

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

List E  
S CI 2010 1354

B E T W E E N

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)

Plaintiff

and

B.B. OLIVES PTY LTD (IN LIQUIDATION)  
(ACN 083 992 367) & ORS (according to the attached Schedule)

Defendant

**AFFIDAVIT OF ROSS WHYTE MCCLYMONT  
(BB Olives Rights Proceeding)**

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Date of document: 27 August 2012

Filed on behalf of: The Plaintiff

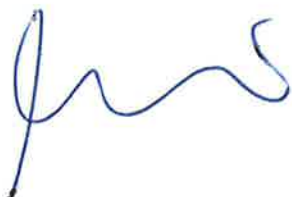
Prepared by:

**Ashurst Australia**  
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181 William Street  
Melbourne VIC 3000

Solicitor code: 53  
DX187 Melbourne  
Tel 9679 3000 Fax 9679 3111  
Ref: RWM 03 2010 2555

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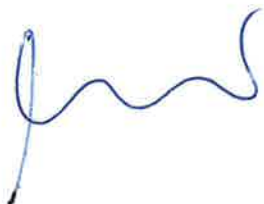
I, **ROSS WHYTE MCCLYMONT** of Ashurst Australia, Level 26, 181 William Street, Melbourne, in  
the State of Victoria, solicitor, do solemnly, sincerely and truly declare and affirm that:



1. I am a partner in the firm Ashurst Australia. I have the care and conduct of this proceeding (the **BB Olives Rights Proceeding**) on behalf of the plaintiff (**BOSI**). I am authorised to make this affidavit on behalf of BOSI.
2. Except where otherwise indicated, I make this affidavit from my own knowledge. Where I depose to matters from information or belief, I believe those matters to be true.
3. This affidavit is made in support of BOSI's summons dated 27 August 2012 by which (among other things), in accordance with Rule 16.01(4) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) (**Rules**), application is made to this Honourable Court for (among other things) approval of the compromise of the BB Olives Rights Proceeding reached between the parties to the proceeding.
4. At the first return date of the summons, BOSI intends to seek directions concerning:
  - (a) the filing and service of further affidavit material in respect of BOSI's application;
  - (b) the filing and service of submissions in respect of BOSI's application; and
  - (c) the substantive hearing of BOSI's application.
5. Except where otherwise indicated, defined terms used in this affidavit have the meaning ascribed to them in the affidavit affirmed by me on 15 August 2012 and filed in the Almond Land Rights Appeal Proceeding (**Appeal Affidavit**). Now produced and shown to me marked "**RWM-1**" is a true copy of the Appeal Affidavit.

#### **Timbercorp apportionment proceedings**

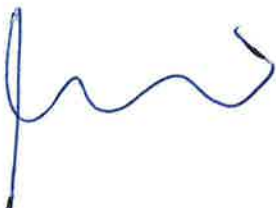
6. The Appeal Affidavit relevantly sets out:
  - (a) at paragraphs 6 to 10, the background to the Apportionment Proceedings (including the BB Olives Rights Proceeding) and the Almond Land Rights Proceeding including, at paragraph 8, the key issue for determination in each proceeding;



- (b) at paragraphs 11 to 15, an overview of the Almond Land Rights Proceeding, including reference to:
  - (i) the order made in that proceeding, pursuant to rule 16.01(2) of the Rules, that certain parties be appointed as Representative Growers to represent the interests of the Growers in the Timbercorp MIS the subject of the proceeding (see paragraph 12 of the Appeal Affidavit); and
  - (ii) the key determination made by her Honour Justice Davies in her reasons for judgment delivered in that proceeding on 15 June 2011 (see paragraph 14 of the Appeal Affidavit);
- (c) at paragraphs 16 to 19:
  - (i) an overview of the commencement and current status of each of the Apportionment Proceedings (including the BB Olives Rights Proceeding); and
  - (ii) reference to the order made, in each such proceeding, pursuant to rule 16.01(2) of the Rules, appointing Representative Growers to represent the interests of the Growers in the Timbercorp MIS the subject of the proceeding (see paragraph 19 of the Appeal Affidavit); and
- (d) at paragraphs 20 to 22, an overview of the background and current status of the Almond Land Rights Appeal Proceeding.

### Compromises

7. As set out at paragraphs 23 and 24 of the Appeal Affidavit, on 25 July 2012, the parties to each of the Apportionment Proceedings and the Almond Land Rights Appeal Proceeding executed a Deed of Compromise for each such proceeding providing, in each case, for the compromise of the relevant proceeding. Each Compromise is conditional on (*inter alia*):



- (a) the Court approving the Compromise and ordering that it shall be binding on the Growers represented by the Representative Growers in the relevant proceeding; and
  - (b) the Court approving the Compromise in each of the other Apportionment Proceedings and the Almond Land Rights Appeal Proceeding (as applicable).
8. I am informed by Jane Sheridan of Arnold Bloch Leibler (solicitors for Timbercorp Securities Limited (in Liquidation)) and believe that, since execution of the Deeds of Compromise, notification has been provided to the Growers in the Timbercorp MIS the subject of each Deed of Compromise with respect to a number of issues including the terms and effect of the Deed of Compromise, and the necessity of, and procedure for, obtaining Court approval. In each case, the notice provided to Growers also stated that a hearing for the approval of the Compromise is anticipated to commence in October 2012.

**Referral of the Almond Land Rights Appeal Proceeding to the trial division of the Supreme Court**

9. I am informed by Chris Fenwick, a solicitor employed by Ashurst Australia, and verily believe that on 24 August 2012 Mr Fenwick received an email from Matthew Boisseau, the Associate to the Honourable Justice Osborn, in relation to the Almond Land Rights Appeal Proceeding. In light of:
- (a) Mr Boisseau's email to Mr Fenwick; and
  - (b) an email dated 27 August 2012 from Ms Jenny Murray of the Supreme Court of Victoria Court of Appeal to his Honour Justice Judd in relation to the Almond Land Rights Appeal Proceeding (a copy of which was sent to my firm (and others) and forwarded to me) attaching an unauthenticated copy of orders by consent dated 24 August 2012 which I understand to have been made by their Honours Justices Buchanan and Osborn of the Court of Appeal on 24 August 2012;

I believe that, although an authenticated copy of the orders is not yet available, their Honours Justices Buchanan and Osborn of the Court of Appeal made orders by consent in the Almond Land Rights Appeal Proceeding on 24 August 2012 in the form attached to Ms Murray's email. By those orders, the Almond Land Rights Appeal Proceeding has been remitted to the Honourable Justice Judd of the trial division of the Supreme Court:

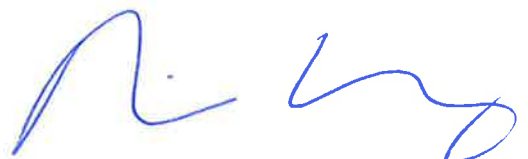
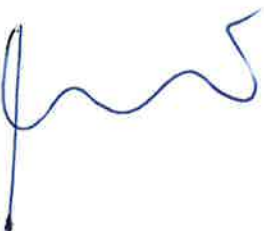
- (a) for the hearing and determination of any application to approve the Compromise of the proceeding (**Compromise Application**); or
- (b) if Justice Judd deems fit, for the purpose of making directions for the hearing and determination of the Compromise Application by another judge of the trial division.

Now produced and shown to me marked "**RWM-2**" is a true copy of all emails (including attachments) referred to in this paragraph of my affidavit.

### **Approval applications**

10. As noted above, by summons dated 27 August 2012, BOSI issues the Approval Application in respect of the BB Olives Rights Proceeding.
11. By summons dated 27 August 2012, filed on behalf of BOSI in the Almond Land Rights Appeal Proceeding, BOSI issues the Approval Application in respect of that proceeding.
12. I am informed by Clint Hinchin of Allens (solicitors for ANZ) and verily believe that by summonses dated 27 August 2012 filed on behalf of ANZ in the Solara Rights Proceeding and the Liparoo and Yungera Rights Proceeding, ANZ issues the Approval Applications in respect of those proceedings.
13. I am informed by Ms Sheridan of Arnold Bloch Leibler (solicitors for Fenceport) and verily believe that, by summons dated 27 August 2012, filed on behalf of Fenceport in the Fenceport Rights Proceeding, Fenceport issues the Approval Application in respect of that proceeding.

14. In light of the following matters, I believe that it is desirable that the Approval Application in respect of the BB Olives Rights Proceeding be managed, heard and determined concurrently with the Approval Applications in respect of the other Apportionment Proceedings and the Almond Land Rights Appeal Proceeding:
- (a) the rights of the parties arising under the constituent documents for the Timbercorp MIS the subject of the Apportionment Proceedings and the Almond Land Rights Appeal Proceeding are the same or similar in each case;
  - (b) in determining the Approval Application for each of the Deeds of Compromise, the same threshold question arises in each case, namely, whether the Compromise is for the benefit of the absent persons (ie the Growers represented in each proceeding by the Representative Growers) in accordance with rule 16.01(4) of the Rules. Therefore, approval of each Compromise will require consideration of a number of the same or similar questions; and
  - (c) as stated above, each Deed of Compromise is conditional on (*inter alia*):
    - (i) the Court approving the Compromise and ordering that it shall be binding on the Growers represented by the Representative Growers in the relevant proceeding; and
    - (ii) the Court approving the Compromise in each of the other Apportionment Proceedings and the Almond Land Rights Appeal Proceeding (as applicable).



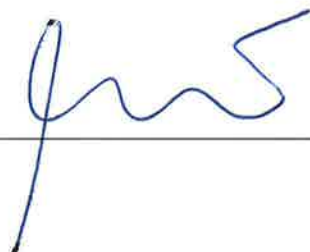
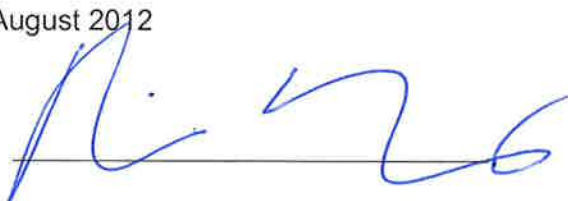
15. I respectfully request that this Honourable Court make directions for the conduct and hearing of the Approval Application in respect of the BB Olives Rights Proceeding.

**AFFIRMED** by **Ross Whyte McClymont** at

Melbourne in the State of Victoria this

27 day of August 2012

Before me

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

**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)**

Plaintiff

and

**B.B. OLIVES PTY LTD (IN LIQUIDATION)  
(ACN 083 992 367)**

First Defendant

and

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

Second Defendant

and

**TIMBERCORP LIMITED (IN LIQUIDATION) (ACN 055 185 067)**

Third Defendant

and

**MARK ANTHONY KORDA  
(in his capacity as liquidator of Almond Land Pty Ltd (in liquidation))  
(in his capacity as liquidator of B.B. Olives Pty Ltd (in liquidation))**

Fourth Defendant

and

**LEANNE KYLIE CHESSER  
(in her capacity as liquidator of B.B. Olives Pty Ltd (in liquidation))**

Fifth Defendant

and

**MARK FRANCIS XAVIER MENTHA  
(in his capacity as liquidator of B.B. Olives Pty Ltd (in liquidation))**

Sixth Defendant

and



**MICHAEL CHARLES VICARY**

**(as the representative of the Growers in the 2006 Timbercorp Olive Project (ARSN 119 182 179))**

Seventh Defendant

and

**PAMELA JAN DRY**

**(as the representative of the Growers in the 2007 Timbercorp Olive Project (ARSN 123 155 715))**

Eighth Defendant

and

**DAVID BUTTERFIELD**

**(as the representative of the Growers in the 2008 Timbercorp Olive Project (ARSN 129 307 722))**

Ninth Defendant