

**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
the schedule attached)

Respondents

EXHIBIT EG-4

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
Level 9,	Tel: 8631 5555
179 Queen Street	Fax: 8631 5599
MELBOURNE VIC 3000	Ref: MG5400/08

This is the exhibit marked "EG-4" now produced and shown to Eli Goldfinger
at the time of swearing his affidavit on 19 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

.....
MGA Lawyers, Level 9, 179 Queen St, Melbourne Vic
An Australian Legal Practitioner with the meaning of the Legal Practice Act
2001

"EG-4"

**Affidavit of Michael Fernon sworn 17
December 2009**

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

LIST E

S CI 2009 10699

BETWEEN:

**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 LIMITED (ACN 007 457 141)
Plaintiffs**

**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522)
AND OTHERS (according to the attached schedule)
Defendant**

AFFIDAVIT OF MICHAEL JOSEPH FERNON

Date of document:
Filed on behalf of:
Prepared by:
Clarendon Lawyers
Level 17, Rialto North Tower
525 Collins Street
MELBOURNE VIC 3000

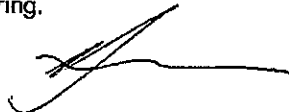
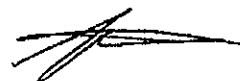
December 2009
Timbercorp Growers Group
Tel: 03 8681 4400
Fax: 03 8681 4499
Solicitors Code: 101294
Ref: MJF:0900665

I, **MICHAEL JOSEPH FERNON** of Level 17, Rialto North Tower, 525 Collins Street, Melbourne, make oath and say that:

1. I am a director of Clarendon Lawyers Pty Ltd who are solicitors for the Timbercorp Growers Group.
2. Except where I state otherwise I make this affidavit from my own knowledge.
3. Clarendon Lawyers Pty Ltd has acted for the Timbercorp Growers Group (TGG) and its representatives in a number of proceedings relating to the Timbercorp forestry, almond and olive managed investment schemes.

Early days

4. Administrators were appointed to the Timbercorp companies on 23 April 2009.
5. On 4 June 2009 the liquidators issued an originating process 7114 of 2009 for an order that it was proper for them to make application to wind up the Timbercorp almond and olive schemes. Mr Christopher Garnaut instructed us to appear at the first directions hearing for this application. Mark Bland, who is also a director of Clarendon Lawyers Pty Ltd, appeared at the first directions hearing.

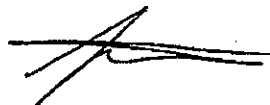
6. On 17 June 2009, His Honour Mr Justice Robson made an order that the administrators were justified in applying to the Court for orders that the managed investment schemes be wound up.

Establishment of Timbercorp Growers Group

7. Christopher Garnaut is founder and managing director of Garnaut Private Clients Advisers Pty Ltd (GPCA) which is the holder of an Australian Financial Services Licence. Mr Garnaut is the responsible officer for GPCA. GPCA is a leading independent financial advising consultancy in Australia with offices in Melbourne and Canberra and associated offices in Sydney, Brisbane, Perth and Adelaide. It is responsible for approximately \$2.5 billion assets under management. Mr Garnaut is a regular speaker at industry conferences. GPCA has 41 clients invested in various Timbercorp forestry, almond and olive schemes.
8. In June and July 2009, Mr Garnaut liaised with the members of other financial planning consultancies and together they formed the Timbercorp Growers Group, of which Mr Garnaut became the chairman. Mr Garnaut used his contacts and influence to raise a fighting fund to be used for the benefit of growers for both legal expenses and obtaining expert advice. The group raised \$536,791.80 which was deposited in a controlled monies account, controlled by Clarendon Lawyers Pty Ltd.
9. According to our trust account records 472 financial planners and growers contributed to the fighting fund and I am informed by Mr Garnaut and verily believe that these financial planners represent approximately 80% of the investors in the Timbercorp forestry, almond and olive schemes (Growers).


Application to wind up almond and olive schemes

10. On 25 June 2009, Mark Korda swore affidavits in relation to the almond and olive schemes in support of applications to wind up those schemes.
11. On 29 June 2009, the creditors of the Timbercorp Group of companies resolved to wind up the Timbercorp Group, including Timbercorp Securities Limited which was the responsible entity of the Timbercorp managed investment schemes.
12. The TGG instructed Clarendon Lawyers Pty Ltd to oppose the application to wind up the almond schemes. We acted for a grower nominated by the TGG for each scheme in opposing the application.
13. Clarendon Lawyers Pty Ltd acted for the same growers in seeking the appointment by the Court of a temporary responsible entity to the schemes.



14. The growers we acted for and the schemes of which they are members are as follows:

Scheme	Representative Investor
2001 Almond ARSN 095 649 746	Peter Holt
2002 Almond ARSN 099 611 935	Graham Goldenberg
2003 Almond ARSN 103 197 299	Malcom Arthur Weaver
2004 Almond ARSN 108 336 670	Kerree Bezencon
2005 Almond ARSN 112 935 092	Christopher Mark Littley
2006 Almond ARSN 118 387 974	Constantine Moshopoulos
2007 Almond ARSN 122 511	David Butterfield
2001 Olives ARSN 094 382 082	Pauline Emma Hammer
2002 Olives ARSN 098 233 455	David Sydney Butterfield
2003 Olives ARSN 104 648 473	Graham Goldenberg
2004 Olives ARSN 108 744 378	Kerree Anne Bezencon
2006 Olives ARSN 119 182 179	Michael Charles Vicary
2007 Olives ARSN 123 155 715	Pamela Jan Dry
2008 Olives ARSN 129 307 722	David Butterfield/Angus Hannah



The growers who have been nominated as defendants in this proceeding are the same persons who appeared in proceeding 7114 of 2009 and 9408 of 2009 in relation to the ^{2002 and 2004-6 almond} relevant schemes.

15. Clarendon Lawyers Pty Ltd formed the view that the way the schemes' constitutions were drafted, an order by the Court that the schemes be wound up would immediately extinguish all growers' rights. This view was contrary to the view held by Arnold Bloch Leibler as solicitors for the liquidators. In our opinion and in the opinion of senior counsel engaged by us, there was a substantial risk that their view was wrong.
16. On 11 November 2009 in proceeding number 9998 of 2009 Mr Zwier from Arnold Bloch Leibler representing the liquidator said:

"Your Honour, the other point that the growers made is referred to in paragraph 30, that is they oppose the winding up for fear that the making of the winding up order itself might prejudice the rights of growers. The liquidators have always taken the view, and make submissions to Robson J on the basis that it's the termination of the winding up which determines rights, not the making of the order for the winding up, but Robson J was concerned that the making of the order might extinguish rights, and it would be fair to say that some of the secured creditors representatives in general – and one in particular – took the view that there was an argument that if a winding up order had been made, the growers rights had been terminated."

Now produced and shown to me and marked with the letters "MJF-1" is a copy of the transcript of proceedings where Mr Zwier made these comments.

17. On 21 July 2009 His Honour Mr Justice Robson made a direction that meetings be held of each of the almond and olive schemes at which agreed resolutions would be put and he made orders to facilitate the holding of the meetings. He also ordered that costs be reserved.

Scheme meetings

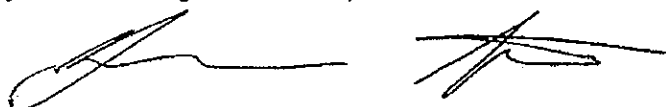
18. The meetings of the members of the almond schemes were held at Etihad Stadium on 31 July 2009.
19. At the meeting the growers overwhelmingly endorsed the continuation of the schemes and agreed to amendments to the constitution to enable the schemes to be restructured.

Continuation of the almond wind up application

20. In mid-August 2009 Arnold Bloch Leibler on behalf of the liquidators served notice that the liquidators would continue with the application to wind up the almond schemes.
21. The matter was listed for 18 August 2009.

Forestry proceedings

22. The liquidators pursued a different strategy in relation to the Timbercorp forestry assets. Rather than seek to wind up the schemes, the liquidators sought an order from the Federal Court that they were justified in selling the Timbercorp scheme assets.



23. His Honour Mr Justice Finkelstein indicated at a hearing on 14 August 2009 that he was unable to facilitate the order sought because the scheme constitution did not give the liquidators any right to sell the assets. He indicated that he could make an order permitting the liquidators to amend the scheme constitutions to give the responsible entity the power to terminate the subleases of the growers, so that the land owning entities and/or TSL as head lessee could then transfer the leasehold interest in the land to a purchaser free of any subleases.
24. At the hearing on 14 August 2009 there was no appearance by any grower but I attended at Court. No notice of the proceedings had been served on us by the liquidators. When the matter came back on before the Federal Court, on 17 August 2009, the TGG and its representatives were represented in Court by counsel instructed by Clarendon Lawyers Pty Ltd. Mr Justice Finkelstein eventually made an order that the liquidators were justified in amending the constitution.

Amendment of constitution

25. Instead of proceeding with the application to wind up the Timbercorp almond schemes at the hearing before Mr Justice Robson on 18 August 2009, the liquidators applied for a similar order to the order made by Mr Justice Finkelstein in the forestry proceeding.
26. On 20 August 2009, Mr Justice Robson adjourned the winding up of the almond schemes and the interlocutory process filed on behalf of the TGG to a date to be fixed and reserved costs and made a direction that the liquidators were justified in making the amendment to the scheme constitutions to enable the subleases to be terminated.

Appointment of special purpose liquidator

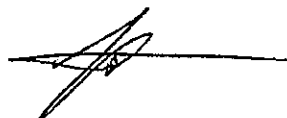
27. On 11 September 2009 the liquidators commenced an interlocutory process in proceeding 7114 of 2009 for the appointment of Ian Carson as a special purpose liquidator. The reasons advanced by the liquidators for the appointment were that they were the liquidators of the Timbercorp land owning entities and that they would be negotiating with themselves for the cancellation of the subleases. They required the assistance of a special purpose liquidator to advise, particularly on the amount of consideration to be paid to the growers for the cancellation of their subleases.
28. The TGG attended at Court to argue against several aspects of the appointment of Mr Carson, in particular, the fact that Mr Carson was required to act upon the advice provided by Arnold Bloch Leibler as solicitors for the liquidators. While we had not seen that advice, we were concerned that just as we believed their advice in relation to the effect of a winding up was wrong, their advice in relation to growers' rights might be wrong. This concern was reinforced by remarks made by Mr Zwier to Mr Garnaut that the growers had no rights, that a "train wreck" was coming and that they should accept whatever amount the banks as secured creditors would allow them.
29. The letter of appointment of Mr Carson included a request by the liquidators that he liaise with the grower representatives.



30. A number of meetings occurred between Mr Carson and his lawyers, Mallesons Stephen Jaques, Mr Garnaut, Mr Owen Lennie and Clarendon Lawyers Pty Ltd on behalf of the Timbercorp Growers Group. These meetings took place at the office of GPCA at 10 Queens Road, Melbourne and at Mr Carson's office at 90 Collins Street, Melbourne.
31. In addition to the meetings, there was considerable correspondence between Clarendon Lawyers Pty Ltd on behalf of the TGG and Mallesons in which we argued for the rights of the growers. Altogether, we wrote five letters to Mallesons setting out our views on growers rights. Now produced and shown to me and marked with the letters "MJF-2" to "MJF-6" are copies of the letters written by us.

Application for direction regarding sale of almond assets

32. On 5 October 2009 the liquidators bought proceeding 9408 of 2009 seeking an order that they were justified in entering into a contract to sell the almond assets to Olam Orchards Australia Pty Ltd. When the matter came on for hearing, the liquidators sought an additional order that they were justified in paying the sum of \$6 million out of the sale proceeds of \$28 million to the growers to extinguish their subleases. This sale related only to the almond schemes which were conducted on land owned by companies in the Timbercorp Group of companies. There were also Timbercorp almond schemes conducted on land owned by subtrusts of the Timbercorp Orchard Trust, which were not part of this application.
33. Counsel instructed by Clarendon Lawyers Pty Ltd on behalf of the TGG nominated defendants in the affected schemes attended at court to consent to the sale but oppose the making of the second order that the liquidators were justified in paying \$6 million to extinguish growers' rights.
34. Ms Kerree Bezencon also appeared in this proceeding on behalf of the TGG Almonds Committee Inc. This group sought an order for the appointment of a responsible entity to the schemes and were represented by separate counsel.
35. At this proceeding, we filed affidavits by myself, Owen Lennie and Christopher Garnaut in support of the growers case. Now produced and shown to me and marked with the letters "MJF-7", "MJF-8" and "MJF-9" are copies of these affidavits.
36. Counsel prepared detailed legal submission which we handed up to the judge. Now produced and shown to me and marked with the letters "MJF-10" is a copy of these legal submissions.
37. On 9 October 2009 His Honour Mr Justice Robson made an order that the liquidators were justified in entering into the sale contract but ordered that the net proceeds of sale be held in an interest bearing trust account pending the hearing of a determination by the Court of a proceeding to determine which persons have rights to the net proceeds. He rejected the application of Ms Bezencon. Costs were reserved.
38. Now produced and shown to me and marked with the letters "MJF-11" is a copy of the order made by His Honour Mr Justice Robson.



39. In his reasons for judgment, His Honour Mr Justice Robson endorsed many of the arguments put forward by the TGG. His Honour made the following comments:

The TGG contends that Mr Carson's report acknowledged that he was bound to accept the Arnold Bloch Leibler advice. They say he noted, however, that the Arnold Bloch Leibler advice relies heavily on an assumption that the growers' interests can in effect be disclaimed by the liquidators of Almond Land. He says that he has reservations about the correctness of that view, based upon his own legal advice. TGG submits, however, on the basis of the correctness of the Arnold Bloch Leibler advice, Mr Carson believes that \$6 million represents an offer that he would accept if the liquidator of TSL provided that he was satisfied that the offer is the product of a robust negotiation around the numerous difficult tasks.

"I will not canvass all the arguments put forward by TGG. It is sufficient to say that they are detailed and amply demonstrate that there are real issues to be resolved as the liquidators concede. There are many complex legal issues that would need to be resolved to precisely identify the proprietary interest of the growers."

Now produced and shown to me and marked with the letters "MJF-12" is a copy of the reasons for judgment.

Sale of TPIF almond assets

40. On 27 November 2009 the liquidators commenced proceedings seeking an order for approval of the sale of those almond assets which relate to schemes conducted on the TPIF land.
41. Clarendon Lawyers Pty Ltd as instructed by Mr Garnaut on behalf of the TGG and its representatives appeared at the proceedings to support the application.
42. On 11 December 2009 His Honour Mr Justice Davies granted the order and reserved costs.

Apportionment case

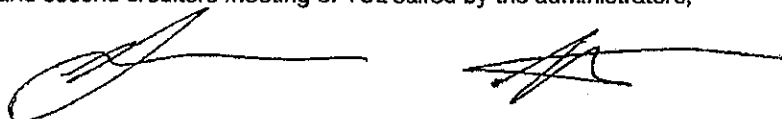
43. Clarendon Lawyers Pty Ltd and counsel, Garry Bigmore QC, with either Michael Galvin or Sam Hopper have appeared in the following proceedings:

Proceeding	
7114 of 2009 Almonds and olives schemes	Application by liquidators to wind up the scheme. Application by growers for the appointment of a new responsible entity. Interlocutory proceedings for the appointment of Mr Carson. Continuation of the application to wind up the Almond Schemes.
9408 of 2009 Almond schemes	Application by liquidators for approval of sale (non-TPIF assets)
10382 of 2009 Almond schemes	Application by liquidators for approval of sale of TPIF assets.

Proceeding	
9998 of 2009 Olive schemes	Application by liquidators for approval of sale.
VID 2005 of 2009 Forestry schemes	Application by liquidators for power of sale (Federal Court)
9299 of 2009 Forestry schemes	Application by liquidators for approval of sale.
9365 of 2009 Forestry schemes	Relief against forfeiture of lease by Plantation Land Limited.
S CI 2009 10240 Forestry schemes	Application concerning Plantation Land Limited settlement.
S CI 2009 10514 Forestry schemes	Application by liquidators for apportionment of forestry sale proceeds.

In all of these except the first proceeding we and counsel acted on behalf of the TGG and its representatives.

44. We have had success in preventing the winding up of the almond and olive schemes and in opposing the liquidators obtaining an order that the almond growers in the non-TPIF schemes receive the sum of \$6 million in compensation for their rights.
45. We are familiar with the constitutions of the almond schemes and the variations in those constitutions between projects. We have made detailed legal submissions to Mallesons Stephen Jaques acting on behalf of the special purpose liquidators in relation to the growers' rights. Counsel briefed by us made detailed legal submissions to the court on behalf of growers.
46. We have also engaged the services of Mr Owen Lennie who is an expert in managed investment schemes and valuation methodologies.
47. Mr Lennie is a fellow of CPA Australia and the Australian Property Institute. He is currently an Associate Professor at the University of Melbourne, in the property department of the Melbourne School of Design, where he teaches (inter alia) Property Investment, a post-graduate subject, involving valuation and risk analysis. He is also sessional member of the Victorian Civil and Administrative Tribunal in the Land Valuation and Planning lists. He has been a managing director and director of property funds management companies since 1996.
48. I am informed by Owen Lennie and verily believe that he has attended to the following matters on behalf of growers in the Almond Schemes:
 - attended the first and second creditors meeting of TSL called by the administrators;



- been the proxy of Chris Garnaut at subsequent meetings of the Committee of Inspection of TSL;
 - assisted with the preparation of the evidence for the initial court appearance by the TGG opposing the application by the liquidators of TSL to wind up the schemes;
 - assisted Huntley Management Limited with information regarding the liabilities of a responsible entity taking over the almond schemes and met with the managing director in Sydney;
 - prepared the agenda for the meetings of growers ordered by the court and prepared the draft resolutions for the meeting, with legal advice;
 - prepared the advice to the growers on how to vote on the resolutions and had it published on the TGG Website;
 - compiled information and news bulletins to be sent to advisers by e-mail and published on the website for the information of growers;
 - examined various scheme documentation with a view to ascertaining the rights of the growers in the almond schemes;
 - built a financial model with Stephen Lynch for the purposes of evaluating the interests of the growers in the almond schemes;
 - met with KordaMentha, regarding the process of sale and re-capitalisation and examined the information memorandum on behalf of the TGG;
 - met with PPB on three occasions over the evaluation of the growers interests before Ian Carson reported to the Court;
 - met with officers of the ANZ to open communications for a possible settlement;
 - put into evidence before the Court his opinion on a possible methodology for evaluating the interests of the growers in the almond schemes.
49. The valuation of rights will be a significant part of the proposed proceedings and Mr Lennie's advice in relation to these matters will be vital to the growers' case.
50. The growers who appeared in the original winding up proceedings propose appearing in the apportionment proceedings and wish to instruct Clarendon Lawyers to act for them and to engage Mr Lennie to provide expert advice.
51. If appointed to represent growers in this action, we will be arguing for their rights based on the detailed legal submissions filed in proceeding 9408 of 2009, namely that the secured creditors interests are subject to the prior and superior rights of the growers arising under this sublease or licence and joint venture rights, that those growers rights have substantial value and they are entitled to a substantial share of the sale proceeds held in the fund.

Profile of Clarendon Lawyers Pty Ltd

52. Clarendon Lawyers is a city based law firm established on 10 October 2007. The Timbercorp matters have been under the care and custody of me and Mark Bland. I have been a barrister and solicitor of this Honourable Court for 36 years. I was a founding partner of Fernon & Ludescher in 1977, which merged with Gadens Lawyers in 1994. In 1999 I was invited to become a partner at Freehills. At that firm I practised in Melbourne, Brisbane and Sydney and worked as a partner in the financial services practice for three years in Sydney. I have practised in many areas of the law including equity, fund raising, financial services and property. Mark Bland was admitted to practice in 2000. He spent 4 years at ASIC during and immediately after the implementation of the Financial Services Reform Act 2001 both as a lawyer and manager of surveillance teams in relation to financial services. His expertise is in financial services law.

Costs

53. The TGG does not have any funding available to pursue the proceedings. The funds raised from the financial planners have been exhausted. All in all, I estimate the total amount of costs incurred by growers in relation to the Timbercorp matters to date to be approximately \$1.3 million.

54. The TGG seeks an order that the costs of the defendants in this proceeding be paid on a full indemnity basis out of the fund established under paragraph 7 of the order of Mr Justice Robson which is Exhibit "MJF-11" and that an initial sum of \$100,000 be set aside from the fund on account of these costs, to be held by Clarendon Lawyers Pty Ltd in a controlled monies account and expended as costs are incurred.

SWORN by the said **MICHAEL JOSEPH FERNON**)
 at Melbourne in the State of Victoria)
 this 17th day of December 2009)



Before me:.....

FRANCESCA FOGARTY
 of Clarendon Lawyers Pty Ltd
 Level 17, Rialto North Tower
 525 Collins St, Melbourne Victoria 3000
 an Australian Legal Practitioner within the
 meaning of the *Legal Profession Act 2004*