

r43.06

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

CERTIFICATE IDENTIFYING EXHIBIT

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

Prepared by:

ARNOLD BLOCH LEIBLER

Lawyers and Advisers

Level 21

333 Collins Street

MELBOURNE 3000

Solicitor's Code: 54

DX 38455 Melbourne

Tel: 9229 9999

Fax: 9229 9900

Ref: 011601361

(Jane Sheridan - jsheridan@abl.com.au)

This is the exhibit marked "JCS-1" now produced and shown to **JANE CHALMERS SHERIDAN** at the time of swearing her affidavit on 27 August 2012.

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

Before me: 

Exhibit "JCS-1"

**Affidavit of Ross Whyte McClymont dated 15
August 2012 in S APCI 2011 0103**

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
IN THE COURT OF APPEAL

S APCI 2011 0103

BETWEEN

GRAHAM GOLDENBERG & ORS (according to the Schedule)

Appellants

and

**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) & ORS** (according to
the Schedule)

Respondents

AFFIDAVIT OF ROSS WHYTE MCCLYMONT

Date sworn: 15 August 2012
Filed on behalf of: the First Respondent
Prepared by:
Ashurst Australia
Level 26
181 William Street
MELBOURNE VIC 3000

Solicitor's Code: 53
DX: 187
Tel: (03) 9679 3000
Fax: (03) 9679 3111
Ref: 03 2010 2555
Attention: Ross McClymont
Email: ross.mcclymont@ashurst.com

I, Ross Whyte McClymont of Level 26, 181 William Street, Melbourne, Solicitor, do solemnly,
sincerely and truly declare and affirm that:

1. I am a partner in the firm of Ashurst Australia, the solicitors for the First Respondent.
2. I have the care and conduct of this proceeding, and had the care and conduct of the proceeding below, on behalf of the First Respondent.
3. I make this affidavit from my own knowledge, save where otherwise stated. Where I depose to matters on the basis of information and belief, I believe those matters to be true.
4. I make this affidavit in support of the First Respondent's summons which seeks an order that the proceeding be 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.

(the **Summons**)

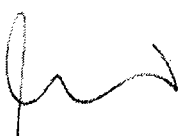

5. Each of the parties to this proceeding consents to the making of the orders sought in the **Summons**. Now produced and shown to me marked "**RWM-1**" is a true copy of a minute of proposed consent order executed on behalf of each of the parties to this proceeding.

Background to the disputes

6. Timbercorp Limited (in liquidation) and its subsidiary entities (together, the **Timbercorp Group**) conducted various agribusiness managed investment schemes across a number of properties involving, among other things, the management, cultivation, harvesting, processing and sale of almonds, olives and citrus (**Timbercorp MIS**).
7. The Timbercorp Group went into administration on 23 April 2009 and was placed into liquidation on 29 June 2009. Thereafter, the land on which the Timbercorp MIS were conducted, and related assets, were sold in a series of transactions each of which was approved by the Supreme Court of Victoria.
8. Subsequently, in accordance with the applicable orders made by Supreme Court of Victoria, the following five separate proceedings were commenced to determine how the net sale proceeds the subject of each sale transaction were to be apportioned between the land owners, the secured creditors, the investors in the Timbercorp MIS (**Growers**) 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**) which concerned the following Timbercorp MIS:

- (i) 2002 Timbercorp Almond Project ARSN 099 611 935;

- (ii) 2005 Timbercorp Almond Project ARSN 112 935 092;
 - (iii) 2006 Timbercorp Almond Project ARSN 118 387 974;
 - (iv) 2007 Timbercorp Almond Project ARSN 122 511 040; and
 - (v) 2002 Timbercorp Almond Project (Private Offer No 1);
- (b) Supreme Court of Victoria Proceeding No. S CI 2011 6604 (**Liparoo and Yungera Rights Proceeding**) which concerned the following Timbercorp MIS:
- (i) 2001 Timbercorp Almond Project ARSN 095 649 746;
 - (ii) 2002 Timbercorp Almond Project ARSN 099 611 935;
 - (iii) 2003 Timbercorp Almond Project ARSN 103 197 299;
 - (iv) 2004 Timbercorp Almond Project ARSN 108 336 670;
 - (v) 2005 Timbercorp Almond Project ARSN 112 935 092; and
 - (vi) 2002 Timbercorp Almond Project (Private Offer) (Unregistered);
- (c) Supreme Court of Victoria Proceeding No. S CI 2011 6606 (**Solara Rights Proceeding**) which concerned the following Timbercorp MIS:
- (i) 2005 Timbercorp Citrus Project ARSN 114 091 299;
- (d) Supreme Court of Victoria Proceeding No. S CI 2010 1354 (**BB Olives Rights Proceeding**) which concerned the following Timbercorp MIS:
- (i) 2006 Timbercorp Olive Project ARSN 119 182 179;
 - (ii) 2007 Timbercorp Olive Project ARSN 123 155 715; and
 - (iii) 2008 Timbercorp Olive Project ARSN 129 307 722; and
- (e) Supreme Court of Victoria Proceeding No. S CI 2011 6777 (**Fenceport Rights Proceeding**) which concerned the following Timbercorp MIS:




- (i) 2000 Timbercorp Olive Project (Private Offer) (Unregistered);
- (ii) 2001 Timbercorp Olive Project ARSN 094 382 082;
- (iii) 2002 Timbercorp Olive Project ARSN 098 233 455;
- (iv) 2003 Timbercorp Olive Project ARSN 104 648 473; and
- (v) 2004 Timbercorp Olive Project ARSN 108 744 378.

9. As the rights of the claimants on the fund created by the sales the subject of the Solora Rights Proceeding, Liparoo and Yungera Rights Proceeding, BB Olives Rights Proceeding and Fenceport Rights Proceeding are yet to be determined, I define those proceedings as the **"Apportionment Proceedings"**.
10. As each of the proceedings referred to in paragraph 8 above 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.

Almond Land Rights Proceeding

11. On 15 December 2009, BOSI Security Services Limited (ACN 009 413 952) as trustee for Australia and New Zealand Banking Group Limited (ACN 005 357 522) (**ANZ**) and BOS International (Australia) Limited (ACN 066 601 250) and Westpac Banking Corporation (ACN 007 457 141) (**BOSI**), as the plaintiff, initiated the Almond Land Rights Proceeding, seeking declarations as to its, the first defendant's (ANZ's) and the fifth to eighth defendants' rights, if any, to the relevant net sale proceeds held in an interest bearing trust account pursuant to orders of Justice Robson made on 9 October 2009 (**Fund**), and how the Fund ought be distributed.

Now produced and shown to me and marked "RWM-2" is a true copy of the Summons and Originating Motion filed in the Almond Land Rights Proceeding on 15 December 2009.

12. On 22 December 2009, the Supreme Court of Victoria made orders in the Almond Land Rights 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 Timbercorp MIS the subject of the Almond Land Rights Proceeding.

Now produced and shown to me and marked "RWM-3" is a true copy of the orders dated 22 December 2009.

13. The Almond Land Rights Proceeding was heard by Justice Davies over 12 days in February 2011 and March 2011.
14. Justice Davies delivered her reasons for judgment on 15 June 2011. Her Honour found that the Growers were unsuccessful in their claims against the Fund and that BOSI and ANZ were entitled to the Fund in its entirety.

Now produced and shown to me and marked "RWM-4" is a true copy of the judgment of Justice Davies in the Almond Land Rights Proceeding reported as (2011) 84 ACSR 341.

15. By orders dated 27 June 2011, the Fund was to be distributed to BOSI and ANZ, subject to certain ancillary orders.

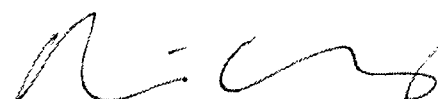
Now produced and shown to me and marked "RWM-5" is a true copy of the orders dated 27 June 2011.

Apportionment Proceedings

16. On 16 March 2010, the BB Olives Rights Proceeding was commenced by BOSI.

Now produced and shown to me and marked "RWM-6" is a true copy of the Summons and Originating Motion filed in the BB Olives Rights Proceeding on 16 March 2010.

17. BOSI is not a party to the Solara Rights Proceeding, Liparoo and Yungera Rights Proceeding and Fenceport Rights Proceeding. ANZ, the Second Respondent to this



appeal, is a party to the Solora Rights Proceeding and Liparoo and Yungera Rights Proceeding. The solicitors for ANZ in the Liparoo and Yungera Rights Proceeding, the Solora Rights Proceeding and the Almond Land Rights Appeal Proceeding are Allens (**Allens**). I am informed by Jonathan Joseph of Allens and believe that on 6 December 2011, the Solora Rights Proceeding and the Liparoo and Yungera Rights Proceeding were commenced by ANZ.

Now produced and shown to me and marked "**RWM-7**" and "**RWM-8**" are true copies of the Summonses and Originating Motions filed in the Solora Rights Proceeding and the Liparoo and Yungera Rights Proceedings on 6 December 2011.

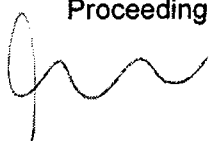
18. BOSI and ANZ are not parties to the Fenceport Rights Proceeding. The Fourth Respondent, Mr Korda (one of the liquidators of the Timbercorp Group), is party to the Fenceport Rights Proceeding. The solicitors for the liquidators of the Timbercorp Group and the Third to Fifth Respondents to this appeal are Arnold Bloch Leibler (**ABL**). I am informed by Jane Sheridan of ABL and believe that the Fenceport Rights proceeding was commenced on 13 December 2011.

Now produced and shown to me and marked "**RWM-9**" is a true copy of the Summons and Originating Motion filed in the Fenceport Rights Proceeding on 13 December 2011.

19. Orders have been made in each of the Apportionment Proceedings pursuant to Rule 16.01(2) of the Rules that parties be appointed as representatives of the Growers in the Timbercorp MIS the subject of the Apportionment Proceedings. However, to date no further interlocutory steps have been taken in any of the Apportionment Proceedings.

Almond Land Rights Appeal Proceeding

20. Pursuant to a Notice of Appeal filed by the Representative Growers on 11 July 2011, the Representative Growers in the Almond Land Rights Proceeding sought to appeal the judgment of Justice Davies in that proceeding (Supreme Court of Victoria Court of Appeal Proceeding No S APCI 2011 0103) (**Almond Land Rights Appeal Proceeding**).




Now produced and shown to me and marked "**RWM-10**" is a true copy of the Notice of Appeal filed by the Growers on 11 July 2011.

21. On 12 December 2011, the parties to the Almond Land Rights Appeal Proceeding filed an agreed summary for the Court of Appeal in accordance with Practice Statement CA 2 of 1995.

Now produced and shown to me and marked "**RWM-11**" is a true copy of the agreed summary for the Court of Appeal filed on 12 December 2011.

22. A date for the hearing of the Almond Land Rights Appeal Proceeding has yet to be set. I understand, however, that, in accordance with an interlocutory order made in the proceeding by Registrar Pedley of the Court of Appeal with the consent of the parties on 17 April 2012, the proceeding is in the list of appeals for hearing.

Now produced and shown to me and marked "**RWM-12**" is a true copy of the order made by Registrar Pedley of the Court of Appeal in the Almond Land Rights Appeal Proceeding on 17 April 2012.

Compromises

23. On 25 July 2012, the parties to each of the Apportionment Proceedings and the Almond Land Rights Appeal Proceeding executed deeds of compromise for each such proceeding (each, a **Deed of Compromise** and together, the **Deeds of Compromise**) providing, in each case, for the compromise of the relevant proceeding (each, a **Compromise** and together, the **Compromises**). 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).



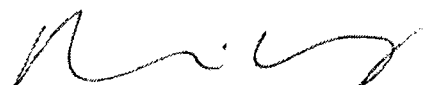
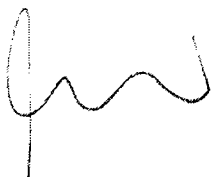

24. Since execution of the Deeds of Compromise, notification has been provided to the Growers in the Timbercorp MIS the subject of each Deed of Compromise with respect to a number of issues including, without limitation, the terms and effect of the Deed of Compromise, and the necessity of, and procedure 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.

Approval Applications

25. On 26 July 2012, Allens wrote to the associate to Justice Davies requesting that enquiries be made to facilitate the appointment by the Court of a judge in the trial division of the Supreme Court to hear the applications for approval of the Compromises (each, an **Approval Application** and together, the **Approval Applications**). Allens' letter was sent on behalf, and with the authority, of each of the parties to the Timbercorp Apportionment Proceedings and the Almond Land Rights Appeal Proceeding and a copy of Allens' letter was provided to the solicitors for each such party.

Now produced and shown to me and marked "RWM-13" is a true copy of the letter from Allens to the associate to Justice Davies dated 26 July 2012.

26. Also on 26 July 2012, again on behalf, and with the authority, of each of the parties to the Timbercorp Apportionment Proceedings and the Almond Land Rights Appeal Proceeding, Allens wrote to the Court of Appeal Registry seeking guidance from the Registry as to the steps required to obtain an order from the Court of Appeal that the hearing of the proposed Approval Application in relation to the Compromise in the Almond Land Rights Appeal Proceeding be referred to the same judge appointed by the trial division of the Supreme Court to manage, hear and determine the other Approval Applications. Again, a copy of Allens' letter was provided to the solicitors for each of the parties to the Timbercorp Apportionment Proceedings and the Almond Land Rights Appeal Proceeding



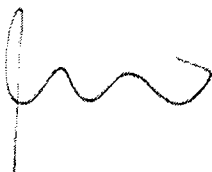
Now produced and shown to me and marked "RWM-14" is a true copy of the letter from Allens to the Court of Appeal Registry dated 26 July 2012.

27. On 9 August 2012, I was copied into an email from Michael Symons, the associate to Justice Judd, to Jonathan Joseph of Allens in which Mr Symons stated that Justice Judd was available for a directions hearing in the Apportionment Proceedings at 10 am on Friday, August 31 2012. Mr Symons also stated that Justice Judd had not been confirmed as the judge who would hear the Approval Applications.

Now produced and shown to me and marked "RWM-15" is a true copy of the email from Mr Symons dated 9 August 2012.

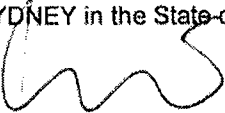
28. The rights of the parties arising under the constituent documents for the Timbercorp MIS the subject of the Almond Land Rights Appeal Proceeding are the same or similar to the rights of parties arising under the constituent documents for the Timbercorp MIS the subject of each of the Apportionment Proceedings. Further, in determining the Approval Application for each of the Deeds of Compromise, the same threshold question arises in each case and regardless of the fact that the Almond Land Rights Appeal Proceeding is presently before the appeal division of the Supreme Court, 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 the Compromises of the Apportionment Proceedings will require consideration of a number of questions which will also arise in considering whether to approve the Compromise of the Almond Land Rights Appeal Proceeding. In addition, as stated above, each Deed of 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).

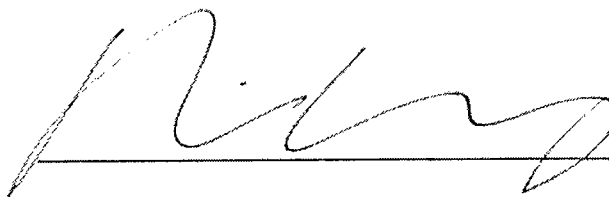
For these reasons, it is considered desirable that the Approval Applications with respect to the Apportionment Proceedings and the Almond Land Rights Appeal Proceeding be heard and determined at the same time and before the same judge.

AFFIRMED at	SYDNEY in the State of NEW SOUTH WALES
Signature of deponent	
Name of witness	Michael Patrick Murray
Address of witness	Ashurst Australia, 181 William St, Melbourne, Victoria 3000
Capacity of witness	An Australian legal practitioner within the meaning of the Legal profession Act 2004

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

- 1 I saw the face of the deponent.
- 2 I have known the deponent for at least 12 months.

Signature of witness



SCHEDULE OF PARTIES

GRAHAM GOLDENBERG

(in his capacity as representative of the Members in the 2002 Almond Project)

First Appellant

and

CHRISTOPHER MARK LITTLE

(in his capacity as representative of the Participant Members in the 2005 Almond Project)

Second Appellant

and

CONSTANTINE MOSHOPOULOS

(in his capacity as representative of the Participant Members in the 2006 Almond Project)

Third Appellant

and

DAVID BUTTERFIELD

**(in his capacity as representative of the Participant Members in the 2007 Almond Project
and as representative of the Members in the 2002 Private offer Scheme)**

Fourth Appellant

and

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)

First Respondent

and

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED

(ACN 005 357 522)

Second Respondent

and

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

Third Respondent

and

MARK ANTHONY KORDA

(in his capacity as liquidator of Almond Land Pty Ltd (in liquidation))

Fourth Respondent

and

LEANNE KYLIE CHESSER
(in her capacity as liquidator of Almond Land Pty Ltd (in liquidation))

Fifth Respondent