in their existing form or, on the balance of probabilities, upon restructure including the replacement of the responsible entity), then no measure of value could be attributed to those rights (paragraphs 82 and 95);
 - (e) since there was no possibility other than a theoretical possibility that the Schemes would have continued if the Growers' rights had not been extinguished, no value could be attributed to the Growers' rights (paragraph 137); and
 - (f) on the basis of Justice Davies' findings in respect of the Rights Issue and the Valuation Issue (as those issues arose in the Almond Land Rights Proceeding), the securities held by ANZ and BOSI over the assets sold entitled these parties to receive the entire amount of the net sale proceeds as the amounts secured were greater than the net sale proceeds held in trust as at the date of judgment and the Growers had not been successful in establishing their entitlement (paragraph 167).
60. The Representative Growers in the Almond Land Rights Proceeding have appealed Justice Davies' orders (**Almond Land Rights Appeal Proceeding**). BOSI is the first respondent to the appeal and I have the conduct of the appeal on behalf of BOSI. ANZ is the second respondent to the appeal. The third, fourth and fifth respondents to the appeal are, respectively, Almond Land and its two liquidators, Mr Korda and Ms Chesser. By paragraph 1 of the orders made by Associate Justice Landsdowne on 29 September 2011

in the Almond Land Rights Proceeding the third, fourth and fifth respondents were excused from taking any steps in the appeal, including court appearances, but may do so.

61. The following documents have been filed with the Court of Appeal in the Almond Land Rights Appeal Proceeding:

- (a) the appellants' (Growers') notice of appeal dated 11 July 2011;
- (b) the notice of contention of the first and second respondents dated 23 November 2011;
- (c) the agreed summary for the Court of Appeal dated 12 December 2011 filed by the parties in accordance with Practice Statement CA 2 of 1995;
- (d) the appellants' outline of submissions dated 28 February 2012;
- (e) the respondents' (ANZ's and BOSI's) joint outline of submissions dated 13 March 2012; and
- (f) the appellants' reply submissions dated 20 March 2012.

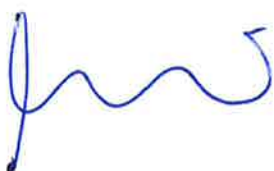
62. As Mr Hinchin deposes in the Hinchin Affidavit:

(a) In the Almond Land Rights Appeal Proceeding, the appellant representative growers:

(i) advance seven grounds of appeal in respect of the Justice Davies' Judgment; and

(ii) seek, among other things, orders that:

(A) ANZ and BOSI reconstitute the fund comprising of the net sale proceeds the subject of the Almond Land Rights Proceeding with the amounts paid to them in accordance with the orders made by Justice Davies on 27 June 2011; and



(B) the proceeding be remitted to Justice Davies for further hearing and determination in accordance with the reasons of the Court of Appeal.

(b) The joint position of the respondent banks (ANZ and BOSI) in the Almond Land Rights Appeal Proceeding is that they:

- (i) reject each of the appellant representative growers' grounds of appeal;
- (ii) contend that Justice Davies' conclusion that the growers were not entitled to share in the relevant net sale proceeds should be affirmed, but on the additional or alternative ground that, in respect of the interests of the Growers in the 2005 Almond Scheme, 2006 Almond Scheme and 2007 Almond Scheme:

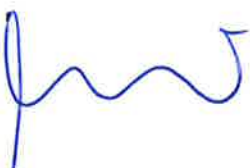
- (A) Justice Davies correctly held that the growers had no proprietary interest in the water licences;
- (B) Justice Davies ought to have held that the growers in those projects had no proprietary interest in the almond trees or the capital works (but rights of a contractual nature only); and
- (C) Justice Davies ought to have held that the growers' leasehold interests in the land and any entitlement under the leases to use or enjoy the almond trees or the capital works:
 - (I) were in the nature of encumbrances; and
 - (II) did not form any part of the subject matter of the sale under the relevant sale and purchase deed.

63. A hearing date for the appeal is yet to be fixed. The appeal is now in the list of appeals for hearing and is unlikely to be heard until 2013.

64. The key issues likely to be addressed in the BB Olives Rights Proceeding will be the same or substantially similar to the matters determined by her Honour Justice Davies in the

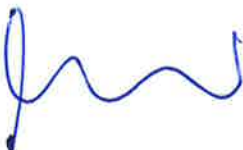
Almond Land Rights Proceeding. The constituent documents for the 2005-2007 Almond Schemes the subject of the Almond Land Rights Proceeding are similar in content and form to the corresponding documents for the 2006 and 2007 Olive Schemes the subject of the BB Olives Rights Proceeding. Similarly, the constituent documents for the 2002 Almond Scheme the subject of the Almond Land Rights Proceeding are similar in content and form to the corresponding documents for the 2008 Olive Scheme the subject of the BB Olives Rights Proceeding.

65. As noted at paragraphs 61(b) and 62(b) above, aspects of Justice Davies' Judgment are the subject of a joint notice of contention served by ANZ and BOSI. If, however, the Court were to apply, without modification, the findings from Justice Davies' Judgment to determine the rights of the parties in the BB Olives Rights Proceeding, then, in relation to the Rights Issue, the likely findings would be as follows:
- (a) To share in the Fund, Growers would need to establish rights of a proprietary nature in and with respect to the olive assets that were converted into the Fund (see paragraph 30 of Justice Davies' Judgment).
 - (b) Growers in the 2008 Olive Schemes subject to licence agreements will be found to have acquired rights of a contractual nature only and, therefore, found not to have obtained a proprietary interest in the Fund (see paragraph 48 of Justice Davies' Judgment).
 - (c) Growers in the 2006 and 2007 Olive Schemes will be found to have held leasehold rights of a proprietary nature in the land, trees and capital works (but of a contractual nature in the water licences) (see paragraphs 73 and 79 of Justice Davies' Judgment). Consistent with Her Honour Justice Davies reasons in the Almond case, Growers will be found to hold no right to share in that part of the Fund resulting from the sale of the Water Shares under the Water SPD (\$21,464,000), and will only have a right to share in that part of the Fund arising from the sale of the



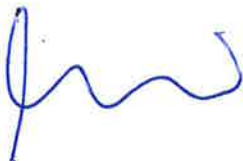
land, trees and capital works under the Land SPD (\$2,036,000). In the latter instance, such Growers will be found to hold a right to share in that part of the Fund only if and to the extent their proprietary rights were valuable on extinction.

66. In relation to the Valuation Issue, applying the reasoning adopted by Justice Davies in the context of the Almond Land Rights Proceeding at [84] –[87] and the evidence of the Liquidators in the 4 June 2009 Affidavit, 2006 Olive Affidavit, 2007 Olive Affidavit, 2008 Olive Affidavit and 10 November 2009 Affidavit, the following matters evidence that any such rights held by the Growers in the Olive Schemes were valueless in any case:
- (a) The insolvency of the Timbercorp Group meant that the Olive Schemes could not continue under their existing structures (4 June 2009 Affidavit at [27] – [33]).
 - (b) The Timbercorp Group had no capacity to fund the capital expenditure for which it was responsible and that it had no capacity to absorb any funding shortfall arising from any defaults on Grower invoices (4 June 2009 Affidavit at [29] and [31]).
 - (c) All of the Olive Schemes required significant cash contributions above the fees that the Growers were contractually obliged to pay in order to meet operating requirements in relation to the management and harvesting of the 2010 crop. The lack of immediate funds meant that the continued operations could not be funded (4 June 2009 Affidavit at [30]).
 - (d) The Olive Schemes were insolvent (4 June 2009 Affidavit at [38]).
 - (e) The olive groves were at risk of wastage and impairment because of the lack of immediate funds available to the Olive Schemes and the lack of any means of funding the continued operations (10 November 2009 Affidavit at [125] to [130]).
 - (f) The insolvency of the Timbercorp Group and the cash flow deficiencies of the Olive Schemes meant that the schemes could not be funded and that they were at imminent and inevitable risk of termination as the purpose of the Olive Schemes could not be accomplished.



67. In relation to the viability of the Olive Schemes:

- (a) the Representative Growers would be required to establish on the balance of probabilities that the extinguishment of their rights deprived them of the opportunity to have the Olive Schemes restructured and continued to full term (Justice Davies' Judgment at [95]);
- (b) such a counterfactual would require the Representative Growers to identify contemporaneous evidence from which it could be submitted that a restructure was a feasible counterfactual as at 10 November 2009;
- (c) having regard to the matters referred to in Justice Davies' Judgment at paragraphs 96 to 136, the Court is likely to have regard to the following matters in considering whether the Olive Schemes could feasibly be restructured as at 10 November 2009:
 - (i) legal issues concerning, among other things, the change of responsible entity for the Olive Schemes and constitutional and contractual amendments;
 - (ii) factual issues concerning, among other things, the market for hire of responsible entities and the terms of any consent given by a possible replacement responsible entity;
 - (iii) the likelihood of any replacement responsible entity taking over as responsible entity of the projects, based on the probability of the Olive Schemes continuing to term in light of (among other things):
 - (A) the immediate cash needs of the projects as against their expected future revenue;
 - (B) the solvency position of other relevant companies in the Timbercorp Group;
 - (C) the need for constitutional and contractual changes;
 - (D) the need to find a consenting responsible entity; and



- (E) the possibility of conditions being imposed to any consent given by a responsible entity to assume that role in respect of these projects.

68. These issues were the subject of extensive evidence and submission in the Almond Land Rights Proceeding. As far as I am aware, no such material has yet been prepared on these matters in the context of this proceeding. I note however, that Mr Korda has previously deposed that by 28 August 2009, no party had offered to take the role of replacement RE of the Olive Schemes on an unconditional and binding basis. (10 November 2009 Affidavit at [50])
69. In all the circumstances, if the key findings in Justice Davies' Judgment are applied consistently in the present proceeding, the Growers in this proceeding are likely to be found to have no entitlement to the Fund.

D. THE COMPROMISE

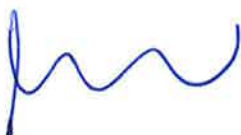
70. As I deposed to above, on 25 July 2012, the parties to this proceeding and TSL executed the BB Olives Deed of Compromise. Also on 25 July 2012, deeds of compromise for each of the other Apportionment Proceedings and the Almond Land Rights Appeal Proceeding were executed by or on behalf of each of the relevant parties and on behalf of TSL (**Deeds of Compromise**).
71. The key features of the BB Olives Deed of Compromise include
- (a) By clause 2, subject to the condition precedent set out in clause 3 being satisfied, the parties agree to the compromise the BB Olives Rights Proceeding by:
 - (i) the making of the payments in accordance with clause 4; and
 - (ii) the giving of releases in accordance with clause 5
 (the **BB Olives Rights Compromise**);
 - (b) By clause 3, it is a condition precedent to the BB Olives Rights Compromise, on or before 31 December 2012 that:

- (i) the Court approve the BB Olives Rights Compromise in accordance with rule 16.01(4) of the Rules; and
 - (ii) the Court approve the compromise the subject of each of the other Deeds of Compromise;
- (c) By clause 4(a) and 4(c), as soon as practicable after the condition precedent in clause 3.1 is satisfied, the Liquidators will pay:
- (i) \$1,185,000 from the Fund to TSL (**Olives Settlement Amount**); and
 - (ii) then, the balance of the Fund to BOSI.
- (d) By clause 4(b), upon receipt the Olives Settlement Amount is to be held by TSL on trust for Growers for distribution to, or on behalf of, Growers in accordance with their entitlements (as outlined in sub-paragraphs (e) to (k) below;
- (e) The Olives Settlement Amount to be apportioned between Growers in the Olive Schemes based on a rateable distribution in accordance with the number of Lots they held in the Olive Schemes (for each Grower, their **Olives Settlement Entitlement**);
- (f) Pursuant to clause 4(b)(i), in respect of each Grower who is not recorded in the books and records of:
- (i) Timbercorp Finance Pty Limited (in liquidation) (**TFL**) as owing amounts under an outstanding loan from TFL in connection with their investment in the Olive Schemes (**TFL Indebtedness**); or
 - (ii) TSL as owing amounts to TSL (**Timbercorp Indebtedness**),

TSL will pay his or her Olives Settlement Entitlement as soon as practicable to or at the direction of that Grower;

- (g) Subject to sub-paragraph (i) to (k) below, any Grower who is recorded in the books and records of:
- (i) TFL as having TFL Indebtedness:
 - (ii) TSL as having Timbercorp Indebtedness,

will be able (should they choose) to direct that their Olives Settlement Entitlement is/are paid, in whole or in part, to TFL or TSL to pay, to the extent possible, its TFL Indebtedness or Timbercorp Indebtedness (as applicable);
- (h) In respect of any Grower who has TFL Indebtedness and has directed TSL to pay its TFL Indebtedness, to the extent possible, out of his or her Olives Settlement Entitlement TSL will, as soon as practicable, use the Growers' Olives Settlement Entitlement to pay, to the extent possible, the TFL Indebtedness as soon as practicable and remit the balance of the Grower's Olives Settlement Entitlement (if any) to the Grower (or, if directed by the Grower, to TSL in payment of any Timbercorp Indebtedness);
- (i) In respect of any Grower who has TFL Indebtedness and has not directed TSL to pay any part of its Olives Settlement Entitlement to TFL, TSL will hold that Grower's Olives Settlement Entitlement on trust pending agreement between TFL and the Grower or court order as to whom it should be paid;
- (j) In respect of any Grower who has TFL Indebtedness and has directed TSL to use his or her Olives Settlement Entitlement to pay only part of the Grower's TFL Indebtedness, TSL will, as soon as practicable, pay to TFL that part of the Grower's TFL Indebtedness and retain the balance of the Grower's Olives Settlement Entitlement (if any) on trust pending agreement between TFL and the Grower or court order as to whom it should be paid; and
- (k) A Grower who has both TFL Indebtedness and Timbercorp Indebtedness may not direct TSL to pay all or part of their Timbercorp Indebtedness out of its Olives



Settlement Entitlement (as the case may be) before there is an agreement in writing between TFL and the Grower, or a court order, about the manner in which the entitlement is to be disbursed;

- (l) By clause 5, upon satisfaction of the condition precedent in clause 3 and the making of the payments in clause 4, each party will release all other parties from any further claim in relation to their entitlement to the Fund or the allocation and disbursement of the Fund.

E. COMMUNICATIONS WITH ASIC

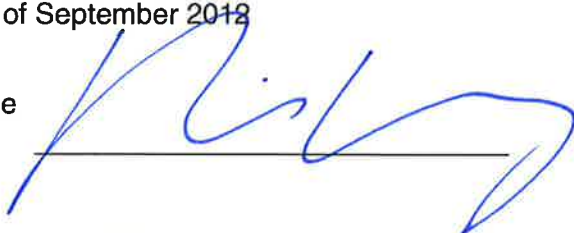
72. Allens has communicated with ASIC in relation to the Deeds of Compromise with the full authority of BOSI. I refer to and rely upon the summary of Allens' communications with ASIC referred in paragraphs 104 to 110 of the Hinchin Affidavit.

AFFIRMED by Ross Whyte McClymont at

Melbourne in the State of Victoria this

20th day of September 2012

Before me



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



SCHEDULE OF PARTIES

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

Plaintiff

and

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

First Defendant

and

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

Second Defendant

and

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

Third Defendant

and

**MARK ANTHONY KORDA
(in his capacity as liquidator of Almond Land Pty Ltd (in liquidation))
(in his capacity as liquidator of B.B. Olives Pty Ltd (in liquidation))**

Fourth Defendant

and

**LEANNE KYLIE CHESSER
(in her capacity as liquidator of B.B. Olives Pty Ltd (in liquidation))**

Fifth Defendant

and

**MARK FRANCIS XAVIER MENTHA
(in his capacity as liquidator of B.B. Olives Pty Ltd (in liquidation))**

Sixth Defendant

and

MICHAEL CHARLES VICARY

(as the representative of the Growers in the 2006 Timbercorp Olive Project (ARSN 119 182 179))

Seventh Defendant

and

PAMELA JAN DRY

(as the representative of the Growers in the 2007 Timbercorp Olive Project (ARSN 123 155 715))

Eighth Defendant

and

DAVID BUTTERFIELD

(as the representative of the Growers in the 2008 Timbercorp Olive Project (ARSN 129 307 722))

Ninth Defendant