

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

SACPI 2011 0103

BETWEEN:

GRAHAM GOLDENBERG & ORS (according to the Schedule)

Appellants

- and -

BOSI SECURITY SERVICES LIMITED (ACN 009 413 852) & ORS (according to the schedule attached)

Respondents

AFFIDAVIT OF ELI GOLDFINGER

Date of document:	19 September 2012
Filed on behalf of:	MRB Equities Pty Ltd, Redvi Pty Ltd and Ferrari Investments Holdings Pty Ltd
MGA Lawyers	Solicitors Code: 104101
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MELBOURNE VIC 3000	Ref: MG5400/08

I, **ELI GOLDFINGER**, accountant, of Level 18, 499 St Kilda Road, Melbourne, Victoria, **MAKE OATH AND SAY** as follows:

The Relevant Entities

1. I am the principal of EGA Corporate Advisers Pty Ltd ("**EGA**"), accountants, and a director of Redvil Pty Ltd ("**Redvil**"). Redvil is one of the funders of the Appellants in this appeal.
2. The other funders of the Appellants in this appeal are:
 - (a) MRB Equities Pty Ltd ACN 102 694 708 ("**MRB**");
 - (b) Ferrari Investments Holdings Pty Ltd ACN 133 024 549 ("**Ferrari Investments**").




which, together with Redvil, are referred to as the "Funders" in this affidavit.

3. Michael Buxton is the primary person behind MRB Equities and Peter Ferrari is the primary person behind Ferrari Investments. Now produced and shown to me and marked "EG-1", "EG-2" and "EG-3" are company searches for Redvil, MRB and Ferrari Investments respectively.
4. I am authorized to swear this affidavit of behalf of Redvil. I have been authorized by Mr Buxton and Mr Ferrari to swear this affidavit on behalf of MRB and Ferrari Investments also.
5. Mr Buxton and Mr Ferrari – or interests associated with them – were growers in the one or more of the Timbercorp schemes. I was not.
6. Christopher Garnaut is the managing director of Garnaut Private Client Advisers Pty Ltd, an investment advisory company. A number of the clients of Garnaut Private Client Advisers were growers in the various Timbercorp schemes including interests associated with Mr Ferrari and Mr Buxton.
7. Mr Ferrari and interests associated with him are clients of EGA and Garnaut Private Client Advisers Pty Ltd. Mr Buxton, and interests associated with him, are clients of Garnaut Private Client Advisers Pty Ltd and, although Mr Buxton is not a client of EGA, I have known him for many years through business dealings. I am a client of Garnaut Private Client Advisers Pty Ltd.
8. I am aware that when the Timbercorp group first went into administration, Mr Garnaut had established the Timbercorp Grower's Group and operated, in effect, as a spokesperson for the growers.

The Trial of the Proceeding

9. Following the decision of Robson J on 8 October 2009, the relevant assets of the various Timbercorp companies were sold and the monies were held in trust in accordance with the orders which his Honour made.



10. I am advised by Mr Garnaut and believe that the costs incurred in running the case before Robson J were funded in part by the fourth and/or fifth respondents ("**the Liquidator**") and in part by financial advisors whose clients had invested in Timbercorp.
11. By originating motion dated 15 December 2009, the First Respondent commenced proceeding No SCI 2009 10699 (the proceeding which resulted in the judgment under appeal).
12. The appellants were members of the Timbercorp Grower's Group and they had been nominated by the Timbercorp Grower's Group to represent the interests of the growers of the relevant fund in which they had invested. The Timbercorp Growers Group instructed Clarendon's Lawyers. This is set out in more detail in the affidavit of Michael Joseph Fernon, sworn 17 December 2009 in proceeding SCI 2009 10699, a copy of which is now produced and shown to me (without exhibits) as "**EG-4**".
13. At that time, another group representing growers was in existence – the TGG Almond Committee Inc which instructed Maurice Blackburn. Both groups proposed their members be made representatives in the proceeding.
14. Pursuant to the orders of Justice Davies dated 22 December 2009 the appellants were added as defendants and appointed as representatives of growers in particular almond project. A copy of the orders of Justice Davies dated 22 December 2009 is now produced and shown to me and marked "**EG-5**".
15. The decision of Davies J in the trial of this matter was delivered on 15 June 2011. I understand that the costs of the growers in the interlocutory proceedings and the original trial of the matter before Davies J were paid from the fund held in trust pursuant to orders of this Court.

The Appeal



16. A notice of appeal dated 11 July 2011 was filed in respect of the decision of Davies J. I am informed by Mr Garnaut and believe that he arranged for the payment of the costs in having the appeal drafted and filed.
17. By summons and supporting affidavit filed 27 July 2011, the Appellants sought to have the fund reconstituted and a pre-emptive costs order made against that fund. The application was opposed by at least some of the Respondents and it the application was not pursued. The Appellants were required to pay the Respondents' costs of that application and those costs have been paid by the Funders.
18. Mr Garnaut approached me and told me that he was looking for people to fund the appeal on commercial terms. He told me and I believe that he was not prepared to fund the appeal himself beyond what he had already done. He further advised me that a number of commercial litigation funders had been approached to fund the costs of the appeal but they had declined to do. He said that the liquidator had refused to fund the appeal and there was little interest from the growers or from financial advisors who had already contributed to costs without seeing any return and they had endured this case for a number of years.
19. Mr Garnaut asked if I would be prepared with other clients of his to fund the appeal on the same sort of terms that a commercial litigation funder would be prepared to fund the appeal. We discussed the fact that we would have to pay the grower's costs of appeal and agree to pay the costs of the other parties to the appeal if the appeal failed. If the appeal succeeded (whether by way of judgment or settlement) then we would be entitled to repayment of the costs we had paid plus a premium. Either Mr Garnaut told me at this time or I was told shortly after that this that the premium was usually about 35% of any judgment sum or settlement proceeds.
20. Mr Garnaut told me that although there were discussions about settlement in progress that they were preliminary and he did not know if they would amount to anything. He also said that there was significant risk in the



appeal and if the growers lost then we would have to pay the costs of the other side as well as the growers' costs of the appeal.

21. Mr Garnaut explained that if he could not get anyone to fund the appeal then, in all likelihood, the appeal could not proceed and the growers would get no return at all. I note that Mr Fernon (a director of Clarendons Lawyers) deposed to this fact in an affidavit sworn 27 July 2011 and filed in this proceeding. a copy of which is now produced and shown to me (without exhibits) as "EG-6".
22. I considered the relevant risks and the return and said that I would be interested in funding the appeal on the terms discussed. Mr Garnaut told me that the other funders would be Mr Ferrari and Mr Buxton. I subsequently discussed the matter with Mr Ferrari who, as noted, is a client of mine. We discussed the matter and the relevant risks and the returns that might be made. Mr Ferrari had a slightly different approach to me in that, as noted, he was a grower in various Timbercorp schemes and so he had an interest in ensuring there was a return to growers. He also viewed it as a potential method of making back some of the losses he had incurred on Timbercorp.
23. All of my discussions about the funding arrangement and the drafting of the funding agreement were with Mr Fernon. He told me that the premium contemplated would be 35% if there was a settlement particularly in respect of the Almond Land and 17.5% of any global settlement subject to a ceiling of \$5 million. He said that this reflected what commercial litigation funders would have funded the appeal if they had been prepared to fund it at all. Mr Fernon told me that if the Funders sought to make a claim under the Funding Agreement, the likelihood was that it would have to be approved by the Court and the Court would not approve it if it was not reasonable.



The Funding Agreement

24. On 22 October 2011, the Funders and the Appellants (ie the representative growers) entered into a management and funding



agreement ("**Funding Agreement**") for the management and funding of this appeal on their behalf. Now produced and shown to me and marked "**EG-7**" is a copy of the Agreement.

25. According to the Funding Agreement, the Funders have the obligation to project manage the appeal (clause 3) and to pay the costs of the appeal including any adverse costs order (clause 4). The Agreement also provides (at clause 5) that any Resolution Sum (which meant any settlement amount or any amount for which judgment was given) would be paid into a trust account and that the Funders would be entitled to be paid a fee from that Resolution Sum which would include the costs they paid for the appeal plus a premium (clause 8).
26. The solicitors provided a project budget for the funding of the appeal and it is a schedule to the Funding Agreement. According to this budget, costs of the entire appeal were estimated at approximately \$129,000.
27. In or about December 2011 Mr Fernon raised with me the need to amend the Funding Agreement. An "Agreement to Amend the Funding Agreement" was entered into on or about 18 December 2011. A copy of this agreement ("**First Amending Agreement**") is now produced and shown to me and marked "**EG-8**".
28. The purpose of the First Amending Agreement was as follows:
 - (a) The requirement to have the Funding Agreement approved by the Supreme Court was replaced by a requirement that, if the payment due to the Funders had to be approved, then the obligation to make that payment would be subject to approval by the Court;
 - (b) A system was introduced in the event that the Funders and the Represented parties disagreed on whether or not the proceeding should be settled. I am not aware of any particular incident requiring this amendment. I believe it was just Clarendon's seeking to avoid any problem potentially arising; and



- (c) The amount of the premium was reduced. Mr Fernon said that this would increase the prospect that the agreement would be approved by the Supreme Court. On that basis the Funders agreed to it.

Legal Costs

29. The accounts rendered to the Funders by Clarendons Lawyers were sent to me and I passed them on to Garnaut Private Client Advisers Pty Ltd. Now produced and shown to me and marked "EG-9" in a confidential exhibit are copies of most of the accounts together with the account rendered by the First Respondent which the Funders were required to pay in relation to abandoned pre-emptive costs order. The accounts (which total \$199,926.27) have been paid. Those accounts that have not been exhibited will be provided in a further exhibit to be sworn and filed very shortly.
30. The accounts were the subject of review by Tom Schubert of Garnaut Private Client Advisers Pty Ltd on behalf of the Funders. They were in excess of the project budge provided by the solicitors. This was due at least in part to greater than expected work involving preparation of the appeal book. By email dated 27 June 2012 from Mr Schubert to Mr Fernon, Mr Schubert raised the issue of the increasing costs. By email of the same day, Mr Fernon responded to the issues raised in Mr Schubert's email. Now produced and shown to me and marked "EG-10" is a copy of the emails between Mr Schubert and Mr Fernon dated 27 June 2012.
31. The Funders have paid those costs on the basis that they do believe that the costs claimed were reasonable given the amount of work involved in prosecuting the appeal. Of course, the Funders paid these sums without any knowledge as to whether these amounts would be reimbursed to them or not.

Settlement

32. By July 2012, settlement negotiations between the Appellants and the Respondents had reached an advanced stage. Mr Fernon told me that his



clients had sought to have included within the terms of settlement, a clause that provided that the Funders would be paid the amount due them under the Funding Agreement (as amended) in priority to payments to group members. The other parties to the appeal were not prepared to agree to such a term on the basis that they were concerned that including such a term may have resulted in the Supreme Court refusing to approve the settlement. Clarendon's Lawyers then asked the Funders to agree that the attempts that the Representative Parties to ensure payment to the Funders meant that the Representative Parties had complied with their requirements to use their best endeavours to bring about such an outcome as required under the Funding Agreement (as amended). The Funders agreed to this and a further amending agreement, entitled Deed of Amendment and Acknowledgement dated 24 July 2012 ("Second Amending Agreement") was entered into. Now produced and shown to me and marked "EG-11" is a copy of the Second Amending Agreement.

33. The settlement agreement between the parties was entered into on 25 July 2012.

34. The notice to growers that was published on the website of Clarendon's Lawyers, and the Frequently Asked Questions document, that was also posted on that website referred to the intention of the Funders to seek to have their claim paid out from the settlement proceedings. Now produced and shown to me and marked "EG-12" and "EG-13" respectively are copies of the first notice and first letter to growers dated 13 August 2012 and the frequently asked questions document respectively.

SWORN by Eli Goldfinger)
 At Melbourne)
 In the State of Victoria)
 On the 19 day of September 2012)



Before me:



MARK GEREMIA
 Level 9 179 Queen Street, Melbourne VIC 3000
 An Australian Legal Practitioner
 within the meaning of the
 Legal Profession Act 2004

SCHEDULE OF PARTIES

BETWEEN:

GRAHAM GOLDENBERG (in his capacity as representative of the Growers in the 2002 Almond Project)

First Appellant

CHRISTOPHER MARK LITTLEY (in his capacity as representative of the Participant Growers in the 2005 Almond Project)

Second Appellant

CONSTANTINE MOSHOPOULOS (in HER capacity as representative of the Participant Growers in the 2006 Almond Project)

Third Appellant

DAVID BETTERFIELD (in his capacity as representative of the Participant Growers in the 2007 Almond Project and as representative of the Growers in the 2002 Private Offer Scheme)

Fourth Appellant

-and-

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

First Respondent

AUSTRALIA AND NEW ZEALAND BANK GROUP LIMITED ACN 005 357 522

Second Respondent

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

Third Respondent

MARK ANTHONY KORDA

(in his capacity of liquidator of Almond Land Pty Ltd (in liq))

Fourth Respondent

LEANNE KYLIE CHESSE

(in her capacity of liquidator of Almond Land Pty Ltd (in liq))

Fifth Respondent