

**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)

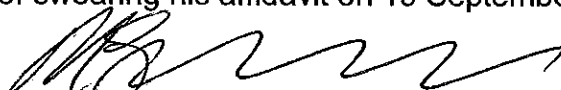
Respondents

EXHIBIT EG-6

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-6" 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-6"

**Affidavit of Michael Fernon sworn 27 July
2011**

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 MICHAEL JOSEPH FERNON

Date of Document: 27 July 2011

Filed on behalf of the Appellants

Prepared by:

Clarendon Lawyers

Level 17, North Rialto Tower

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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 (**Clarendon Lawyers**) who are solicitors for the Appellants in this matter. I have the care and conduct of this appeal and have had the conduct of the proceeding below on behalf of the Appellants.
2. Except where I state otherwise, I make this affidavit from my own knowledge. Where I depose to matters arising from information and belief, I believe those matters to be true.
3. This application relates to an appeal from the decision of Her Honour Justice Davies in proceeding number SCI 2009 10699 (**Proceeding**).
4. Now produced and shown to me and marked "MJF-1", "MJF-2" and "MJF-3" respectively are:
 - (a) the order of Her Honour Justice Davies made 27 June 2011;
 - (b) Her Honour Justice Davies' reasons of 15 June 2011; and
 - (c) the notice of appeal dated 11 July 2011 filed in this proceeding.



Catherine M. Curtain

Background

5. I am aware of this background from my involvement in the various proceedings for the Timbercorp Growers Group (TGG). Mark Anthony Korda and other members of the firm Korda Mentha (Administrators) were appointed administrators to Timbercorp Limited and its subsidiaries on 23 April 2009.
6. A subsidiary in the group, Timbercorp Securities Limited (TSL) was and remains responsible entity of a number of forestry, almond, olive, citrus, table grapes and other horticultural managed investment schemes.
7. On 4 June 2009 the Administrators 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. Christopher Garnaut instructed Clarendon Lawyers to appear at the first directions hearing for this application.
8. On 17 June 2009, the Honourable Justice Robson made an order that the Administrators were justified in applying to the Court for orders that the various TSL managed investment schemes be wound up.

Establishment of Timbercorp Growers Group

9. Christopher Garnaut is founder and managing director of Garnaut Private Wealth (GPW) which is the holder of an Australian Financial Services Licence. Mr Garnaut is the responsible officer for GPW.
10. I am informed by Mr Garnaut that in June and July 2009, he liaised with the members of other financial planning consultancies and together they formed the TGG, 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 members 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.
11. According to our trust account records 472 financial planners and members 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.

Application to wind up almond and olive schemes

12. On 29 June 2009, the creditors of the Timbercorp Group of companies resolved to wind up the Timbercorp Ltd and its subsidiaries, including TSL, and appointed the Administrators as Liquidators (Liquidators).
13. The TGG instructed Clarendon Lawyers to oppose the application to wind up the almond schemes. We acted for a member nominated by the TGG for each scheme in opposing the application.



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14. 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.
15. Now produced and shown to me marked MJF-4 is a true copy of Robson J's order of 21 July 2009.

Scheme meetings

16. The meetings of the members of the almond schemes were held at Etihad Stadium on 31 July 2009. I attended that meeting.
17. At the meeting the members 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 schemes winding up application

18. On 10 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.
19. That application was listed for 18 August 2009.
20. Now produced and shown to me marked MJF-5 is a true copy of that notice.

Amendment of constitution

21. 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 an order that they were justified in amending the constitutions of the schemes to enable members' subleases and/or leases to be terminated. In each of the almond schemes, the scheme members held either a licence or a sub-lease over an identifiable lot.
22. On 21 August 2009, Mr Justice Robson adjourned the application to wind up the almond schemes and the TGG's application to replace the responsible entity to a date to be fixed and made a direction that the liquidators were justified in making the amendment to the scheme constitutions to enable the members' licences and subleases to be terminated.
23. Now produced and shown to me marked MJF-6 is a true copy of Robson J's order of 21 August 2009.

Application for direction regarding sale of almond assets

24. On 5 October 2009 the Liquidators brought proceeding 9408 of 2009 in the Victorian Supreme Court seeking an order that they were justified in entering into a contract to sell the almond assets of 5 of the schemes to a Singaporean controlled company 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 \$128 million to the members to extinguish their subleases. I have reviewed the documents filed in support of that application. This sale related only to the almond schemes which were conducted on land owned by a company in the



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Timbercorp group of companies known as Almond Land Pty Ltd. There were also Timbercorp almond schemes conducted on land owned by sub-trusts of the Timbercorp Orchard Trust, which, although using the name "Timbercorp", were not part of the Timbercorp Group. The schemes affected by the proceeding were the Private Offer 2002 Timbercorp Almond Project, the 2002 Timbercorp Almond Project, the 2005 Timbercorp Almond Project, the 2006 Timbercorp Almond Project and the 2007 Timbercorp Almond Project (**Relevant Schemes**).

25. I am informed by Associate Professor Owen Lennie, who is a consultant valuer assisting the TGG with significant expertise in managed investment schemes, that prior to receipt of 2009 harvest proceeds, the members of the Relevant Schemes had contributed \$387 million (net of distributions) to the Schemes. Although the land owned by Almond Land Pty Ltd secured debts to secured creditors of \$249 million, a substantial portion of that was collateral security for debt owed by other Timbercorp companies. The amount contributed directly by secured creditors to the Almond assets was approximately \$150 million.
26. Counsel instructed by Clarendon Lawyers on behalf of the TGG nominated defendants who are members in the Relevant Schemes appeared at court in that proceeding to consent to the sale but oppose the making of the second order that the Liquidators were justified in paying \$6 million to extinguish members' rights.
27. Ms Kerree Bezencon also appeared in this proceeding on behalf of the TGG Almonds Committee Inc (another group established to represent the interests of members of the various Timbercorp almond schemes). I have reviewed the documents filed in this proceeding by that group. This group sought an order for the appointment of a replacement responsible entity to the schemes.
28. On 9 October 2009 His Honour 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 (**Fund**) pending the hearing and determination by the Court of a proceeding to determine which persons have rights to the Fund. His Honour Justice Robson dismissed the application of Ms Bezencon.
29. Now produced and shown to me and marked with the letters "MJF-7" is a copy of the order made by His Honour Justice Robson.

Background to appeal

30. Proceeding S CI 2009 10699 (**Apportionment Proceeding**) was commenced by the first respondent, one of the secured creditors of the Timbercorp land owning company Almond Land Pty Ltd, to determine the apportionment of the proceeds of the sale to Olam Orchards Australia Pty Ltd.
31. On 22 December 2010, Her Honour Justice Davies made an order that the Appellants be appointed as representative defendants on behalf of members in the Relevant Schemes and that the costs of the representative defendants be paid from the fund constituted by the proceeds of the sale. The order was subsequently varied on 22 March 2010 to remove the \$100,000 limit and to add a requirement for Clarendon Lawyers to produce a costs certificate.



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32. Now produced and shown to me and marked with the letters "MJF-8" are copies of the order of Her Honour Justice Davies made on 22 December 2010 appointing the Appellants as member representatives and of 22 March 2011 amending that order.
33. The Appellants made a claim on the Fund but were unsuccessful. They now seek to challenge that decision in this appeal.

Other Proceedings

34. There are a number of other proceedings before the Supreme Court of Victoria relating to the apportionment of the proceeds of sale of assets relating to Timbercorp managed investment schemes.
35. The assets and the sale proceeds which are held in funds pending apportionment are summarised in the table below:

Asset	Sale Proceeds
Almond Land Pty Ltd (the current proceedings)	\$128 Million
TPIF almond assets	\$160 Million
Boort olive assets	\$36 Million
Boundary Bend olive assets	\$23.5 Million
Solara citrus assets	\$13.1 Million
Kangara citrus assets	\$11 Million*
TOTAL	\$371.6 Million

* this is an estimate. The Receivers have not disclosed the sale price for the land and water rights.

36. The source of my information for the amount of sale proceeds referred to in paragraph 35 for the TPIF almond assets is paragraph 41 of the affidavit of David Lawrence McEvoy sworn 27 November 2009 in proceeding S CI 2009 10382. Mr McEvoy is one of the receivers of OIM#2 Pty Ltd, OIM#3 Pty Ltd and OIM#5 Pty Ltd which are the trustees of land owning sub-trusts of Timbercorp Primary Infrastructure Fund (TPIF).
37. The source of my information for the amount of sale proceeds for the Boort olive assets and the Boundary Bend olive assets is paragraph 81 of the affidavit of Mark Anthony Korda (the fourth respondent in this appeal) sworn 10 November 2009 in proceeding S CI 2009 9998.
38. The source of my information concerning the sale proceeds of the Solara citrus assets is paragraph 26 of the affidavit of David Lawrence McEvoy sworn 25 January 2010 in proceeding S CI 2010 398.
39. Information concerning the Kangara citrus assets is contained in confidential exhibits to the affidavit of Paul William Kirk sworn 23 February 2010 in proceeding S CI 2011 0888. The amount



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contained in the table in paragraph 35 is an estimate provided to me by Kerree Bezencon, whom I believe to be the Chairperson of the Timbercorp Citrus Committee Inc, which is an unincorporated association whose members are members of the citrus schemes

40. Now produced and shown to me and marked with the letters "MJF-9", "MJF-10" and "MJF-11" are copies of the orders of His Honour Justice Croft relating to the apportionment of Boort Olives sale proceeds made on 12 November 2009 and of Her Honour Justice Davies relating to the apportionment of TPIF Almond sale proceeds made on 11 December 2009 and Solara Citrus sale proceeds made on 26 February 2010.
41. I am familiar with the documents in the other schemes for which funds have been created by the above order. The decision in the Apportionment Proceeding affects the decision on the apportionment of these funds. For example, Her Honour Justice Davies' finding (which is being appealed against) that His Honour Justice Robson in his order of 9 October 2009 did not intend members to have any rights to a portion of sale proceeds unless they held rights which were proprietary, impacts upon the members of the 2001, 2002 and 2003 almond schemes who have a potential claim against the \$160 million fund held from the sale of the TPIF almond assets. It also affects the members of the early Boort Olive schemes and the Citrus schemes.
42. Also, Her Honour Justice Davies ruled that the water rights held by members in all schemes before her were purely contractual. This finding is also being appealed. This finding impacts on members in the almond schemes affected by the sale of the TPIF almond assets and of the Boort olive and Boundary Bend olive schemes where subleases were held which included water rights in the sublease grants.
43. According to paragraph 12 of the affidavit of Mark Anthony Korda sworn 17 August 2009 in proceeding number 7114 of 2009, there are 6,957 members in Timbercorp almond schemes. According to paragraph 9 of the affidavit of Mark Anthony Korda sworn 10 November 2009 in proceeding 9998 of 2009, there are 3,307 members in the olive schemes. I am informed by Kerree Bezencon that there are 320 members (after allowing for Timbercorp-related interests) in the citrus schemes.
44. Clarendon Lawyers are acting for member groups in relation to other collapsed managed investment schemes, namely Willmott, Great Southern, Forest Enterprises Australia and Rewards. There are no apportionment proceedings yet commenced in these schemes, but there is a strong chance that there will be, particularly in relation to Rewards and Willmott where sale processes are currently under way. Receivers in Rewards have rejected a deed of company arrangement proposal sponsored by members and approved by creditors, which in the members' view would have paid out the secured creditors and rescued the schemes, and are currently negotiating with prospective buyers following advertisements placed by them. The receivers in the Willmott companies placed a sale advertisement in the *Financial Review* on 12 July 2011 and have made an application to the Federal Court of Australia that foreshadows the creation of a similar fund.



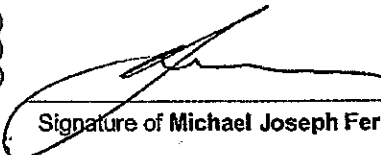
Catherine M. Curtin

45. Now produced and shown to me marked MJF-12 is a true copy of the advertisement dated 12 July 2011.
46. Now produced and shown to me and marked with the letters "MJF-13", is a copy of the Federal Court Originating Process commenced by Willmott Forests Limited (Receivers and Managers Appointed) (In Liquidation).

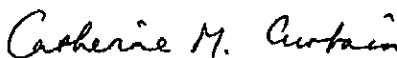
Ability of the representative members to pay costs

47. In past cases involving Timbercorp matters, members and/or financial planners have made contributions to fighting funds to conduct litigation on behalf of members. I estimate that \$1.3 million has been raised to pay for the costs of these actions.
48. In addition to these cases many members have contributed to the case *Woodcroft-Brown v Timbercorp Securities Ltd (In Liquidation)* List B proceeding 9807 of 2009 where scheme members have commenced a class action against Timbercorp directors.
49. A significant number of members borrowed to invest in these schemes. Typically, Timbercorp Finance Ltd provided a loan to an investor of up to 90% of the amount invested. Those members not only face the loss of their investment but also may be saddled with repaying the borrowings.
50. I am informed by Chris Garnaut who is chairman of the TGG and Kerree Bezencon who is chairperson of the Timbercorp Almonds Committee Inc., Timbercorp Olives Committee Inc. and Timbercorp Citrus Committee Inc. and verily believe, that there is little prospect of raising further funding from members to cover the cost of this appeal and any adverse costs order against the Appellants.
51. The Appellants do not have the personal resources available to them to fund the appeal and any potential adverse costs order.
52. The Appellants seek an order that the fund created by the sale proceeds of the sale of the almond assets utilized in the Relevant Schemes can be reconstituted and that the costs of the Appellants in this proceeding be paid on a solicitor and client basis out of the fund.

SWORN by the said MICHAEL JOSEPH
FERNON at Melbourne in the State of
Victoria this 27th day of July 2011

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Signature of Michael Joseph Fernon

Before me:



CATHERINE CURTAIN
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*