

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

No S APCI 2011 0103

BETWEEN:

GRAHAM GOLDENBERG & ORS
(according to the Schedule of Parties)

Appellants

- and -

**BOSI SECURITY SERVICES LIMITED (A.C.N. 009 413 852)
as trustee for AUSTRALIA AND NEW ZEALAND BANKING GROUP
LIMITED (A.C.N. 005 357 522) and BOS INTERNATIONAL
(AUSTRALIA) LIMITED (A.C.N. 066 601 250) and WESTPAC
BANKING CORPORATION (A.C.N. 007 457 141) & ORS** (according to
the Schedule of Parties)

Respondents

**AFFIDAVIT OF ROSS WHYTE MCCLYMONT
(Almond Land Rights Appeal Proceeding)**

Date of document: 19 September 2012
Filed on behalf of: The First Respondent
Prepared by:

Ashurst Australia

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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:

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1. I am a partner in the firm Ashurst Australia. I have the care and conduct of this proceeding (the **Almond Land Rights Appeal Proceeding**) on behalf of the first respondent (**BOSI**). BOSI is the security trustee for a syndicate of banks comprised of Australia and New Zealand Banking Group Ltd (**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.
3. On 15 December 2009, BOSI commenced a proceeding in this Honourable Court (**Almond Land Rights Proceeding**) seeking declarations as to *inter alia* its and ANZ's rights, if any, to the net proceeds (the **Fund**) arising from the sale of certain assets owned by Almond Land Pty Ltd (**Almond Land**), a company 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 Almond Land Rights Proceeding on 15 December 2009.
4. On 22 December 2009, the Court 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 following schemes (**Growers**):
 - (a) 2002 Timbercorp Almond Project (Private Offer No 1) (**2002 Private Offer Scheme**);
 - (b) 2002 Timbercorp Almond Project (ARSN 099 611 935) (**2002 Almond Scheme**);

- (c) 2005 Timbercorp Almond Project (ARSN 112 935 092) (**2005 Almond Scheme**);
- (d) 2006 Timbercorp Almond Project (ARSN 118 387 974) (**2006 Almond Scheme**); and
- (e) 2007 Timbercorp Almond Project (ARSN 122 511 040) (**2007 Almond Scheme**),

(together, the **Almond Schemes**).

Now produced and shown to me and marked "**RWM-2**" is a true copy of the orders dated 22 December 2009.

5. The Almond Land Rights Proceeding was heard by the Honourable Justice Davies over 12 days in February 2011 and March 2011. Justice Davies delivered her reasons for judgment on 15 June 2011 (**Justice Davies' Judgment**). Her Honour found that the Representative Growers were unsuccessful in their claims against the Fund and that BOSI and ANZ were entitled to the Fund in its entirety plus interest thereon, less the Representative Growers' legal costs of the proceeding, less the mediator's fees and less the costs of the Liquidators (defined below). Now produced and shown to me and marked "**RWM-3**" is a true copy of Justice Davies' Judgment reported at (2011) 84 ACSR 341.
6. Pursuant to orders made on 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-4**" is a true copy of the orders dated 27 June 2011.
7. Pursuant to a Notice of Appeal filed by the Representative Growers on 11 July 2011, the Representative Growers in the Almond Land Rights Proceeding appealed the judgment of Justice Davies in that proceeding, thereby commencing the Almond Land Rights Appeal Proceeding.

Now produced and shown to me and marked "**RWM-5**" is a true copy of the Notice of Appeal filed by the Growers on 11 July 2011.

8. On 25 July 2012, the parties to the Almond Land Rights Appeal Proceeding together with TSL (defined below) executed a deed of compromise (**Almond Land 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 the proceeding.
9. This affidavit is made, in accordance with Rule 16.01(4) of the Rules, in support of BOSI's application for (*inter alia*) approval of the Compromise (**Application**).
10. Pursuant to clause 8 of the 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 Almond Land Rights Appeal Proceeding or the related proceedings to which I refer below.
11. This affidavit addresses the following matters:
 - (a) The background to the Almond Land Rights Proceeding (Section A)
 - (b) The Almond Land Rights Proceeding (Section B);
 - (c) The Almond Land Rights Appeal Proceeding (Section C);
 - (d) The Almond Land Deed of Compromise (Section D); and
 - (e) Communications with ASIC (Section E).

12. 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 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**);
- (d) Affidavit of Mark Anthony Korda sworn on 5 October 2009 and filed in Supreme Court of Victoria Proceeding No S CI 2009 9408 (**5 October 2009 Affidavit**);
- (e) Affidavit of Mark Anthony Korda sworn on 9 November 2010 and filed in Supreme Court of Victoria Proceeding No S CI 2009 10699 (**9 November 2010 Affidavit**);
- (f) Affidavit of Michael Pullella sworn on 14 January 2011 and filed in Supreme Court of Victoria Proceeding No S CI 2009 10699 (**Pullella Affidavit**);
- (g) Affidavit of Michael Dawkins sworn on 7 January 2011 and filed in Supreme Court of Victoria Proceeding No S CI 2009 10699 (**Dawkins Affidavit**);
- (h) Affidavit of Mark Anthony Korda sworn on 6 October 2009 and filed in Supreme Court of Victoria Proceeding No S CI 2009 9408 (**6 October 2009 Affidavit**); and
- (i) 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 2002 Almond Project (**2002 Almond Affidavit**);
- (ii) the 2005 Almond project (**2005 Almond Affidavit**);
- (iii) the 2006 Almond Project (**2006 Almond Affidavit**); and
- (iv) the 2007 Almond Project (**2007 Almond Affidavit**),

(together, the **Background Affidavits**).

Now produced and shown to me and marked "**RWM-6**" to "**RWM-17**" are true copies of the Background Affidavits excluding exhibits. A copy of the Background Affidavits including exhibits on CD, is produced and marked "**RWM-18**" to this affidavit. Where relevant, I have identified information that I have obtained from the Background Affidavits by noting the source in parenthesis.

A. BACKGROUND

- 13. Timbercorp Limited (**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]).
- 14. 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]).
- 15. 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]).

16. 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 (3 March 2010 Affidavit at [12]).
17. Other Timbercorp Group companies, such as Almond Management Pty Ltd (**Almond Management**), acted as managers for two forestry and horticultural projects which were not registered as managed investment schemes under the Corporations Act (**Private Offer Schemes**). At the time of the appointment of administrators, there were 2 Private Offer Schemes in addition to the 33 Schemes (3 March 2010 Affidavit at [13]).
18. TSL was the RE of each of the registered Almond Schemes, relevantly the 2002, 2005, 2006 and 2007 Almond Schemes. Almond Management was the manager of the 2002 Private Offer Scheme.
19. The purpose of the Almond Schemes was the cultivation of almonds for commercial sale. The Almond Schemes the subject of this proceeding were operated on land owned by Almond Land.
20. The differing structures of the Almond Schemes are set out in Schedules A to Schedule C to Justice Davies' reasons dated 15 June 2011. The Almond Schemes were governed by the suite of documents referred to in those Schedules. Now produced and shown to me marked "**RWM-19**" is a CD containing an example of each of the constituent documents of the Almond Schemes.

21. On 23 April 2009, the fourth and fifth respondents, Mr Korda and Ms Chesser (**Liquidators**) were appointed as voluntary administrators of *inter alia* Timbercorp, TSL, Almond Land and Almond Management (5 October 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 (other than TSL), and TSL respectively. Since 29 June 2009, Mr Korda and Ms Chesser have been the liquidators of *inter alia* TSL, TL, Almond Land and Almond Management (5 October 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 companies in the 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 Almond 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 Almond 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 Almond 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 Almond Schemes, Mr Korda deposed as follows:

- (a) approximately \$247 million was required in operational expenditure for the 2010 crop management and harvest (4 June 2009 Affidavit at [33]);
- (b) TSL did not have \$247 million and TSL was not permitted to borrow \$247 million, or any funds at all, as responsible entity (4 June 2009 Affidavit at [33]);
- (c) each of the Almond Schemes was insolvent - in simple terms, the proceeds of sale for almonds to be harvested in 2010 was going to be less than the costs of growing them (4 June 2009 Affidavit at [38]);
- (d) the 2002 Almond Scheme was insolvent because:
 - (i) there was an estimated "Cumulative Scheme Cashflow - Before CAPEX" deficit of \$2,247,000 to the end of September 2009; and

- (ii) TSL did not have the capacity to fund the capital expenditure and temporary water requirement of \$346,000 identified as necessary to the end of September 2009

(2002 Almond Affidavit at [8.10]);

- (e) the 2005 Almond Scheme was insolvent because:

- (i) there was an estimated "Cumulative Scheme Cashflow - Before CAPEX" deficit of \$4,510,000 to the end of September 2009; and
- (ii) TSL did not have the capacity to fund the capital expenditure of \$5,968,000 identified as necessary to the end of September 2009

(2005 Almond Affidavit at [8.8]);

- (f) the 2006 Almond Scheme was insolvent because:

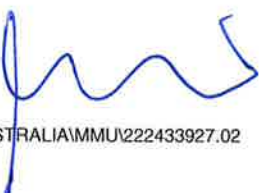
- (i) there was an estimated "Cumulative Scheme Cashflow - Before CAPEX" deficit of \$7,002,000 to the end of September 2009; and
- (ii) TSL did not have the capacity to fund the capital expenditure of \$17,450,000 identified as necessary to the end of September 2009

(2006 Almond Affidavit at [8.8]);

- (g) the 2007 Almond Scheme was insolvent because:

- (i) there was an estimated "Cumulative Scheme Cashflow - Before CAPEX" deficit of \$8,077,000 to the end of September 2009; and
- (ii) TSL did not have the capacity to fund the capital expenditure of \$42,020,000 identified as necessary to the end of September 2009

(2007 Almond Affidavit at [8.8]);



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- (h) Almond Management was hopelessly insolvent because the estimated level of unsecured creditors, including guarantees provided by Almond Management to the various financiers of the Timbercorp Group, was \$400,212,263 - \$244,090,346 higher than the book value of Almond Management's assets (9 November 2010 Affidavit at [19]); and
- (i) as at 23 April 2009, Almond Land was indebted to Timbercorp in the sum of \$177,754,627.40. Furthermore, Almond Land owed a further \$425,114,918 to secured creditors. As these amounts were significantly in excess of the estimated realisable value of Almond Land's assets as outlined in the Reports as to Affairs contained in the Creditors Report (as defined in the 9 November 2010 Affidavit) (being \$135,670,961) and in light of the significant forecast capital expenditure obligations in respect of the Almond Schemes and Timbercorp's incapacity to meet any shortfall, the Liquidators formed the opinion that Almond Land was unable to meet its debts when they fell due and was hopelessly insolvent (9 November 2010 Affidavit at [20]).

29. On 17 June 2009 Justice Robson of this Honourable Court made directions that the Liquidators were justified in procuring TSL to apply to wind up *inter alia* the Almond Schemes (10 November 2009 Affidavit at [26]). Now produced and shown to me and marked "**RWM-20**" is a true copy of the orders dated 17 June 2009.
30. Between 31 July 2009 and 17 August 2009 no party made an unconditional and binding offer to take the role of replacement RE of the registered Almond Schemes (10 November 2009 Affidavit at [41]).
31. On 18 August 2009, the Liquidators pressed their application to wind up the Almond Schemes. The Liquidators considered that it was necessary to press the application in relation to the Almond Schemes as the RE remained hopelessly insolvent and the Almond Schemes each had a cashflow deficiency. The Liquidators were also

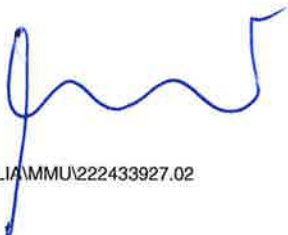
concerned about the risk of severe wastage of the almond orchards if the almond assets were not sold or the Almond Schemes recapitalised in the near term (10 November 2009 Affidavit at [42]-[43]).

32. The application to wind up the Almond Schemes was opposed by the Timbercorp Growers Group. As an alternative to immediately winding up the Almond Schemes, the Liquidators sought directions that they were justified in amending the Constitutions of the Almond Schemes to give the RE an express power to terminate Growers' rights so that they could engage in an orderly sale or recapitalisation process (10 November 2009 Affidavit at [48]).
33. On 21 August 2009, Justice Robson made a direction that the Liquidators were justified in causing TSL to amend the constitutions of *inter alia* the 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]). Now produced and shown to me and marked "**RWM-21**" is a true copy of the orders dated 21 August 2009.
34. On 18 September 2009, Timbercorp, TSL, Almond Management and Almond Land together with their liquidators (Mark Korda and Leanne Chesser), entered into a conditional sale and purchase deed (**SPD**) with Olam Orchards Australia Pty Limited (ACN 139 442 535) (**Olam Orchards**) guaranteed by Olam International Limited (**Olam**) to sell the "Almond Assets" as they were defined in the SPD for a price of \$128 million.
35. The Syndicate Banks advanced principal of \$200million to Timbercorp. Almond Land guaranteed to BOSI the due and punctual payment of that amount, which was secured, *inter alia* by the securities referred to in paragraph 37 below (3 March 2010 Affidavit at [35-36]). As at 9 December 2010, the outstanding balance owed to the Syndicate Banks was \$229,278,804,93 (including interest) (Dawkins Affidavit at [46]).

36. ANZ granted to Almond Land a loan facility of up to \$45 million for the purpose of funding the almond operations of Timbercorp and its subsidiaries. The amount owed by Almond Land to ANZ under the facility (including interest) as at 14 January 2011 was \$56,244,445.57 (Pullella Affidavit at [4] and [19] – [20]).
37. Certain of the Almond Assets sold pursuant to the SPD were, until completion, subject to securities in favour of BOSI and the first respondent, ANZ. Those securities relevantly included:
- (a) Registered Land Mortgage No AG360673L dated 30 December 2008 in favour of BOSI;
 - (b) Registered Water Mortgage No MOR001572 dated 30 December 2008 in favour of BOSI;
 - (c) Registered Land Mortgage No AE683873S dated 26 September 2006 in favour of ANZ;
 - (d) Registered Land Mortgage No AG290139V dated 24 December 2008 in favour of ANZ;
 - (e) Limited fixed and floating charge (ASIC No 1364261) registered 6 October 2006 in favour of ANZ; and
 - (f) Limited fixed and floating charge (ASIC No 1364257) registered 6 October 2006 in favour of ANZ.
38. I have caused a table to be prepared, which summarises the land sold by Almond Land pursuant to the SPD which was secured by BOSI's mortgage and/or ANZ's securities, the associated lot name and the Almond Scheme that was operated upon that land. Now produced and shown to me "RWM-22" is a true copy of that table.
39. The sale the subject of the SPD was conditional upon *inter alia*:

- (a) the release of BOSI and ANZ's securities in accordance with the SPD; and
- (b) the Liquidators obtaining directions from the Court that they were justified in causing TSL and Almond Management to terminate or surrender the Growers' sub-leases or licence and joint venture agreements insofar as they related to the Almond Assets.

40. On 30 September 2009, BOSI and ANZ made a conditional written offer to Almond Land that BOSI and ANZ would pay \$6 million to Almond Land, to be paid to TSL as RE (for the benefit of the Growers) in full and final settlement of all claims by the Growers to the sale proceeds the subject of the SPD. Before the \$6 million was to be paid to Growers costs were to be paid out (5 October 2009 Affidavit at [103]).
41. The Liquidators accepted BOSI and ANZ's offer referred to in paragraph 40 above subject to a direction of the Court that they were justified in doing so, as they believed it to be the best option available to TSL for a number of reasons including based on legal advice that they had obtained and their own assessment of the commercial value of the Growers' interests in the Almond Schemes (6 October 2009 Affidavit at [11]).
42. On 9 October 2009, Justice Robson authorised the Liquidators to enter into and perform the SPD (in their capacity as liquidators of Timbercorp, Almond Land, TSL and Almond Management). However, Justice Robson declined to order that the Liquidators were justified in accepting BOSI and ANZ's offer and instead ordered that the Fund be held on trust pending the hearing and determination of a proceeding to determine the rights (if any) of any person to share in the Fund – in other words, the Almond Land Rights Proceeding. Now produced and shown to me marked “**RWM-23**” is a true copy of the orders of Justice Robson made on 9 October 2009.



B. ALMOND LAND RIGHTS PROCEEDING

43. There were a large number of complex facts and issues in dispute in the Almond Land Rights Proceeding. As noted below, many of these issues concerned matters within specialised fields of knowledge in respect of which expert opinion was provided to the Court. The issues were addressed by the parties by way of:
- (a) contentions and reply contentions of in excess of 300 pages;
 - (b) lay evidence from 10 witnesses in the form of 14 affidavits; and
 - (c) expert evidence from 5 witnesses in the form of 13 affidavits and six joint expert reports.
44. The expert evidence spanned the following fields of expertise:
- (a) 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;
 - (b) water allocation, availability and cost;
 - (c) estimated future operating costs and almond yields; and
 - (d) the valuation of the rights of the relevant Growers and secured lenders in connection with the Almond Schemes.
45. As stated above, Justice Davies delivered her reasons for judgment in the Almond Land Rights Proceeding on 15 June 2011. In summary, her Honour's key findings were as follows:

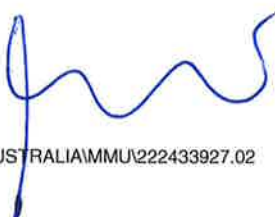
- (a) to share in the Fund, the Growers needed to establish rights of a proprietary nature in and with respect to the Almond Assets sold and thereby converted into the Fund (paragraph 30);
- (b) for licence-based Almond Schemes (being the 2002 Almond Scheme and the 2002 Almond Private Offer Scheme), the Growers acquired rights of a contractual nature only and did not obtain a proprietary interest in the Almond Assets (paragraph 48). Accordingly, Growers in those projects had no right to share in the Fund;
- (c) for lease-based Almond Schemes (being the 2005 Almond Scheme, the 2006 Almond Scheme and the 2007 Almond Scheme), the Growers held rights of a proprietary nature in the land, trees and capital works (but of a contractual nature in the water licences). Accordingly, Growers in those projects had a right to share in the 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) Almond Schemes in which Growers held proprietary rights were not viable at the time those rights were extinguished by the Liquidators (as approved by Court order) (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); and
- (e) since there was no possibility other than a theoretical possibility that the Almond Schemes would have continued if the Growers' rights had not been extinguished, no value could be attributed to the Growers' rights (paragraph 137).

46. The key findings made by Justice Davies concerning the viability of the Almond Schemes under their existing structures were as follows:

82. *The first issue for determination is whether any of the projects were viable at the time that the growers' rights were extinguished. If the projects were not viable, it follows that there is no measure of value to be attributed to those rights to support an apportionment of the proceeds to the growers. The growers' rights under the sub-leases could only be exercised for the purposes of the projects and thus any value attributable to the growers' rights was coterminous with the continuation of the projects. If they were viable, the value of the growers' rights measures the extent of their legal claim to the proceeds of sale.*

Were the projects viable under the existing structures?

83. *I am satisfied that the evidence established that by the time the growers rights' were extinguished, the projects could not continue under their existing structures and were at risk of imminent and inevitable termination.*
84. *First, the insolvency of the Timbercorp Group meant that the projects could not continue under their existing structures. It was not a disputed fact that TSL, AL and AM were hopelessly insolvent. Nor was it a disputed fact that 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 participant grower invoices. All of the projects 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.*
85. *Secondly, the operating and capital expenses of each of the projects were expected to exceed the anticipated 2010 harvest returns. The projects themselves had cash flow deficiencies and, in the view of the liquidators (which was not challenged), were insolvent because the projected returns were less than the project expenses, which the projects could not meet.*



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86. *Thirdly the orchards were at risk of wastage and impairment because of the lack of immediate funds available to the projects and the lack of any means of funding the continued operations.*

87. *I find that the growers' rights under the projects as they were structured held no value at the time of extinguishment of those rights. The insolvency of the Timbercorp group and the cash flow deficiencies of the projects meant that the projects could not be funded and that they were at imminent and inevitable risk of termination as the purpose of the projects could not be accomplished.*

47. In paragraphs 96 to 136 of Justice Davies' Judgment, her Honour considered the various legal and factual matters bearing on whether there was a chance for restructure of the relevant projects and, having found that there was such a chance, the value of that chance. On these matters, her Honour concluded, at paragraph 137, in the following terms:

137. *These matters demonstrated, in my view, that any prospect that the projects would have been continued was wishful thinking and unfounded in the reality of the situation that the growers found themselves in, regrettable as it was. I could not conclude on the state of the evidence that there was any possibility, other than a theoretical possibility, that the projects would have continued, if the growers' rights had not been extinguished. Accordingly, in my view no value can or should be attributed to the rights given up.*

C. ALMOND LAND RIGHTS APPEAL PROCEEDING

48. As referred to above, the Representative Growers have appealed the judgment of Justice Davies in the Almond Land Rights Proceeding. Now produced and shown to me and marked "RWM-24" to "RWM-29" are true copies of the documents filed thus far in the Almond Land Rights Appeal Proceeding.

49. In the Almond Land Rights Appeal Proceeding, the appellant representative growers:

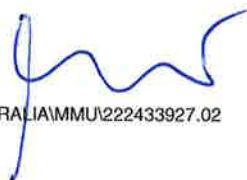
(a) advance seven grounds of appeal in respect of Justice Davies' Judgment; and

- (b) seek, among other things, orders that:
 - (i) ANZ and BOSI reconstitute the Fund with the amounts paid to them in accordance with the orders made by Justice Davies on 27 June 2011; and
 - (ii) the proceeding be remitted to Justice Davies for further hearing and determination in accordance with the reasons of the Court of Appeal.

50. The joint position of ANZ and BOSI is, in summary, that they:

- (a) reject each of the appellant representative growers' grounds of appeal; and
- (b) contend that Justice Davies' conclusion that the growers were not entitled to share in the Fund should be affirmed on the additional ground that, in respect of the interests of the Growers in the 2005-2007 Almond Schemes:
 - (i) Justice Davies ought to have held that the Growers in those schemes had no proprietary interest in the almond trees or the capital works (but rights of a contractual nature only); and
 - (ii) 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:
 - (A) were in the nature of encumbrances; and
 - (B) did not form any part of the subject matter of the sale under the SPD.

51. 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.


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Now produced and shown to me and marked "**RWM-30**" 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.

D. THE DEED OF COMPROMISE

52. On 25 July 2012, deeds of compromise for each of:

- (a) Supreme Court of Victoria Proceeding No. S CI 2011 6604 (the **Liparoo and Yungera Rights Proceeding**);
- (b) Supreme Court of Victoria Proceeding S CI 2011 6606 (the **Solara Rights Proceeding**);
- (c) Supreme Court of Victoria Proceeding S CI 2011 6777 (the **Fenceport Rights Proceeding**);
- (d) Supreme Court of Victoria Proceeding S CI 2010 1354 (the **BB Olives Rights Proceeding**); and
- (e) the Almond Land Rights Appeal Proceeding,

were executed by or on behalf of each of the relevant parties and on behalf of TSL (together, the **Deeds of Compromise**).

53. The key features of the Almond Land Deed of Compromise are as follows.

- (a) By clause 2, subject to the condition precedent set out in clause 3 being satisfied, the parties agree to the compromise the Almond Land Rights Appeal 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 **Almond Land Rights Appeal Compromise**)

- (b) By clause 3, it is a condition precedent to the Almond Land Rights Appeal Compromise that, on or before 31 December 2012:
- (i) the Court approve the Almond Land Rights Appeal 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), as soon as practicable after the condition precedent in clause 3 is satisfied, the following payments will be made to TSL :
- (i) \$3,819,000 by BOSI; and
 - (ii) \$2,181,000 by ANZ;
- being a total of \$6 million (**Almond Settlement Amount**).
- (d) By clause 4(b), upon receipt, the Almond 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 addressed further in sub-paragraphs (e) to (l) below):
- (e) the Almond Settlement Amount is to be apportioned between Growers in the Almond Schemes based on a rateable distribution in accordance with the number of Almondlots in each of the Almond Schemes (for each Grower, their **Almond 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 Almond Projects (**TFL Indebtedness**); or

(ii) TSL as owing amounts to TSL (**Timbercorp Indebtedness**),

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

(g) Subject to sub-paragraphs (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 Almond 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 Almond Settlement Entitlement TSL will, as soon as practicable, use the Grower's Almond Settlement Entitlement to pay, to the extent possible, the TFL Indebtedness as soon as practicable and remit the balance of the Grower's Almond 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 Almond Settlement Entitlement to TFL, TSL will hold that Grower's Almond 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 Almond 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

Almond 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 Almond 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 Net Sale Proceeds (as defined in the Almond Land Deed of Compromise) or the allocation and disbursement of the Net Sale Proceeds.

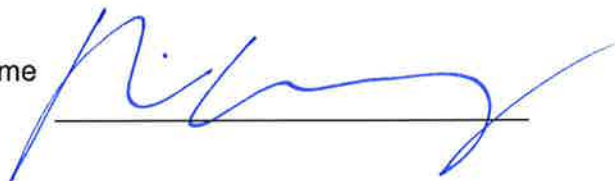
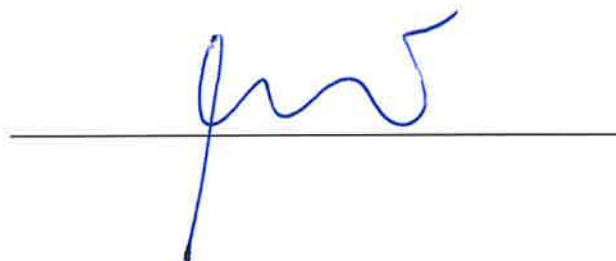
E. COMMUNICATIONS WITH ASIC

54. 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 to in paragraphs 104 to 110 of the affidavit sworn by Clinton Charles Hinchon on 19 September 2012 in the Liparoo and Yungera Rights Proceeding.

AFFIRMED by Ross Whyte McClymont at

Melbourne in the State of Victoria this 19th
day of September 2012

Before me

A blue ink signature, likely of Michael Murray, written over a horizontal line.A blue ink signature, likely of Ross Whyte McClymont, written over a horizontal line.

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

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

Fifth Respondent