

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

CERTIFICATE IDENTIFYING EXHIBIT

Date of document: 27 August 2012

Filed on behalf of: The Plaintiff

Prepared by:

**Ashurst Australia**

Level 26

181 William Street

Melbourne VIC 3000

Solicitor code: 53

DX187 Melbourne

Tel 9679 3000 Fax 9679 3111

Ref: RWM 03 2010 2555

This is the **Exhibit** marked '**RWM-1**' now produced and shown to **Ross Whyte McClymont** at the time of affirming his affidavit on 27 August 2012.

Before me

**'RWM-1'**

Copy of an affidavit of Ross Whyte McClymont affirmed on 15  
August 2012

**MICHAEL MURRAY**

Ashurst Australia

181 William Street, Melbourne Vic, 3000  
An Australian legal practitioner within the  
meaning of the Legal Profession Act 2004

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

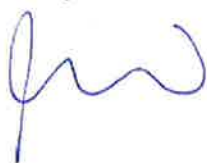
**AFFIDAVIT OF ROSS WHYTE MCCLYMONT**

Date sworn: 15 August 2012  
Filed on behalf of: the First Respondent  
Prepared by:  
**Ashurst Australia**  
Level 26  
181 William Street  
MELBOURNE VIC 3000

Solicitor's Code: 53  
DX: 187  
Tel: (03) 9679 3000  
Fax: (03) 9679 3111  
Ref: 03 2010 2555  
Attention: Ross McClymont  
Email: [ross.mcclymont@ashurst.com](mailto:ross.mcclymont@ashurst.com)

I, Ross Whyte McClymont of Level 26, 181 William Street, Melbourne, Solicitor, do solemnly,  
sincerely and truly declare and affirm that:

1. I am a partner in the firm of Ashurst Australia, the solicitors for the First Respondent.
2. I have the care and conduct of this proceeding, and had the care and conduct of the proceeding below, on behalf of the First Respondent.
3. I make this affidavit from my own knowledge, save where otherwise stated. Where I depose to matters on the basis of information and belief, I believe those matters to be true.
4. I make this affidavit in support of the First Respondent's summons which seeks an order that the proceeding be remitted to the Honourable Justice Judd of the trial division of the Supreme Court:



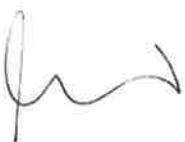
- (a) for the hearing and determination of any application to approve the compromise of the proceeding (**Compromise Application**); or
- (b) if Justice Judd deems fit, for the purpose of making directions for the hearing and determination of the Compromise Application by another judge of the trial division.

(the **Summons**)

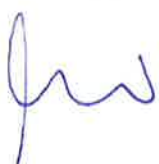
- 5. Each of the parties to this proceeding consents to the making of the orders sought in the Summons. Now produced and shown to me marked "**RWM-1**" is a true copy of a minute of proposed consent order executed on behalf of each of the parties to this proceeding.

#### **Background to the disputes**

- 6. Timbercorp Limited (in liquidation) and its subsidiary entities (together, the **Timbercorp Group**) conducted various agribusiness managed investment schemes across a number of properties involving, among other things, the management, cultivation, harvesting, processing and sale of almonds, olives and citrus (**Timbercorp MIS**).
- 7. The Timbercorp Group went into administration on 23 April 2009 and was placed into liquidation on 29 June 2009. Thereafter, the land on which the Timbercorp MIS were conducted, and related assets, were sold in a series of transactions each of which was approved by the Supreme Court of Victoria.
- 8. Subsequently, in accordance with the applicable orders made by Supreme Court of Victoria, the following five separate proceedings were commenced to determine how the net sale proceeds the subject of each sale transaction were to be apportioned between the land owners, the secured creditors, the investors in the Timbercorp MIS (**Growers**) and other interested parties claiming an interest in those proceeds:
  - (a) Supreme Court of Victoria Proceeding No. S CI 2009 10699 (**Almond Land Rights Proceeding**) which concerned the following Timbercorp MIS:
    - (i) 2002 Timbercorp Almond Project ARSN 099 611 935;




- (ii) 2005 Timbercorp Almond Project ARSN 112 935 092;
  - (iii) 2006 Timbercorp Almond Project ARSN 118 387 974;
  - (iv) 2007 Timbercorp Almond Project ARSN 122 511 040; and
  - (v) 2002 Timbercorp Almond Project (Private Offer No 1);
- (b) Supreme Court of Victoria Proceeding No. S CI 2011 6604 (**Liparoo and Yungera Rights Proceeding**) which concerned the following Timbercorp MIS:
- (i) 2001 Timbercorp Almond Project ARSN 095 649 746;
  - (ii) 2002 Timbercorp Almond Project ARSN 099 611 935;
  - (iii) 2003 Timbercorp Almond Project ARSN 103 197 299;
  - (iv) 2004 Timbercorp Almond Project ARSN 108 336 670;
  - (v) 2005 Timbercorp Almond Project ARSN 112 935 092; and
  - (vi) 2002 Timbercorp Almond Project (Private Offer) (Unregistered);
- (c) Supreme Court of Victoria Proceeding No. S CI 2011 6606 (**Solara Rights Proceeding**) which concerned the following Timbercorp MIS:
- (i) 2005 Timbercorp Citrus Project ARSN 114 091 299;
- (d) Supreme Court of Victoria Proceeding No. S CI 2010 1354 (**BB Olives Rights Proceeding**) which concerned the following Timbercorp MIS:
- (i) 2006 Timbercorp Olive Project ARSN 119 182 179;
  - (ii) 2007 Timbercorp Olive Project ARSN 123 155 715; and
  - (iii) 2008 Timbercorp Olive Project ARSN 129 307 722; and
- (e) Supreme Court of Victoria Proceeding No. S CI 2011 6777 (**Fenceport Rights Proceeding**) which concerned the following Timbercorp MIS:




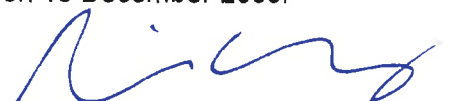
- (i) 2000 Timbercorp Olive Project (Private Offer) (Unregistered);
- (ii) 2001 Timbercorp Olive Project ARSN 094 382 082;
- (iii) 2002 Timbercorp Olive Project ARSN 098 233 455;
- (iv) 2003 Timbercorp Olive Project ARSN 104 648 473; and
- (v) 2004 Timbercorp Olive Project ARSN 108 744 378.

9. As the rights of the claimants on the fund created by the sales the subject of the Solara Rights Proceeding, Liparoo and Yungera Rights Proceeding, BB Olives Rights Proceeding and Fenceport Rights Proceeding are yet to be determined, I define those proceedings as the **"Apportionment Proceedings"**.
10. As each of the proceedings referred to in paragraph 8 above involves similar issues, it was considered appropriate for one such proceeding to be heard and determined first, with the intention that the result in that proceeding would then form the basis for determination of the other proceedings. This led to the hearing and determination of the Almond Land Rights Proceeding.

#### **Almond Land Rights Proceeding**

11. On 15 December 2009, BOSI Security Services Limited (ACN 009 413 952) as trustee for Australia and New Zealand Banking Group Limited (ACN 005 357 522) (**ANZ**) and BOS International (Australia) Limited (ACN 066 601 250) and Westpac Banking Corporation (ACN 007 457 141) (**BOSI**), as the plaintiff, initiated the Almond Land Rights Proceeding, seeking declarations as to its, the first defendant's (ANZ's) and the fifth to eighth defendants' rights, if any, to the relevant net sale proceeds held in an interest bearing trust account pursuant to orders of Justice Robson made on 9 October 2009 (**Fund**), and how the Fund ought be distributed.

Now produced and shown to me and marked "**RWM-2**" is a true copy of the Summons and Originating Motion filed in the Almond Land Rights Proceeding on 15 December 2009.

12. On 22 December 2009, the Supreme Court of Victoria 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 Timbercorp MIS the subject of the Almond Land Rights Proceeding.

Now produced and shown to me and marked "**RWM-3**" is a true copy of the orders dated 22 December 2009.

13. The Almond Land Rights Proceeding was heard by Justice Davies over 12 days in February 2011 and March 2011.
14. Justice Davies delivered her reasons for judgment on 15 June 2011. Her Honour found that the Growers were unsuccessful in their claims against the Fund and that BOSI and ANZ were entitled to the Fund in its entirety.

Now produced and shown to me and marked "**RWM-4**" is a true copy of the judgment of Justice Davies in the Almond Land Rights Proceeding reported as (2011) 84 ACSR 341.

15. By orders dated 27 June 2011, the Fund was to be distributed to BOSI and ANZ, subject to certain ancillary orders.

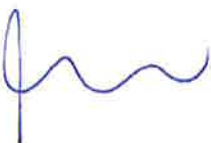
Now produced and shown to me and marked "**RWM-5**" is a true copy of the orders dated 27 June 2011.

### **Apportionment Proceedings**

16. On 16 March 2010, the BB Olives Rights Proceeding was commenced by BOSI.

Now produced and shown to me and marked "**RWM-6**" is a true copy of the Summons and Originating Motion filed in the BB Olives Rights Proceeding on 16 March 2010.

17. BOSI is not a party to the Solara Rights Proceeding, Liparoo and Yungera Rights Proceeding and Fenceport Rights Proceeding. ANZ, the Second Respondent to this




appeal, is a party to the Solora Rights Proceeding and Liparoo and Yungera Rights Proceeding. The solicitors for ANZ in the Liparoo and Yungera Rights Proceeding, the Solora Rights Proceeding and the Almond Land Rights Appeal Proceeding are Allens (**Allens**). I am informed by Jonathan Joseph of Allens and believe that on 6 December 2011, the Solora Rights Proceeding and the Liparoo and Yungera Rights Proceeding were commenced by ANZ.

Now produced and shown to me and marked "**RWM-7**" and "**RWM-8**" are true copies of the Summonses and Originating Motions filed in the Solora Rights Proceeding and the Liparoo and Yungera Rights Proceedings on 6 December 2011.

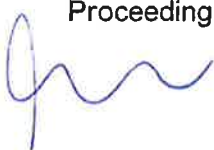
18. BOSI and ANZ are not parties to the Fenceport Rights Proceeding. The Fourth Respondent, Mr Korda (one of the liquidators of the Timbercorp Group), is party to the Fenceport Rights Proceeding. The solicitors for the liquidators of the Timbercorp Group and the Third to Fifth Respondents to this appeal are Arnold Bloch Leibler (**ABL**). I am informed by Jane Sheridan of ABL and believe that the Fenceport Rights proceeding was commenced on 13 December 2011.

Now produced and shown to me and marked "**RWM-9**" is a true copy of the Summons and Originating Motion filed in the Fenceport Rights Proceeding on 13 December 2011.

19. Orders have been made in each of the Apportionment Proceedings pursuant to Rule 16.01(2) of the Rules that parties be appointed as representatives of the Growers in the Timbercorp MIS the subject of the Apportionment Proceedings. However, to date no further interlocutory steps have been taken in any of the Apportionment Proceedings.

#### **Almond Land Rights Appeal Proceeding**

20. Pursuant to a Notice of Appeal filed by the Representative Growers on 11 July 2011, the Representative Growers in the Almond Land Rights Proceeding sought to appeal the judgment of Justice Davies in that proceeding (Supreme Court of Victoria Court of Appeal Proceeding No S APCI 2011 0103) (**Almond Land Rights Appeal Proceeding**).




Now produced and shown to me and marked "**RWM-10**" is a true copy of the Notice of Appeal filed by the Growers on 11 July 2011.

21. On 12 December 2011, the parties to the Almond Land Rights Appeal Proceeding filed an agreed summary for the Court of Appeal in accordance with Practice Statement CA 2 of 1995.

Now produced and shown to me and marked "**RWM-11**" is a true copy of the agreed summary for the Court of Appeal filed on 12 December 2011.

22. 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.

Now produced and shown to me and marked "**RWM-12**" 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.

### Compromises

23. On 25 July 2012, the parties to each of the Apportionment Proceedings and the Almond Land Rights Appeal Proceeding executed deeds of compromise for each such proceeding (each, a **Deed of Compromise** and together, the **Deeds of Compromise**) providing, in each case, for the compromise of the relevant proceeding (each, a **Compromise** and together, the **Compromises**). 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).



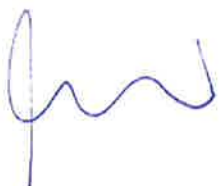

24. Since execution of the Deeds of Compromise, notification has been provided to the Growers in the Timbercorp MIS the subject of each Deed of Compromise with respect to a number of issues including, without limitation, the terms and effect of the Deed of Compromise, and the necessity of, and procedure 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.

### **Approval Applications**

25. On 26 July 2012, Allens wrote to the associate to Justice Davies requesting that enquiries be made to facilitate the appointment by the Court of a judge in the trial division of the Supreme Court to hear the applications for approval of the Compromises (each, an **Approval Application** and together, the **Approval Applications**). Allens' letter was sent on behalf, and with the authority, of each of the parties to the Timbercorp Apportionment Proceedings and the Almond Land Rights Appeal Proceeding and a copy of Allens' letter was provided to the solicitors for each such party.

Now produced and shown to me and marked "RWM-13" is a true copy of the letter from Allens to the associate to Justice Davies dated 26 July 2012.

26. Also on 26 July 2012, again on behalf, and with the authority, of each of the parties to the Timbercorp Apportionment Proceedings and the Almond Land Rights Appeal Proceeding, Allens wrote to the Court of Appeal Registry seeking guidance from the Registry as to the steps required to obtain an order from the Court of Appeal that the hearing of the proposed Approval Application in relation to the Compromise in the Almond Land Rights Appeal Proceeding be referred to the same judge appointed by the trial division of the Supreme Court to manage, hear and determine the other Approval Applications. Again, a copy of Allens' letter was provided to the solicitors for each of the parties to the Timbercorp Apportionment Proceedings and the Almond Land Rights Appeal Proceeding



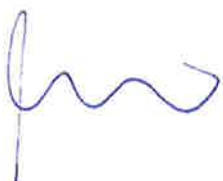
Now produced and shown to me and marked "RWM-14" is a true copy of the letter from Allens to the Court of Appeal Registry dated 26 July 2012.

27. On 9 August 2012, I was copied into an email from Michael Symons, the associate to Justice Judd, to Jonathan Joseph of Allens in which Mr Symons stated that Justice Judd was available for a directions hearing in the Apportionment Proceedings at 10 am on Friday, August 31 2012. Mr Symons also stated that Justice Judd had not been confirmed as the judge who would hear the Approval Applications.

Now produced and shown to me and marked "RWM-15" is a true copy of the email from Mr Symons dated 9 August 2012.


28. The rights of the parties arising under the constituent documents for the Timbercorp MIS the subject of the Almond Land Rights Appeal Proceeding are the same or similar to the rights of parties arising under the constituent documents for the Timbercorp MIS the subject of each of the Apportionment Proceedings. Further, in determining the Approval Application for each of the Deeds of Compromise, the same threshold question arises in each case and regardless of the fact that the Almond Land Rights Appeal Proceeding is presently before the appeal division of the Supreme Court, namely, whether the Compromise is for the benefit of the absent persons (i.e. the Growers represented in each proceeding by the Representative Growers) in accordance with Rule 16.01(4) of the Rules. Therefore, approval of the Compromises of the Apportionment Proceedings will require consideration of a number of questions which will also arise in considering whether to approve the Compromise of the Almond Land Rights Appeal Proceeding. In addition, as stated above, each Deed of 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).

For these reasons, it is considered desirable that the Approval Applications with respect to the Apportionment Proceedings and the Almond Land Rights Appeal Proceeding be heard and determined at the same time and before the same judge.

AFFIRMED at	SYDNEY in the State of NEW SOUTH WALES
Signature of deponent	
Name of witness	Michael Patrick Murray
Address of witness	Ashurst Australia, 181 William St, Melbourne, Victoria 3000
Capacity of witness	An Australian legal practitioner within the meaning of the Legal profession Act 2004

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

- 1 I saw the face of the deponent.
- 2 I have known the deponent for at least 12 months.

Signature of witness



## 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 CHESSER**  
**(in her capacity as liquidator of Almond Land Pty Ltd (in liquidation))**

Fifth Respondent

Form 43A

Rule 43.06(3)

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

CERTIFICATE IDENTIFYING EXHIBIT "RWM-1"

Date of document: 15 August 2012  
Filed on behalf of: The First Respondent  
Prepared by:  
**Ashurst Australia**  
Level 26  
181 William Street  
MELBOURNE VIC 3000

Solicitor's Code: 53  
DX: 187  
Tel: (03) 9679 3000  
Fax: (03) 9679 3111  
Ref: 03 2010 2555  
Attention: Ross McClymont  
Email: ross.mcclymont@ashurst.com

This is the exhibit marked "**RWM-1**" now produced and shown to Ross Whyte McClymont at the time of affirming the person's affidavit on 15 August 2012.

Before me:



Signature of person taking affidavit

**Michael Patrick Murray**  
Ashurst Australia, 181 William St, Melbourne, Victoria 3000  
An Australian Legal practitioner within the meaning of the Legal  
Profession Act 2004

**"RWM-1"**

**Minute of proposed consent order**

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
IN THE COURT OF APPEAL  
CIVIL DIVISION

S APCI 2011 0103

BETWEEN

**GRAHAM GOLDBERG & ORS** (according to the Schedule)

and

Appellants

**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

**PROPOSED MINUTE OF CONSENT ORDER OF THE COURT OF APPEAL**

JUDICIAL OFFICER:

DATE MADE:

ORIGINATING PROCESS: Notice of Appeal

HOW OBTAINED: By consent

ATTENDANCE: Not applicable

OTHER MATTERS: Not applicable

**THE COURT OF APPEAL ORDERS THAT:**

1. The proceeding be 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.

2. There be no order as to costs.

DATED: 2012

  
Clarendon Lawyers  
Solicitors for the Appellants

Ashurst Australia  
Solicitors for the First Respondent

Alens  
Solicitors for the Second Respondent

Arnold Bloch Leibler  
Solicitors for the Third, Fourth and  
Fifth Respondents

# SCHEDULE OF PARTIES

BETWEEN

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

First Appellant

**CHRISTOPHER MARK LITTLE** (in his capacity as representative  
of the Growers in the 2005 Almond Project)

Second Appellant

**CONSTANTINE MOSHOPOULOS** (in his capacity as representative  
of the Growers in the 2006 Almond Project)

Third Appellant

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

Fourth Appellant

AND

**BOSI SECURITY SERVICES LIMITED** (ACN 009 413 852)  
as trustee for  
**AUSTRALIA AND NEW ZEALAND 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

**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED**  
(ACN 005 357 522)

Second Respondent

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

Third Respondent

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

Fourth Respondent

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

Fifth Respondent

Dated:

2012

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
IN THE COURT OF APPEAL  
CIVIL DIVISION

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

PROPOSED MINUTE OF CONSENT ORDER OF THE COURT OF APPEAL

JUDICIAL OFFICER:

DATE MADE:

ORIGINATING PROCESS: Notice of Appeal

HOW OBTAINED: By consent

ATTENDANCE: Not applicable

OTHER MATTERS: Not applicable

THE COURT OF APPEAL ORDERS THAT:

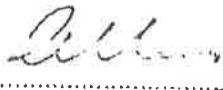
1. The proceeding be remitted to the Honourable Justice Judd of the trial division of the Supreme Court:
  - (a) for the hearing and determination of any application to approve the compromise of the proceeding (**Compromise Application**); or
  - (b) if Justice Judd deems fit, for the purpose of making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

2. There be no order as to costs.

DATED: 2012

.....  
Clarendon Lawyers  
Solicitors for the Appellants

.....  
Ashurst Australia  
Solicitors for the First Respondent

  
.....  
Allens  
Solicitors for the Second Respondent

.....  
Arnold Bloch Leibler  
Solicitors for the Third, Fourth and  
Fifth Respondents

# **SCHEDULE OF PARTIES**

BETWEEN

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

First Appellant

**CHRISTOPHER MARK LITTLE** (in his capacity as representative  
of the Growers in the 2005 Almond Project)

Second Appellant

**CONSTANTINE MOSHOPOULOS** (in his capacity as representative  
of the Growers in the 2006 Almond Project)

Third Appellant

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

Fourth Appellant

AND

**BOSI SECURITY SERVICES LIMITED** (ACN 009 413 852)  
as trustee for  
**AUSTRALIA AND NEW ZEALAND 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

**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED**  
(ACN 005 357 522)

Second Respondent

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

Third Respondent

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

Fourth Respondent

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

Fifth Respondent

Dated:

2012

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

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

**PROPOSED MINUTE OF CONSENT ORDER OF THE COURT OF APPEAL**

JUDICIAL OFFICER:

DATE MADE:

ORIGINATING PROCESS: Notice of Appeal

HOW OBTAINED: By consent

ATTENDANCE: Not applicable

OTHER MATTERS: Not applicable

**THE COURT OF APPEAL ORDERS THAT:**

1. The proceeding be 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.

2. There be no order as to costs.

DATED: 14 August 2012

.....  
Clarendon Lawyers  
Solicitors for the Appellants

.....  
Ashurst Australia  
Solicitors for the First Respondent

.....  
Allens  
Solicitors for the Second Respondent

.....  
Arnold Bloch Leibler  
Arnold Bloch Leibler  
Solicitors for the Third, Fourth and  
Fifth Respondents

## SCHEDULE OF PARTIES

BETWEEN

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

First Appellant

**CHRISTOPHER MARK LITTLE** (in his capacity as representative  
of the Growers in the 2005 Almond Project)

Second Appellant

**CONSTANTINE MOSHOPOULOS** (in his capacity as representative  
of the Growers in the 2006 Almond Project)

Third Appellant

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

Fourth Appellant

AND

**BOSI SECURITY SERVICES LIMITED** (ACN 009 413 852)  
as trustee for  
**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED**  
(ACN 005 357 522) and **BOS INTERNATIONAL (AUSTRALIA) LIMITED**  
(ACN 086 601 250) and **WESTPAC BANKING CORPORATION**  
(ACN 007 457 141)

First Respondent

**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED**  
(ACN 005 357 522)

Second Respondent

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

Third Respondent

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

Fourth Respondent

**LEANNE KYLIE CHESSER**  
(in her capacity as liquidator of Almond Land Pty Ltd (in liquidation))

Fifth Respondent

Dated:

2012

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

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

**PROPOSED MINUTE OF CONSENT ORDER OF THE COURT OF APPEAL**

JUDICIAL OFFICER:

DATE MADE:

ORIGINATING PROCESS: Notice of Appeal

HOW OBTAINED: By consent

ATTENDANCE: Not applicable

OTHER MATTERS: Not applicable

**THE COURT OF APPEAL ORDERS THAT:**

1. The proceeding be 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.

2. There be no order as to costs.

**DATED:** 15<sup>th</sup> August 2012

.....  
Clarendon Lawyers  
Solicitors for the Appellants

Ashurst Australia  
.....  
Ashurst Australia  
Solicitors for the First Respondent

.....  
Allens  
Solicitors for the Second Respondent

.....  
Arnold Bloch Leibler  
Solicitors for the Third, Fourth and  
Fifth Respondents

## SCHEDULE OF PARTIES

BETWEEN

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

First Appellant

**CHRISTOPHER MARK LITTLE (in his capacity as representative  
of the Growers in the 2005 Almond Project)**

Second Appellant

**CONSTANTINE MOSHOPOULOS (in his capacity as representative  
of the Growers in the 2006 Almond Project)**

Third Appellant

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

Fourth Appellant

AND

**BOSI SECURITY SERVICES LIMITED (ACN 009 413 852)  
as trustee for  
AUSTRALIA AND NEW ZEALAND 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

**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED  
(ACN 005 357 522)**

Second Respondent

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

Third Respondent

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

Fourth Respondent

**LEANNE KYLIE CHESSER  
(in her capacity as liquidator of Almond Land Pty Ltd (in liquidation))**

Fifth Respondent

Dated:

2012

Form 43A

Rule 43.06(3)

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

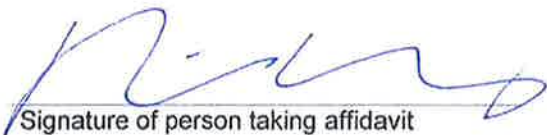
CERTIFICATE IDENTIFYING EXHIBIT "RWM-2"

Date of document: 15 August 2012  
Filed on behalf of: The First Respondent  
Prepared by:  
**Ashurst Australia**  
Level 26  
181 William Street  
MELBOURNE VIC 3000

Solicitor's Code: 53  
DX: 187  
Tel: (03) 9679 3000  
Fax: (03) 9679 3111  
Ref: 03 2010 2555  
Attention: Ross McClymont  
Email: ross.mcclymont@ashurst.com

This is the exhibit marked "RWM-2" now produced and shown to Ross Whyte McClymont at the time of  
affirming the person's affidavit on 15 August 2012.

Before me:



Signature of person taking affidavit

**Michael Patrick Murray**  
Ashurst Australia, 181 William St, Melbourne, Victoria 3000  
An Australian Legal practitioner within the meaning of the Legal  
Profession Act 2004

**"RWM-2"**

**Summons and Originating Motion filed in  
Almond Land Rights Proceeding on  
15 December 2009**

Form 46A

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

LIST 2

No. S CI 2009 10699

BETWEEN:

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)

Plaintiff

and

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED  
(A.C.N. 005 357 522) & ORS (according to the attached Schedule)

Defendants

SUMMONS

Date of document: 15 December 2009

Filed on behalf of: The Plaintiff

Prepared by:

**Blake Dawson**

Level 26

181 William Street

MELBOURNE VIC 3000

Solicitor's Code: 53

DX: 187

Tel: (03) 9679 3000

Fax: (03) 9679 3111

Ref: RWM CHFE

Attention: Mr R McClymont

Email: [ross.mcclymont@blakedawson.com](mailto:ross.mcclymont@blakedawson.com)

TO: The First Defendant

c/- its solicitors:

Allens Arthur Robinson

Level 27, 530 Collins Street

Melbourne VIC 3000

The Second, Third and Fourth Defendants

c/- their solicitors

Arnold Bloch Leibler

Level 21, 333 Collins Street

Melbourne VIC 3000

Graham Goldenberg, Christopher Mark Littley, Constantine Moshopolous and David  
Butterfield

c/- their solicitors

Clarendon Lawyers

Level 17

North Rialto Tower

525 Collins Street

Melbourne VIC 3000

You are summoned to attend before the Court on the hearing of an application by the plaintiff for orders that:

1. Pursuant to rule 16.01(2) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic):
  - (a) Graham Goldenberg be appointed as the representative of the Growers in the 2002 Timbercorp Almond Project (ARSN 099 611 935);
  - (b) Christopher Mark Littley be appointed as the representative of the Growers in the 2005 Timbercorp Almond Project (ARSN 112 935 092);
  - (c) Constantine Moshopoulos be appointed as the representative of the Growers in the 2006 Timbercorp Almond Project (ARSN 118 387 974);
  - (d) David Butterfield be appointed as the representative of the Growers in the 2007 Timbercorp Almond Project (ARSN 122 511 040); and
  - (e) David Butterfield be appointed as the representative of the Growers in the unregistered managed investment scheme known as the 2002 Timbercorp Almond Project (Private Offer No 1).
2. The persons appointed pursuant to paragraph 1 above, be joined as the fifth, sixth, seventh and eighth defendants in the proceeding pursuant to rule 9.02 and/or rule 9.06(b) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).
3. The plaintiff is granted leave to file and serve an amended originating motion on the defendants on or before 4pm 23 December 2009;
  - (a) incorporating a declaration as to what, if any, right the Growers represented by the fifth, sixth, seventh and eighth defendants have to the sale proceeds held on trust by the second defendant pursuant to paragraph 7 of the Orders; and
  - (b) amending paragraph 5 of the Originating Motion to read "A declaration as to how the sale proceeds held on trust by the second defendant pursuant to

paragraph 7 of the Orders ought to be distributed between the plaintiff and the first, fifth, sixth, seventh and eighth defendants."

4. The plaintiff is granted leave to proceed against Almond Land Pty Ltd A.C.N. 091 460 992 (in liquidation) pursuant to s.471B of the *Corporations Act* 2001 (Cth).
5. Further directions for the conduct of the proceeding.
6. Such other orders as the Court deems fit.

Court 2, 450 LITTLE BOURKE STREET MELBOURNE

The application will be heard before Justice Davies of the Supreme Court at ~~210 William~~ Street, Melbourne, on 18 December 2009 at 10 am or so soon afterwards as the business of the Court allows.

FILED:

15 DEC 2009

C

This summons was filed by Blake Dawson of Level 26, 181 William Street, Melbourne 3000, Solicitors for the Plaintiff.

**SCHEDULE**

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

No.

**BETWEEN:**

**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)**  
Plaintiff

and

**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED  
(A.C.N. 005 357 522)**

First Defendant

and

**ALMOND LAND PTY LTD (IN LIQUIDATION) (A.C.N 091 460 392)**

Second Defendant

and

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

Third Defendant

and

**LEANNE KYLIE CHESSEY  
(in her capacity as liquidator of Almond Land Pty Ltd (in liquidation))**

Fourth Defendant

Form 5C

Rules 5.02(2), 45.05(2)(b)

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

LIST E

No. S C 1009 10699

**BETWEEN:**

**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)**  
Plaintiff

and

**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED  
(A.C.N. 005 357 522) & ORs (according to the attached Schedule)**

Defendants

**ORIGINATING MOTION**

Date of document: 15 December 2009  
Filed on behalf of: The Plaintiff  
Prepared by:  
**Blake Dawson**  
Level 26  
181 William Street  
MELBOURNE VIC 3000

Solicitor's Code: 53  
DX: 187  
Tel: (03) 9679 3000  
Fax: (03) 9679 3111  
Ref: RWM CHFE  
Attention: Mr R McClymont  
Email: ross.mcclymont@blakedawson.com

**TO THE DEFENDANTS**

**TAKE NOTICE** that this proceeding by originating motion has been brought against you by the plaintiff for the relief or remedy set out below.

**IF YOU INTEND TO DEFEND** the proceeding you must attend before the Court at the time and place named in the summons served with this originating motion.

**FILED**

15 DEC 2009

Prothonotary

**THIS ORIGINATING MOTION** is to be served within one year from the date it is filed or within such further period as the Court orders.

**THE PLAINTIFF SEEKS THE FOLLOWING ORDERS:**

1. Pursuant to Rule 45.05 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) the requirements of Rules 5.03(1) and 8.02 are dispensed with.
2. Pursuant to Rule 45.05 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) the plaintiff has leave to proceed by originating motion in Form 5C.
3. A declaration as to what, if any, right the plaintiff has to the sale proceeds held on trust by the second defendant pursuant to paragraph 7 of the orders made by the Honourable Justice Robson on 9 October 2009 in proceeding No. 9408 of 2009 (**Orders**).
4. A declaration as to what, if any, right the first defendant has to the sale proceeds held on trust by the second defendant pursuant to paragraph 7 of the Orders.
5. A declaration as to how the sale proceeds held on trust by the second defendant pursuant to paragraph 7 of the Orders ought to be distributed between the plaintiff and the first defendant.
6. Any other order the Court deems fit.

DATE 15 December 2009

Blake Dawson

**Blake Dawson**

Solicitors for the Plaintiff

1. Place of trial – Melbourne.
2. This originating motion was filed for the plaintiff by Blake Dawson, of Level 26, 181 William Street, Melbourne VIC 3000.
3. The address of the plaintiff is Level 27, 45 Clarence Street, Sydney NSW 2000.
4. The address for service of the plaintiff is at the offices of Blake Dawson, of Level 26, 181 William Street, Melbourne VIC 3000.
5. The address of the first defendant is Level 14, 100 Queen Street, Melbourne VIC 3000.
6. The address of the second defendant is Level 8, 461 Bourke Street, Melbourne VIC 3000.
7. The address of the third defendant is Level 24, 333 Collins Street, Melbourne, VIC 3000.
8. The address of the fourth defendant is Level 24, 333 Collins Street, Melbourne, VIC 3000.

SCHEDULE

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

No.

BETWEEN:

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)  
Plaintiff

and

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED  
(A.C.N. 005 357 522)

First Defendant

and

ALMOND LAND PTY LTD (IN LIQUIDATION) (A.C.N 091 460 392)

Second Defendant

and

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

Third Defendant

and

LEANNE KYLIE CHESSER  
(in her capacity as liquidator of Almond Land Pty Ltd (in liquidation))

Fourth Defendant

Form 43A

Rule 43.06(3)

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

CERTIFICATE IDENTIFYING EXHIBIT "RWM-3"

Date of document: 15 August 2012  
Filed on behalf of: The First Respondent  
Prepared by:  
**Ashurst Australia**  
Level 26  
181 William Street  
MELBOURNE VIC 3000

Solicitor's Code: 53  
DX: 187  
Tel: (03) 9679 3000  
Fax: (03) 9679 3111  
Ref: 03 2010 2555  
Attention: Ross McClymont  
Email: ross.mcclymont@ashurst.com

This is the exhibit marked "**RWM-3**" now produced and shown to Ross Whyte McClymont at the time of  
affirming the person's affidavit on 15 August 2012.

Before me:



Signature of person taking affidavit

**Michael Patrick Murray**  
Ashurst Australia, 181 William St, Melbourne, Victoria 3000  
An Australian Legal practitioner within the meaning of the Legal  
Profession Act 2004

"**RWM-3**"

**Orders made by Davies J dated 22 December 2009**

LIST E  
S CI 2009 10699

BOSI SECURITY SERVICES LIMITED AS TRUSTEE  
FOR AUSTRALIA AND NEW ZEALAND BANKING  
GROUP LIMITED AND BQS INTERNATIONAL  
(AUSTRALIA) LIMITED AND WESTPAC BANKING  
CORPORATION

### GENERAL FORM OF ORDER

Bezencon

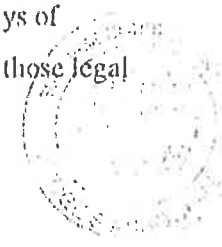
OTHER MATTERS:

None

THE COURT ORDERS THAT:

1. Pursuant to rule 45.05 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) the requirements of Rules 5.03(1) and 8.02 are dispensed with.
2. Pursuant to rule 45.05 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) the Plaintiff has leave to proceed by originating motion in Form 5C.
3. Pursuant to rule 16.01(2) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic):
  - (a) Graham Goldenberg is appointed as the representative of the Growers in the 2002 Timbercorp Almond Project (ARSN 099 611 935);
  - (b) Christopher Mark Littley is appointed as the representative of the Growers in the 2005 Timbercorp Almond Project (ARSN 112 935 092);
  - (c) Constantine Moshopoulos is appointed as the representative of the Growers in the 2006 Timbercorp Almond Project (ARSN 118 387 974);
  - (d) David Butterfield is appointed as the representative of the Growers in the 2007 Timbercorp Almond Project (ARSN 122 511 040); and
  - (e) David Butterfield is appointed as the representative of the Growers in the unregistered managed investment scheme known as the 2002 Timbercorp Almond Project (Private Offer No 1).
4. The persons appointed pursuant to paragraph 3 above, are joined as the Fifth, Sixth, Seventh and Eighth Defendants in the proceeding pursuant to rule 9.02 and/or rule 9.06(b) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).
5. The Plaintiff is granted leave to file and serve an amended originating motion on the Defendants on or before 4:00pm 23 December 2009:
  - (a) incorporating a declaration as to what, if any, right the Growers represented by the Fifth, Sixth, Seventh and Eighth Defendants have to the sale proceeds held on trust by the Second Defendant pursuant to paragraph 7 of the orders; and



- (b) amending paragraph 5 of the originating motion to read "A declaration as to how the sale proceeds held on trust by the second defendant pursuant to paragraph 7 of the Orders ought to be distributed between the plaintiff and the first, fifth, sixth, seventh and eighth defendants."
6. The parties file and serve a list of documents on which they intend to rely in relation to the issue of what right, if any, they have to the net sale proceeds (the **Funds**) to be held on trust by the second defendant pursuant to paragraph 7 of the orders (the **Rights Issue**) on or before 4:00pm on 12 February 2010.
7. The parties file and serve on or before 4:00pm on 19 February 2010:
- (a) written contentions of fact and law addressing the Rights Issue (the **Rights Contentions**);
- (b) any affidavit material upon which they wish to rely in relation to the Rights Issue.
8. The parties file and serve on or before 4:00pm on 5 March 2010:
- (a) written contentions of fact and law in reply to the Rights Contentions;
- (b) any affidavit material upon which they wish to rely by way of reply in relation to the Rights Issue.
9. Each party serve a copy of the documents referred to in paragraphs 6, 7 and 8 upon TGG Almond Committee Inc and any other document filed in the proceeding from the date of this order at the same time as the document is served upon a party to the proceeding.
10. The Liquidators of the Second Defendant pay from the Funds to Clarendon Lawyers, the solicitors for the Fifth, Sixth, Seventh and Eighth defendants, the legal costs and disbursements incurred in this proceeding by the Fifth, Sixth, Seventh and Eighth Defendants in complying with paragraphs 6, 7, 8 and 9 of this order on a solicitor and client basis pursuant to rule 63.32(2)(a) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) up to a maximum of \$100,000 within 14 days of presentation to the Liquidator by Clarendon Lawyers of a tax invoice for those legal
- 

costs and disbursements, such tax invoices rendered by Clarendon Lawyers with such frequency as it sees fit.

11. The proceeding is listed for further directions at 10:00am on 12 March 2010.
12. Costs of today are reserved.
13. Liberty to apply.

DATE AUTHENTICATED:

**4 December 2010**



JUSTICE DAVIES

SCHEDULE OF PARTIES

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 WESTPAC BANKING CORPORATION (ACN 007 457 141) Plaintiff

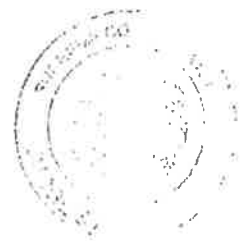
- and -

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522) First Defendant

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

MARK ANTHONY KORDA (in his capacity as liquidator of Almond Land Pty Ltd (in liq)) Third Defendant

LEANNE KYLIE CHESSER (in her capacity as liquidator of Almond Land Pty Ltd (in liq)) Fourth Defendant



Form 43A

Rule 43.06(3)

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

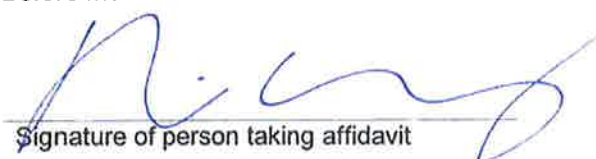
CERTIFICATE IDENTIFYING EXHIBIT "RWM-4"

Date of document: 15 August 2012  
Filed on behalf of: The First Respondent  
Prepared by:  
**Ashurst Australia**  
Level 26  
181 William Street  
MELBOURNE VIC 3000

Solicitor's Code: 53  
DX: 187  
Tel: (03) 9679 3000  
Fax: (03) 9679 3111  
Ref: 03 2010 2555  
Attention: Ross McClymont  
Email: ross.mcclymont@ashurst.com

This is the exhibit marked "RWM-4" now produced and shown to Ross Whyte McClymont at the time of  
affirming the person's affidavit on 15 August 2012.

Before me:



Signature of person taking affidavit

**Michael Patrick Murray**  
Ashurst Australia, 181 William St, Melbourne, Victoria 3000  
An Australian Legal practitioner within the meaning of the Legal  
Profession Act 2004

"RWM-4"

**Judgment of Davies J dated 15 June 2011  
reported as (2011) 84 ACSR 341**

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

10 SUPREME COURT OF VICTORIA

DAVIES J

14–17, 21–24, 28 February, 1, 21, 22 March, 15 June 2011 —

15 [2011] VSC 255

20 Managed investment — Liquidations — Apportionment of interests — Managed  
 investment schemes for cultivation of almonds — Companies in Timbercorp placed  
 in liquidation — Scheme gave rights to use orchards and land — Land and orchards  
 subject to mortgages and securities — In earlier proceedings court gave direction  
 authorising liquidators to proceed with sale of schemes — Court directed proceeds  
 be placed into trust pending rights proceeding — Whether securities over assets  
 entitled banks to whole of net proceeds — Whether pre-extinguishment rights of  
 growers proprietary in nature — Whether opportunity for projects to be  
 25 restructured if rights not extinguished — (CTH) Corporations Act 2001 Pt 5C,  
 ss 601FS, 601FT.

30 The Timbercorp group of companies went into administration in April 2009. In June  
 2009 the companies, which included the second defendant, Almond Land Pty Ltd (in liq)  
 (AL), were placed into liquidation. Before liquidation, the Timbercorp group had managed  
 and operated managed investment schemes for the cultivation of almonds. Five of the  
 schemes (the almond projects) had used commercial almond orchards established by AL  
 on its land. Investors in these projects (the growers) subscribed for interests in  
 “almondlots”, which carried rights to use and occupy AL’s orchards for the terms of the  
 projects of which they were members (the growers’ rights).

35 Timbercorp Ltd (TL) was the parent entity of the Timbercorp group. Timbercorp  
 Securities Ltd (TSL), a wholly owned subsidiary of TL, was the responsible entity (RE)  
 of the schemes. The schemes included the 2002, 2005, 2006 and 2007 almond projects  
 (the registered projects). The Timbercorp group also managed private offer investment  
 schemes which included the other almond project the subject of this proceeding namely,  
 the 2002 private offer almond project managed by Almond Management Pty Ltd (AM),  
 40 another TL subsidiary.

45 All of the almond projects had many years left to run but the insolvency had the  
 consequence that the Timbercorp companies could not continue their involvement in the  
 projects. The liquidators brought the projects to an end when they extinguished the  
 growers’ rights on 2 December 2009 so that they could sell AL’s land, almond trees and  
 water licences (the almond assets) free of any encumbrance to a third party. As the  
 plaintiff, BOSI Security Services Ltd (BOSI) and the first defendant, Australia and New  
 Zealand Banking Group Ltd (ANZ), (the banks) held securities over the almond assets for  
 loan facilities given by them, the banks also had to give releases and discharges of those  
 securities.

50 Due to the competing claims, the net proceeds from the sale have been held in a trust  
 fund pursuant to an order by a trial judge pending a court proceeding (the rights  
 proceeding) to determine which persons have rights to the net proceeds.

doubtful that there was any real prospect that such an order would have been made. The trial judge would not appoint HML as temporary RE in October 2009 because HML's consent was conditional: at [126].

(viii) The growers' submission that read fairly HML would have consented to act as permanent RE is rejected. There was unequivocal evidence that HML was not prepared to take on the role of permanent RE without the modifications to ss 601FS and 601FT. In view of that evidence no inference could be made that HML would have been willing to be appointed as permanent RE: at [132].

(ix) 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. There was no possibility, other than a theoretical possibility, that the projects would have continued, if the growers' rights had not been extinguished. Accordingly, no value can or should be attributed to the rights given up: at [137].

### Application

This was a proceeding determining the nature and value of rights held by claimants on a trust fund ordered by the court in an earlier proceeding.

*P E Anastassiou SC, R G Craig and K E Foley* instructed by *Blake Dawson* for the plaintiff (BOSI Security Services Ltd (ACN 009 413 852) (as trustee for Australia and New Zealand Banking Group Ltd (ACN 005 357 522), BOS International (Australia) Ltd (ACN 066 601 250) and Westpac Banking Corporation Ltd (ACN 007 457 141)).

*A C Archibald QC and W A Harris SC* instructed by *Allens Arthur Robinson* for the first defendant (Australia and New Zealand Banking Group Ltd (ACN 005 357 522)).

*O Bigos* instructed by *Arnold Bloch Leibler* for the second to fourth defendants (Almond Land Pty Ltd (in liq) (ACN 091 460 392), Mark Anthony Korda (in his capacity as liquidator of Almond Land Pty Ltd (in liq)) and Leanne Kylie Chesser (in her capacity as liquidator of Almond Land Pty Ltd (in liq))).

*G T Bignmore QC and S Hopper* instructed by *Clarendon Lawyers* for the fifth to eighth defendants (Graham Goldenberg (in his capacity as representative of the growers in the 2002 almond project), Christopher Mark Littley (in his capacity as representative of the growers in the 2005 almond project), Constantine Moshopoulos (in her capacity as representative of the growers in the 2006 almond project) and David Puterfield (in his capacity as representative of the growers in the 2007 almond project and as a representative of the growers in the 2002 private offer scheme)).

**Davies J.**

### A. Introduction

[1] The Timbercorp group of companies went into administration on 23 April 2009. On 29 June 2009, the creditors voted at their second meeting<sup>1</sup> for the companies to be wound up and the companies, which included the second defendant, Almond Land Pty Ltd (in liq) (AL), were placed into liquidation. The third and fourth defendants, Mark Anthony Korda and Leanne Kylie Chesser (the liquidators), who had been the administrators of the companies, were appointed as the liquidators.

1. Section 439A of the Corporations Act 2001 (Cth) (the Act).

securities, and were only entitled to exercise their rights under their securities in respect of the secured property, "subject to all of the growers' rights",<sup>3</sup> which were defined in the deeds to mean:

5 ... all of their present rights and interests under the Project Documents and any other rights and interests under the Project Documents.<sup>4</sup>

"Project Documents" was a reference to the constituent documents governing the almond projects.<sup>5</sup>

10 [8] The banks have not disputed that the deeds of covenant operate to give the growers priority of payment out of the net sale proceeds, if and in so far as the rights of the growers that were extinguished were property rights in the assets sold holding a measure of value at the time of extinguishment. However, they disputed that the growers held any rights of that nature or that if they did, that their rights held any value at the time they were extinguished.

15 **B. Primary issues for determination**

[9] The primary issues for determination in the rights proceeding are:

- 20 (a) the intent and effect of the orders of Robson J in *Timbercorp Securities (No 3)*.<sup>6</sup> The issue is whether Robson J reserved to the court in the rights proceeding the task of valuing the pre-extinguishment rights and interests of the growers and the banks in the assets sold in order to determine the division of the net proceeds between them, as contended for by the growers, or whether it was incumbent on both claimants to establish rights of a proprietary nature in the assets that were sold in order to found an entitlement to share in the net proceeds, as contended for by the banks;
- 25 (b) if rights of a proprietary nature in the assets sold must be shown to found the entitlement, whether the project arrangements gave the growers any proprietary interest in those assets;
- 30 (c) given that the projects could not continue under the Timbercorp structure, whether the growers' rights held any value just before they were extinguished; and
- (d) if so, the value to be ascribed to those rights.

35 [10] The banks did not raise any issue for determination in this proceeding concerning the priority of payment as between them. The banks have agreed to determine that issue separately, if it becomes relevant and necessary.

**C. Background**

[11] The background to the dispute explains how the issues arise.

40 [12] The Timbercorp group had been in the business of agribusiness investment. The 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 investors in projects. Timbercorp Ltd (TL) was the parent entity of the  
45 Timbercorp Group and a publicly listed company on the Australian Securities Exchange. At the time that the Timbercorp group was placed under

3. Clause 2(a)(i) of the deeds of covenant.

4. Clause 1.1 of the deeds of covenant.

5. Clause 1.1 of the deeds of covenant.

6. (2009) 74 ACSR 626; [2009] VSC 510.

almond projects formally<sup>8</sup> and in mid-July 2009 the court heard the winding up applications. A growers' group, the Timbercorp Growers Group (TGG), opposed the applications and sought the appointment of a temporary RE for the almond projects. TGG's opposition was partly based on the concern that the winding up may immediately extinguish growers' rights, which the growers wanted to avoid. The court adjourned the winding up applications by consent to enable meetings of the growers in each almond project to consider various resolutions directed at enabling the almond projects to continue in a restructured form. These meetings were held on 31 July 2009, but no specific recapitalisation proposal was able to be put before the meetings, and the meetings were adjourned to a date to be fixed. No further occasion arose for the meetings to resume because no restructure proposal could be formulated before the almond assets were sold and the growers' rights extinguished.

[17] AL's almond orchards continued to be maintained over this time but only as the consequence of short term arrangements that the liquidators had entered into with Select Harvest Ltd (SH), which had been managing the day-to-day operations of the almond orchards under the project structures. The liquidators considered that the almond orchards were at serious risk of wasting and impairment unless they were sold or the projects were recapitalised in the near future. Accordingly, on 4 August 2009 they published an advertisement seeking expressions of interest for the purchase of the almond assets (identified as "comprised of owned and leasehold interests in freehold, and owned and leasehold interests in water rights") or the recapitalisation of the almond projects. [18] The liquidators also decided that in order to facilitate and maximise the realisation of the almond assets at the best achievable price, they would need to demonstrate to a potential bidder that the buyer could, if it wished, buy the almond assets with title unencumbered by the growers' rights and the rights of the banks as secured creditors. On 17 August 2009, the liquidators renewed their application to wind up the almond projects. In the alternative, they sought directions from the court that they were justified in amending the constitutions of the almond projects to give the RE an express power to terminate the growers' rights to enable the sale of almond assets unencumbered by the growers' rights. The court would not wind up the projects and adjourned the application to a date to be fixed but did authorise the liquidators to cause TSL to make the amendments to the constitutions which were effected on 28 August 2009.

[19] The liquidators received seven bids for the almond assets. All of the bids were for the transfer of clear title to the almond assets, unencumbered by any rights of the growers or of the secured creditors. No bid was received for the recapitalisation of the almond projects. The liquidators selected Olam Orchards Pty Ltd (Olam) as the preferred bidder and on 18 September 2009, a sale and purchase deed (SPD) for the sale of the almond assets to Olam for \$128 million was executed.

[20] The assets sold under the SPD were:

- the properties;
- the water rights;
- the almond orchards;

50 8. Orders of the Honourable Robson J made 17 June 2009 in proceeding No S CI 2009 7114. The 2002 private offer project was not the subject of those court proceedings.

[79] The banks are entitled to the full extent and benefit of their charges and securities. The banks are under no obligation to give up or surrender any of their security rights if they so chose. On the other hand, subject to any agreement that is made between the parties, if the sale proceeds, the banks are only entitled to that portion of the sale proceeds that represents the property over which they hold securities.

[80] ... The fund, if it is created, ... is to be divided "by reference to the proportionate share of the fund measured by the extent and value of the claims or rights given up in exchange for an interest in the fund.

[81] ... The banks can obtain payment for only so much of the property as they have a charge over. The key issue is what proportion of the fund represents the property over which they hold security.<sup>17</sup>

His Honour was firmly and, with respect, properly of the view that he could not determine on the material before him whether the banks' offer was an appropriate apportionment according to law and, accordingly, that he could not direct that the liquidators were justified in accepting that offer. Robson J accordingly directed that the liquidators were not justified in entering into an agreement to accept \$6 million to extinguish the growers' rights in accordance with the terms of the banks' offer.<sup>18</sup> Robson J held though that the liquidators were justified in instituting or participating in proceedings to determine the extent and measure of the interest in the fund constituted by the proceeds of the sale of the almond assets.<sup>19</sup> In the event, BOSI instituted these proceedings and joined the liquidators, ANZ and the growers (by way of a representative claim) as defendants.

[23] Robson J authorised the liquidators in their capacity as liquidators of TL, TSL, AL and AM to enter into and perform the SPD and ordered the net proceeds to be held in trust pending the hearing and determination by the court of the rights proceeding to determine which person or persons had any rights to all or any part of the net proceeds. The terms of his Honour's orders were:

6. [The liquidators] in their capacity as liquidators of [TSL], [AM], [TL] and [AL] may enter into and perform: the SPD; and any document referred to, in connection with, or necessary to give effect to the SPD.

7. Upon completion of any sale under the SPD the net proceeds of sale (after payment of selling costs and expenses, retentions (if any) and the costs and expenses of the liquidators ... referable to the preservation and realisation of the assets the subject of the SPD ... be held ... in an interest bearing trust account ... pending the hearing and determination by the Court of a proceeding (Rights Proceeding) to determine which person or persons have any rights to all or any part of the Net Proceeds (Claimants), and to be held on trust for the Claimants until further order of the Court.

The terms of his Honour's orders preserving the claimants' rights were (at [89]):

8. Insofar as each of the Secured Creditors have any rights to the assets the subject of the [Sale and Purchase Deed (SPD)], whether under their securities over those assets or otherwise, nothing in the release of those securities upon completion of the SPD will prejudice those rights for the purposes of their claim to all or any part of the Net Proceeds.

17. *Timbercorp Securities (No 3)* at [79]–[81].

18. *Timbercorp Securities (No 3)* at [85].

19. *Timbercorp Securities (No 3)* at [87].

exchange for an interest in the fund”<sup>24</sup>. The growers argued that they held rights of a contractual and proprietary nature in respect of the almond assets pursuant to the constituent documents that governed each of the almond projects. They also argued that those rights were valuable as at 2 December 2009 when they  
5 were extinguished to enable the completion of the sale to Olam and that the value of those rights is the measure of their entitlement to share in the net proceeds. They argued further that AL took its rights in the orchards subject to the growers’ rights of tenure under sublease and licence and accordingly that the banks’ rights as mortgagees under their securities over the almond assets were no greater than  
10 AL’s “reversionary” interest in those assets and should be valued on that basis. The growers reasoned that the banks’ securities are a “red herring in this case”<sup>25</sup> because AL could not give the banks an interest greater than the “reversionary interest” that AL possessed at the time. Further they argued that if, and in so far as, there was any amount of the net sale proceeds remaining after accounting for  
15 the respective entitlements of the growers and the banks, the remaining balance should be apportioned between the growers and the banks on the “marriage principle”.

[28] Robson J did not rule that each party’s proportionate share of the net  
20 proceeds was to be determined by the value of their respective rights, without regard to whether the rights given up were rights of a proprietary nature in the assets sold. It is apparent from a consideration of the reasons of Robson J that his Honour was concerned with the measure of the growers’ *property* rights surrendered or transferred as part of the consideration paid by Olam. This is explicit in para 77 of his Honour’s reasons, where his Honour stated (at [77]):

25 [77] As the evidence in this case indicates, there is uncertainty at this stage as to precisely what property rights of the growers are to be transferred or surrendered as part of the consideration for the payment of the purchase price of approximately \$128 million. Until those rights are identified it is not possible according to law to fairly assess the value of the rights being surrendered on behalf of the growers.

30 In *Hazelton Air Charter*<sup>26</sup> Goldberg J held that fairness and appropriateness is not a sufficient basis on which to determine the extent and measure of the respective *proprietary* interests of two groups in a fund as apportionment must be determined by appropriate principles of law and equity. Robson J’s reasoning in  
35 [77] was entirely consistent with *Hazelton Air Charter*. Robson J did not determine that the growers had a right to share in the net proceeds or more specifically that the extinguishment of their rights would give them an interest in the net proceeds, the extent and measure of which was to be determined according to the principles laid down by Goldberg J in *Hazelton Air Charter*. His  
40 Honour did no more than preserve the growers’ ability to make that claim.

[29] The misconception in the growers’ primary case is that it presupposes that rights were given up in exchange for an interest in the net proceeds so that, pursuant to the orders of Robson J, the growers’ and the banks’ proportionate  
45 shares of the fund are to be measured by the value of the rights that each gave up. The difficulty with that submission is that Robson J’s orders did not create in the growers any entitlement or any right to share in the net proceeds that the growers did not otherwise possess nor, in my opinion, on a fair reading of his

50 24. *Timbercorp Securities (No 3)* at [80].

25. Transcript of proceeding, 21 March 2011, 833.

26. (2002) 41 ACSR 472; [2002] FCA 529.

that the application fees would be deductible in full to the growers as outgoings on revenue account incurred in the course of carrying on a business of primary production, namely the cultivation of almond trees, the growing of almonds and the harvesting of almonds for processing and sale.

5 [34] Management fees were payable by the growers because the actual cultivation and harvesting of the almonds was done on their behalf under management agreements. For the 2002 private offer project, the growers' management agreements were with AM. For the registered projects the growers' management agreements were with TSL as RE, which TSL contracted out to AM.  
10 For all of the projects, AM engaged SH as an independent contractor to manage the almond orchards on a day-to-day basis and to harvest, process and market the almond crops.

15 [35] Licence and rental fees were payable by the growers because the growers did not acquire the land or the orchards which they used in and for their primary production businesses. It was essential for tax deductibility that the growers did not get rights as owners of the orchards and the constituent documents expressly provided that the land, the almond trees, the capital works and the water licences would be, and would remain, the property of AL.<sup>30</sup> These assets did not become  
20 "scheme property" of the projects.<sup>31</sup>

[36] The growers derived their income from the sale of the almonds. All sales of almonds were pooled and each grower was entitled to a share of the net proceeds determined in accordance with a formula set out in the relevant constitution governing each registered project and in the management agreement  
25 applicable to the 2002 private offer project.

[37] Each of the projects was intended to run for several years. The terms of the 2002 project and the 2002 private offer project were 20 years and the terms of the 2005–07 projects were between 20 and 24 years.

30 [38] I now set out the constituent elements of each of the projects in greater detail for the purposes of identifying with specificity the nature of the rights that the growers acquired as participants in the projects.

35 Timbercorp almond project — Early growers (to 15 June 2007); PR 2006/146 — Income tax: 2007 almond project — Post 30 June growers; Div 358, Sch 1 of the Taxation Administration Act 1953 (Vic); PR 2007/71 — Product ruling: The product rulings system.

30 Clause 2.2 of the 2002 licence and joint venture agreements; cl 2.2 of the 2005, 2006 and 2007 subleases.

31. The leases and subleases expressly provided that these assets were not "scheme property": cl 2.2 of the head leases; cl 1.7 of the subleases.

40 Section 9 of the Act defines *scheme property* of a registered scheme to mean:

- (a) contributions of money or money's worth to the scheme; and
- (b) money that forms part of the scheme property under provisions of this Act or the ASIC Act; and
- (c) money borrowed or raised by the responsible entity for the purposes of the scheme; and
- 45 (d) property acquired, directly or indirectly, with, or with the proceeds of, contributions or money referred to in paragraph (a), (b) or (c); and
- (e) income and property derived, directly or indirectly, from contributions, money or property referred to in paragraph (a), (b), (c) or (d).

Note 1: Paragraph (a) — if what a member contributes to a scheme is rights over property, the rights in the property that the member retains do not form part of the scheme property.

50 Note 2: For provisions that are relevant to paragraph (b), see subsections 177(4), 1317HA(1A), 1317HB(3) and 1317HD(3) of this Act and subsection 93A(5) of the ASIC Act.

[43] The licence and joint venture agreement provided for the growers to use and occupy the almondlots under licence from AL and for the growers to pay a licence fee to AL per almondlot for their rights of use and occupation.<sup>40</sup> The licence that AL granted to the growers was only for the purposes of the joint venture operations, that is for growing, cultivating and harvesting the almonds<sup>41</sup> and conferred no rights of exclusive occupation on the growers.<sup>42</sup> The agreement also obliged the growers to use the almondlots solely for the purpose of the joint venture operations.<sup>43</sup>

[44] The licence was limited in duration.<sup>44</sup> The term of the agreement was expressed to continue until the earlier of the termination of the joint venturers' participating interest in the project, 30 June 2022 or termination of the project.<sup>45</sup>

[45] It appears that security of tenure for the growers for the duration of the project in respect of those almondlots was effected, or intended to be effected, by a head lease of the land used by this project (as well the land used by the 2002 registered project) from AL to TSL and a sublease from TSL back to AL for licence to the growers. The prospectus for the 2002 registered project stated that the head lease secured the growers' tenure of the land for the duration of the project by giving TSL exclusive rights of possession of that land. The sublease back to AL was to enable AL to licence growers to use and occupy their almondlots for the purposes of the joint venture operations.<sup>46</sup> The head lease and the sublease contained clauses limiting the use of the land for the purposes of the project<sup>47</sup> and limiting the duration of the leases to the duration of the project. Both leases provided for automatic termination if the project ended.<sup>48</sup>

[46] The rights that the growers acquired as participants in the project in relation to AL's property may be summarised as:

- (a) the right to grow almonds on AL's trees;
- (b) the right to manage the orchards for the purpose of growing almonds;
- (c) the right to harvest the almonds;
- (d) the right to 90% of the sale proceeds from the harvests (shared with AL which was entitled to 10% of the sale proceeds);<sup>49</sup> and

35

40. Clause 7 of the licence and joint venture agreement: 2002 Timbercorp almond project (private offer No 1).

41. Clause 8 of the licence and joint venture agreement: 2002 Timbercorp almond project (private offer No 1).

42. Clauses 3.1 and 3.2 of the licence and joint venture agreement: 2002 Timbercorp almond project (private offer No 1).

43. Clause 8.1(a) of the licence and joint venture agreement: 2002 Timbercorp almond project (private offer No 1).

44. Clause 4 of the licence and joint venture agreement: 2002 Timbercorp almond project (private offer No 1).

45. Clause 4.1 of the licence and joint venture agreement: 2002 Timbercorp almond project (private offer No 1).

46. 2002 Timbercorp almond project prospectus, 18

47. Clause 6 of the sublease Carina: 2002 almond projects; cl 4.1 of the sub-underlease Carina: 2002 almond projects.

48. Clauses 3 and 12 of the sublease Carina: 2002 almond projects; cl 2 and 8 of the sub-underlease Carina: 2002 almond projects.

49. Clause 11.4 of the licence and joint venture agreement — 2002 Timbercorp almond project (private offer No 1).

A "Participating Interest" was defined in cl 1.1 to mean the entitlement of the grower to the "Project assets", the "Crop", the "Product" and the "Proceeds" calculated in accordance with the formula set out in that definition. Relevantly, that entitlement did not extend to conferring any proprietary rights in the growers in the land, the almond trees, the capital works or the water licences.

[52] The growers accepted that the rights of participating growers in the 2002 almond project in relation to those assets were also contractual in nature.<sup>57</sup> Those contractual rights likewise did not give those growers an interest in the fund constituted by the sale of the almond assets.

#### 2005, 2006 and 2007 almond projects

[53] A schematic diagram of the 2005, 2006 and 2007 almond projects is attached to these reasons in Sch C.

#### (a) Analysis

[54] Growers who participated in these projects had the same rights under these projects as under the 2002 projects with respect to a several share of the almonds produced and the proceeds from the harvesting of those almonds, save that they were entitled to 100% of the sale proceeds as there was no joint venture with AL.<sup>58</sup> However, instead of rights under licence, growers took a sublease of identifiable areas of AL's land for the purposes of their horticultural activities. In dispute is whether those subleases included the demise of the trees, capital works and water licences.

[55] The demise was contained in cl 3.1(a) of the subleases in the following terms:

[TSL] grants to the Participant Grower and the Participant Grower takes from [TSL] a sub-lease, effective from the Commencement Date, to use and occupy the relevant ... Land Lots for the sole purpose of conducting the Almondlot operations.<sup>59</sup>

[56] "Land Lots" was defined in the subleases to mean "that part of an almondlot that is situated on ... Land consisting of approximately 0.15 hectares".<sup>60</sup> "Almondlot" was defined, although the definitions in the various subleases were not identical. "Almondlot" was defined variously as:

(a) (i) in the 2005 Wangera sub-lease:

"an interest in the Project held by the Participant Grower, including its interest in, and rights in relation to, each separately identifiable area of the Land comprising approximately 0.25 hectares on which a Participant Grower will conduct the Almondlot Operations and which includes the Almond Trees, the Capital Works and the Water Licences attributed to the Project."<sup>61</sup>

57. Transcript of proceeding, February 21 2011, 369.

58. Clause 13.1 of the Constitution: 2002 Timbercorp almond project.

59. Clause 3.1(a) of the sublease for the 2005 Wangera project used slightly different wording. It provided that:

[TSL] grants to the Participant Grower and the Participant Grower takes from [TSL] a sub-lease, effective from the Commencement Date, to use and occupy the relevant Almondlots for the sole purpose of conducting the Almondlot Operations.

The difference is not material for the purposes of the analysis.

60. Clause 1.1 of the 2005, 2006, 2007 subleases.

61. Clause 1.1 of the sublease deed: 2005 Timbercorp almond project.

[59] In my view, the banks' construction fails to give due regard to the project arrangements, which involved integrated legal relationships between AL, TSL and the participant growers. Those integrated legal relationships provide the context in which the court is to determine the meaning of the language used by reference to what a reasonable person would have understood that language to mean. As the High Court held in *Toll (FGCT) v Alphapharm Pty Ltd* at [40]:<sup>66</sup>

[40] References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.<sup>67</sup>

This approach to construction recognises that the meaning of a text may take on a different understanding when the text of the contract is considered in a broader context, having regard to the object of the transaction and the surrounding circumstances in which the transaction was entered into.

[60] A consideration of the constitutions, the head leases and the subleases, as an integrated commercial arrangement, makes it evident that the interest conveyed by lease to TSL was a leasehold interest in land on which commercial almond orchards were or would be established and that the "Land Lots" demised were those parts of the orchards on the relevant land that TSL allocated to growers as "almondlots".

[61] The starting point are the constitutions of the 2005, 2006 and 2007 projects. Each constitution gave the RE the express power in cl 11(1):

to lease the Land from the Land Owner, and sub-lease it to, the Participant Grower<sup>68</sup>

[62] Each constitution also included cl 18.1 which required the terms of the subleases of "the Land" to be read subject to the constitutions. Clause 18.1 provided as follows:

18.1 *Status of Agreements*

The Sub-leases<sup>69</sup> entered into between [TSL] in its personal capacity, [AL] and each of the Participant Growers and the Almondlot Management Agreement entered into between [TSL] in its personal capacity and each of the Participant Growers must be read subject to the terms and conditions of this Deed.<sup>70</sup>

[63] "Land" was a defined term in each constitution and meant:

... the land on which the Project will be conducted, as described in the PDS and such other land which is used in the Project.<sup>71</sup>

66. (2004) 219 CLR 165; 211 ALR 342; [2004] HCA 52 (*Toll (FGCT)*).

67. *Toll (FGCT)* at [40]. See also *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451; 208 ALR 213; [2004] HCA 35 at [22].

68. Constitution: 2005 Timbercorp almond project; Constitution: 2006 Timbercorp almond project; Constitution: 2007 Timbercorp almond project.

69. In the 2005 constitution the phrase "Deed of Sub-lease" is used.

70. Constitution: 2005 Timbercorp almond project; Constitution: 2006 Timbercorp almond project; Constitution: 2007 Timbercorp almond project.

71. Clause 1.1 of the Constitution: 2005 Timbercorp almond project; Constitution: 2006 Timbercorp almond project; Constitution: 2007 Timbercorp almond project.

[67] In other words, the definition of "almondlot" reflects that an almondlot comprised a bundle of rights constituting the grower's "interest in the Project" which carried with it rights "in and in relation to" the land "*which [land] includes the almond trees, the capital works and the water licences*". Properly construed, the phrase *and which includes* relates back to the land *as* including the almond trees, the capital works and the water licences.

[68] Consistently, each PDS represented that TSL had leased from AL the whole of the project land and capital improvements, comprising the orchards. The apparent purpose was to give TSL exclusive possession of the orchards to secure the growers' tenure for the duration of the projects.<sup>78</sup> The head leases however, described the "land" leased to TSL by reference to Torrens system volume and folio references. There was no mention in those head leases of any of the trees, the capital works and the water licences forming part of the demise. Hence the banks' submission that the lease was of the physical land only. However, it would be artificial and wrong to construe the head leases in isolation from the project documentation. The head leases need to be considered in the whole legal context governing the project arrangements.

[69] Considered in context, the leases and subleases were part of the interconnected arrangement by which growers obtained rights to cultivate and harvest almonds on orchards that AL had planted or made available to the growers for that purpose. The land that AL leased to TSL was land on which AL had or would establish almond orchards to be used in and for the projects.<sup>79</sup> That land under the terms of the leases could only be used by TSL for the purposes and duration of the projects.<sup>80</sup> To that end, the leases expressly provided that AL consented and authorised TSL to enter into the subleases with the participant growers.<sup>81</sup> Under the project arrangements, the growers obtained their rights to cultivate and harvest the almonds grown on those orchards on subscription for, and allotment of, almondlots. Each allotment had a bundle of rights attached to it and these almondlots were situated on the land that TSL leased from AL. Those bundles of rights included rights to the use and occupation of the almond trees, capital works and water licences attributable to the land on which the almondlots were situated. The sublease of the "Land Lots" from TSL to the growers, which AL had consented to and authorised, was for the purposes of the growers' horticultural operations under the project arrangements. In my view, on the proper construction of cl 3.1(a) considered in the broader context of the project arrangements, the "Land Lots" demised under the subleases were the individual parts of the leased orchards established or made available by AL for the purposes of the projects that growers were allocated on allotment of almondlots, in respect of which the growers took possessory rights of use and occupation.

[70] Viewed in this context, the intent of cl 2 of the subleases which the banks relied on to support their construction, was to confirm that ownership of the assets was to remain with AL, although the works that AL was required to carry

78. Each PDS represented that TSL had leased the whole of the project land and capital improvements comprising the orchards from AL: 2005 Timbercorp almond project: Product disclosure statement, 26; 2006 Timbercorp almond project: Product disclosure statement, 31; 2007 Timbercorp almond project: Product disclosure statement, 55.

79. Clause 2 of the 2005, 2006, 2007 subleases; definition of "Orchard", cl 1.1 of the 2005, 2006 and 2007 leases.

80. Clause 5.1 of the 2005, 2006 and 2007 leases.

81. Clause 9.2 of the 2005, 2006 and 2007 leases.

consequently that those assets formed part of the demise.<sup>86</sup> It may be accepted that it would have been a breach of TSL's obligation not to derogate from the grant if the assets had formed part of the demise and TSL had interfered with the growers' rights of use and occupation.<sup>87</sup> The inherent flaw in this argument is that the growers seek to use the principle of non-derogation from grant in order to create property rights. The principle of non-derogation from grant entitles a lessee to remedies against the landlord<sup>88</sup> but does not operate to create property rights that did not already exist under the terms of the grant. Accordingly if the assets were not part of the demise, this principle would not have advanced their case.

[75] The growers had also argued that the "tenants'" rights to use and enjoy those assets, if not part of the demise, formed covenants that touched and concerned the land and bound the reversion. The claim was put variously but was based on the proposition that the growers' rights were appurtenant to and necessary for the completion of the permitted and required purposes of the use of the demised land under the subleases for the cultivation of almonds. That is, that they were rights that would be of no benefit if separated from the demised land, and that the growers' use and enjoyment affected the nature, quality mode of use or value of the land of the reversioner.<sup>89</sup> The argument has superficial attraction but the argument does not withstand scrutiny.

[76] First, no attempt was made to specify the covenant that was claimed to touch and concern AL's land or the source of the putative covenant. Merely describing the covenant in terms of the "tenants'" rights to the use and enjoyment of the assets begged the question.

[77] Second, no privity of estate existed between AL and the growers. The privity of estate existed between AL as landlord and TSL as tenant and between TSL as sublessor and the growers as sublessee. TSL could not confer any interest in the growers in relation to the land that it did not hold.

[78] Third, there was no covenant expressed in the head leases to the effect argued by the growers.<sup>90</sup> Nor as a matter of law could one be inferred.<sup>91</sup> The covenant running with the lease and sublease was the restriction on the use of the demised land for the purposes of the almondlot operations.<sup>92</sup> The putative covenant is not found in that covenant (and nor was it argued that it could be). Accordingly, the rights that the growers claimed were not rights that could have passed with the subtenancy of the land. Accordingly, this argument also would not have advanced the growers' case as AL's obligations to the growers under the sublease to establish the amenity of the demised land as a commercial orchard were personal covenants only.

#### 40 Conclusion

[79] I have reached the conclusion that the growers in the 2002 projects have no legal entitlement to a share of the net proceeds because they held no proprietary interest in the assets that Olam purchased. Although they owned the

86. Contentions of fact and law for the fifth to eighth defendants (growers' submissions) (26 February 2010), 11 [41].

87. *Specialist Diagnostic Services* at [151] per Croft J.

88. *Aldin v Latimer, Clark, Muirhead & Co* [1894] 2 Ch 437 at 444 per Stirling J.

89. *Rodgers v Hosegood* [1900] 2 Ch 388 at 395 per Farwell J.

90. Compare *Jourdain v Wilson* (1821) 106 ER 935.

91. *O'Keefe v Williams* (1910) 11 CLR 171 at 220; 17 ALR 113 per Higgins J.

92. Clause 3.1(a) of the 2005, 2006, 2007 subleases; cl 5 of the 2005, 2006, 2007 leases.

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.

*Were the projects viable if restructured?*

[88] None the less, the growers argued that the insolvency of the Timbercorp group did not mean that the projects could not continue, if restructured. They referred to an article by Barrett J, writing extra judicially, in which his Honour made the observation that "a simple replacement of the [RE] under the statutory provisions should be feasible" where a scheme is "on a financially healthy footing".<sup>95</sup> They argued the projects were feasible if TSL was removed as the RE and replaced by a new RE with a new structure to put the projects on a financially healthy footing and therefore were capable of running their full term, if restructured. They submitted that their rights were accordingly valuable when extinguished, measured by the net present value of the future income from the projects on the hypothesis that they would have continued on a restructured basis for their full term.

[89] Significantly, the growers did not submit that the projects would have been restructured, if their rights had not been extinguished. Certainly, the objective evidence showed that the projects were unable to be restructured before the almond assets were sold. There was evidence that the liquidators had sought, but had received no expressions of interest for the recapitalisation of the almond projects from their advertisement published on 4 August 2009. There was also evidence that the growers had attempted before the almond assets were sold to secure a restructure proposal to put to members for voting but had not been successful. However, the growers' contention was that it was sufficient to set up the hypothesis (or counterfactual as counsel for the parties each called it) for the purposes of valuation by establishing on the balance of probabilities that the projects could have been restructured in a way that would have made them viable and that there was the legal ability to effect that restructure. They contended that they did not have to prove that the projects would have been restructured, which they argued was in the realm of hypothesis "where proof is necessarily unattainable".<sup>96</sup> Rather, it was put, they had the evidentiary burden of demonstrating that:

- (a) there was a market of reasonably priced RE's for hire;
- (b) REs of viable schemes are routinely replaced; and
- (c) that the projects as restructured would have been viable—

from which "the court [could] safely assume that the schemes would continue".<sup>97</sup> They argued that for this purpose the market, that is a purchaser prepared to purchase the land subject to the growers' rights, is to be assumed.<sup>98</sup>

[90] The banks argued that the authorities on loss of opportunity claims were apposite to what the growers must establish as the growers' case on valuation was founded on the loss of a chance, being the loss of a chance to earn an income stream by having the almond projects run to term under a replacement RE on the basis of the various assumptions for which they contended. They contended that

95. Reginald Barrett, "Insolvency of Registered Managed Investment Schemes" (2008) *Banking and Financial Services Law Assn*, Queenstown, New Zealand.

96. *Poseidon Ltd & Sellers v Adelaide Petroleum NL* (1994) 179 CLR 332; 120 ALR 16 (*Poseidon*).

97. Growers' closing submissions: Rights and valuation issues (11 March 2011), 19 [4.2].

98. *Spencer v Commonwealth* (2010) 241 CLR 118; 269 ALR 233; [2010] HCA 28.

suffered. Proof on the balance of probabilities has no part to play in the evaluation of such hypotheses or possibilities: evaluation is a matter of informed estimation.<sup>101</sup>

Thus, the opportunity lost must be established on the balance of probabilities, even if that proof of the loss of that opportunity involves an hypothesis. Once the opportunity has been established, the value of that loss is to be ascertained by reference to the degree of likelihood of that event happening.<sup>102</sup>

[95] The growers' case on valuation depended on them showing on the balance of probabilities that the extinguishment of their rights lost them the opportunity to have the projects restructured and continued to full term. In order to value that lost opportunity the court then makes an assessment of the probability or possibility of a viable restructure occurring, based on a consideration of the evidence.<sup>103</sup> The value is ascertained by reference to the degree of probability or possibility of the event happening so that to have value, the possibility must be more than a mere hope or speculation.<sup>104</sup> Thus the growers' case required some evidentiary basis from which the court could evaluate the likelihood of the restructure counterfactual eventuating had the growers' rights not been extinguished.<sup>105</sup>

20 *Was there a chance that the projects could have been restructured and continued as viable projects?*

(a) *Legal issues*

25 [96] A restructure would have required a change of RE and constitutional and contractual amendments.

(i) *Change of RE*

30 [97] TSL could not have continued as RE and for the registered projects to continue a new RE would need to have been appointed.

35 [98] It is possible under the Act to replace a RE and to have a new RE appointed subject to compliance with the requirements of Div 2 of Pt 5C.2 of the Act.<sup>106</sup> The legislative scheme regulating managed investment schemes contemplates that there may be a need from time to time for an RE to be replaced because the extant RE wants to retire or the members of the registered scheme want to remove the RE.<sup>107</sup> However, any appointment will not be effective unless made in accordance with Div 2 of Pt 5C.2 of the Act.<sup>108</sup> The requirements are as follows.

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101. *Poseidon* at CLR 368; ALR 40.

102. See also *Tabet v Gett* (2010) 240 CLR 537; 265 ALR 227; [2010] HCA 12 at [137] (*Tabet*) per Keifel J; *St George Bank Ltd v Quinert Pty Ltd* (2009) 25 VR 666; [2009] VSCA 245 (*St George Bank*) *La Trobe Capital & Mortgage Corp Ltd v Hay Property Consultants Pty Ltd* (2011) 190 FCR 299; 273 ALR 774; [2011] FCAFC 4 at [110]–[112] (*La Trobe*).

103. *Poseidon*.

104. *St George Bank; La Trobe; Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638 at 643; 92 ALR 545 at 549 per Deane, Gaudron and McHugh JJ.

105. *St George Bank; Tabet*.

106. Section 601FJ(2) of the Act.

107. Sections 601FL, 601FM of the Act.

108. Sections 601FJ(2) of the Act.

former RE could not have been indemnified for out of scheme property if it had remained the scheme's RE.<sup>117</sup> This is provided for in s 601FS(1) and (2)(d) as follows:

5 (1) If the [RE] of a registered scheme changes, the rights, obligations and liabilities of the former [RE] in relation to the scheme become rights, obligations and liabilities of the new [RE].

(2) Despite subsection (1), the following rights and liabilities remain rights and liabilities of the former [RE]:

10 (d) any liability for which the former [RE] could not have been indemnified out of the scheme property if it had remained the scheme's [RE].

and in s 601FT which in effect provides for statutory novation of the rights obligations and liabilities of the former RE to the new RE.

15 [105] The scope and effect of ss 601FS and 601FT were the subject of considerable argument in this proceeding and it will be necessary to return to those provisions in the context of the consideration of the evidence on whether there was any company willing to become the new RE for any of the projects. However, for present purposes it is sufficient to conclude that there was the power under the Act to have TSL replaced as RE of the registered almond projects.

20 (ii) Constitutional amendments

[106] There was also power under the Act to amend the constitution of the projects. Section 601GC of the Act provides relevantly:

25 (1) The constitution of a registered scheme may be modified, or repealed and replaced with a new constitution:

(a) by special resolution of the members of the scheme; or

(b) by the [RE] if the [RE] reasonably considers the change will not adversely affect members' rights.

30 [107] For present purposes it is sufficient to note that the section does not fetter the kind of amendment that can be made to the constitution of a registered scheme. The limitation is in the statutory prescription that any amendment can only be effected by the RE if the RE reasonably considers that the amendments will not adversely affect members' rights and otherwise by special resolution of the members.<sup>118</sup>

35 (iii) Amendments of growers' agreements

40 [108] While the state of the law is that amendments to the constitution would not operate to effect amendments to the growers' agreements,<sup>119</sup> the growers' agreements expressly permitted modification or amendment subject to the

117. Section 601FS(1) of the Act.

45 118. *Great Southern Managers Australia Ltd (receivers and managers appointed) (in liq)* (2009) 76 ACSR 146; [2009] VSC 557 at [9] (*Great Southern Managers*) per Davies J; see also *Re Great Southern Managers Australia Ltd (receivers and managers appointed) (in liq)* [2009] VSC 627 at [7]; *Re Timbercorp Securities Ltd (in liq)* [2011] VSC 24 at [5]; *Re Timbercorp Securities Ltd* (2010) 77 ACSR 291; [2010] VSC 50; *Colonial First State Investments Ltd v Commissioner of Taxation* (2011) 192 FCR 298; [2011] FCA 16; *Re Colonial First State Property Trust Group (No 1)* (2002) 43 ACSR 143; [2002] ATP 15; compare *Kearns v Hill* (1990) 21 NSWLR 107; *Permanent Trustee Co Ltd v National Australian Managers Ltd* (Unreported, McLelland CJ in Eq, 8 August 1994).

50 119. *Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Co Ltd* (2008) 66 ASCR 594; [2008] WASCA 119 at [4].

[113] Further, the growers led evidence directed to showing that HML would meet the requirements of s 601FA of the Act, that is as an RE that held an Australian financial service licence that authorised it to act as RE of the almond projects. The evidence was that HML had applied to ASIC for a variation to its  
5 Australian financial service licence to operate the almond projects in its capacity as RE and that ASIC by letter dated 25 June 2009 had indicated that it was "minded to grant the application for variation of the licence conditions" subject to HML lodging a form 5107 change of responsible entity of a registered scheme for each additional scheme as evidence that it had been appointed as RE to the  
10 respective schemes.<sup>124</sup>

[114] In the event, TSL was not removed as RE and HML was not appointed as temporary RE because the sale of the almond assets became the only achievable option.

15 (iii) Conclusion on factual issues

[115] Despite the turn of events which saw the almond assets sold as the best option and no restructure proposal eventuating, I am satisfied on the strength of Mr Knox's evidence that there was a chance for restructure, albeit that Mr Knox's evidence was in the most general terms only. It was sufficient in my view for the  
20 growers to demonstrate that there was a company that was capable of taking over as RE which had indicated a preparedness to do so: viz HML, albeit that HML's consent to act was only as a temporary RE and was conditional. It was not incumbent upon the growers at this stage to prove on the balance of probabilities that HML would have been appointed to replace TSL as permanent RE.

25 *Determination of the value of the chance*

[116] It is at this stage that the court must evaluate and assess the likelihood of HML taking over as permanent RE. The value of the chance must reside in the probability or possibility of the continuation of the almond projects to term with  
30 HML assuming the functions and responsibilities as the permanent RE of the registered projects on a restructured basis. The assessment must be on this basis as it was essential for the continuation of the registered projects that there was a company holding a licence that authorised it to act as RE of the almond projects that was prepared to assume that responsibility. Significantly the growers did not  
35 produce evidence of any other company willing to replace TSL as RE of the almond projects. On the evidence, HML was the only company willing to undertake that responsibility. There was no evidential foundation for the court to evaluate the chance that some other company could, or would, have undertaken that responsibility.

40 [117] There were a number of contingencies in the way of HML replacing TSL as permanent RE. It is tolerably clear, in my view on the state of the evidence, that those contingencies would have become insuperable so that there was at best no more than a theoretical possibility or mere hope that HML could be appointed in replacement of TSL.

45 (a) *The need to restructure*

[118] First and foremost, HML could not simply replace TSL as RE so as to enable the projects to continue as the projects under the Timbercorp structure could not on any view continue. The Timbercorp companies were insolvent. That  
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<sup>124</sup>. Affidavit of John Huntley Knox affirmed 14 July 2009, [5].

willing to acquire the land and orchards subject to the growers' rights. It was an undisputable fact that the value of the growers' rights lay in the continuation of the projects.<sup>128</sup>

5 (b) *The need for constitutional and contractual changes*

[122] Second, HML was not prepared to step in as RE on the terms under which TSL carried out its functions as RE. Mr Knox's evidence was that HML would have required a number of constitutional and contractual changes to the projects. Although Mr Knox did not say so specifically in his evidence, it may be readily  
10 inferred that HML, unlike the Timbercorp companies, was not prepared to carry any risk. The constitutional and contractual changes to the projects that Mr Knox identified were all changes that would have had the effect of removing or significantly reducing any risk for HML by its participation in the projects. HML  
15 would not have been prepared to act as RE, irrespective of the performance of the projects, a right of indemnity from the agency account (the account into which the harvest proceeds were deposited and out of which the growers' entitlements were paid) for costs and expenses that it incurred as RE, the ability to borrow funds for working capital secured by the funds in the agency account and for the manager of the orchards to bear the risk that the harvest proceeds would be  
20 sufficient to cover operational expenses.

[123] Under the Timbercorp structure, TSL was liable to SH for management fees. Mr Knox agreed in cross-examination that HML would not have been prepared to accept that structure and would have needed to negotiate a change in arrangements with SH. Mr Knox stated that he had offers from other operational  
25 managers to take over the role of SH and had a financier willing to contribute working capital, although the arrangements had not progressed to a point where funding was in place. Rather, Mr Knox stated that the financier which had expressed its willingness to contribute to transitional needs had provided the funding on one of the other failed Timbercorp projects and "so there was a precedent and they said they were also interested in helping on the almonds on  
30 a similar basis".<sup>129</sup> None the less, the evidence was that HML would only have been prepared to borrow the money from this financier had it been possible to obtain an indemnity from the agency account for the repayment of the borrowings. Thus critical to any consent to becoming a permanent RE for the  
35 registered almond schemes were amendments to the constitutions of those schemes permitting HML to borrow for working capital purposes and to grant security over the agency account with respect to those borrowings.

[124] Any constitutional amendment would have required a special resolution of the members of the project unless HML reasonably considered that the change  
40 would not adversely affect members' rights.<sup>130</sup> It is reasonable for the court to infer that the nature of the proposed changes would have required a special resolution of the members of the scheme. The growers were criticised for not leading evidence that HML would have been able to secure the necessary grower  
45 approvals for such amendments. It is difficult to see how evidence to that effect could have been led. Rather, it is reasonable to surmise that growers would have

128. Compare *Airservices Australia v Canadian International Airlines Ltd* (1999) 202 CLR 133; 167 ALR 392; 60 ALD 1; [1999] HCA 62 at [444] and *Re Philip Charles Weeden, a bankrupt*; *Rainaldi v Weeden* [2008] FCA 1597.

129. Transcript of proceeding, 16 February 2011, 235.

130. Section 601GC of the Act.

route was to become a temporary RE to establish the viability of the projects".<sup>136</sup> Certainly, the action plan which he prepared for the projects included assessment of viability and other evidence showed that HML's pattern of conduct was to wind up unviable projects at the end of its 3-month appointment as temporary RE if the project was unviable.

[128] Fifth, Mr Knox's evidence was that HML's willingness to act as permanent RE was "subject only to confirmation of the liabilities that it would have incurred on assumption of that role".<sup>137</sup> The specific matter of concern to HML was the operation and scope of ss 601FS and 601FT with respect to the liabilities and obligations of TSL that HML would assume if it replaced TSL as RE. Mr Knox's evidence was that HML was not prepared to take on the role of permanent RE of the registered schemes without modifications to ss 601FS and 601FT as follows:

1 section 601FS of the Act, as in force on the date of this Exemption and Declaration, were amended as follows:

(1) If the responsible entity of a registered scheme changes the rights, obligations and liabilities of the former responsible entity in relation to the scheme become rights, obligations and liabilities of the new responsible entity:

- (a) subject to each existing charge, mortgage and any other encumbrance (Encumbrance) granted by the former responsible entity which relates to the scheme, *other than* an Encumbrance referred to in paragraph (c) or (d) below; and
- (b) free of any Encumbrance (and rights under that Encumbrance) granted by the former responsible entity which does not relate to the scheme (notwithstanding that the new responsible entity had notice of that Encumbrance); and
- (c) free of any Encumbrance (and rights under that Encumbrance) granted by the former responsible entity over, or in relation, to the former responsible entity's rights, interests and benefits as a party to each member's Licence and Joint Venture Agreement or Sub-Lease Agreement, as the case may be, and Almondlot Management Agreement relating to the scheme (whether or not the new responsible entity had knowledge of that Encumbrance); and
- (d) free of any Encumbrance (and rights under that Encumbrance) granted by the former responsible entity over, or in relation, to the former responsible entity's rights, interests and benefits as a party to each member's Licence and Joint Venture Agreement or Sub-Lease Agreement, as the case may be, and Almondlot Management Agreement relating to the scheme (whether or not the new responsible entity had knowledge of that Encumbrance), *other than* any Encumbrance granted over a right of the former responsible entity to be paid fees for the performance of its functions before it ceased to be the responsible entity.

2 section 601FS(2)(d) as in force on the date of this Exemption and Declaration, were amended as follows:

(2) Despite subsection (1) the following rights and liabilities remain rights and liabilities of the former responsible entity:

- (d) any liability for which the former responsible entity could not have been indemnified out of the scheme property if it had remained the scheme's responsible entity including any liability for which the former responsible entity could not have been indemnified out of scheme property by reason of the scheme property being sufficient to meet the amount of that liability.

136. Transcript of the proceeding, 16 February 2011, 237.

137. Affidavit of John Knox affirmed 2 August 2010, [5].

assume the liabilities that a permanent RE would assume. Mr Knox's evidence was that he understood that there was a significant distinction between HML agreeing to become a temporary RE and HML agreeing to become a permanent RE on the basis that as temporary RE the liabilities that HML would incur would be "limited".<sup>144</sup> Senior counsel for the growers submitted that the distinction that Mr Knox drew did not exist as the legislation makes it clear that a temporary RE is in the same position as a permanent RE. Thus, it was put, "having consented and being ready, willing and able to be temporary RE, Mr Knox — whether he understood it or not at the time, and it seems he mightn't have — was going to be or [HML] would have been caught up with the potential argument about s 601FS notwithstanding".<sup>145</sup>

[131] In fact Mr Knox obtained legal advice in August 2009 to the effect that TSL's liabilities under the charges that it had given over its property were entered into by TSL in its personal capacity with respect to its own property and not in its capacity as RE of any of these funds and that ss 601FS and 601FT would not apply to impose those liabilities on HML as replacement RE. It was argued that having regard to that advice, any concern that Mr Knox had about s 601FS would have been allayed.

[132] I disagree with the growers' "fair reading" of Mr Knox's evidence. The fair reading of it was that Mr Knox did draw a distinction between the responsibilities and liabilities that a temporary RE would assume and the responsibilities and liabilities that a permanent RE would assume by operation of ss 601FS and 601FT, whether that view was one that was correctly held or not. That evidence explained why HML consented to act as temporary RE but qualified its willingness to act as permanent RE.<sup>146</sup> Second the application to ASIC in July 2009 is objective evidence of the concerns that HML had about the responsibilities and liabilities that it may assume if it was appointed RE. Although HML obtained legal advice, that advice was directed only to one of Mr Knox's concerns.<sup>147</sup> HML did not receive legal advice on its other concern, namely whether ss 601FS and 601FT may operate to cause HML to assume TSL's obligations under the charges so that HML may become subject to directions of a receiver appointed over the charged property. Moreover Mr Knox was not asked whether his concerns were allayed by the legal advice he received nor did he give evidence to that effect. Moreover, the fact remained that ASIC did not make the declarations and exemptions sought under s 601QA and Mr Knox's unequivocal evidence was that he was not prepared for HML to take on the role of permanent RE without the modifications of the kind that were sought. In view of that evidence, I would not infer that HML would have been willing to be appointed as permanent RE merely from the fact that HML was a contract RE eager to take on schemes or from the fact that HML was willing to act as temporary RE, albeit on the basis that Mr Knox thought that the liabilities that HML would assume as temporary RE were limited or from the fact that Mr Knox had received legal advice that may have allayed one of his concerns about the scope and operation of ss 601FS and 601FT. The likelihood, on the evidence, was that HML would not have given its consent to act as permanent RE because of

144. Transcript of proceeding, 16 February 2011, 238.

145. Transcript of proceeding, 21 March 2011, 868.

146. Affidavit of John Knox affirmed 2 August 2010, [5].

147. Transcript of proceeding, 21 February 2011, 321.

[136] It is unnecessary to say anything further about these matters, other than that they indicate the innumerable factors bearing upon the chance that the projects would have continued to term, if the growers' rights had not been extinguished and the purely speculative basis on which the growers' counterfactual was advanced.

*(f) Conclusion*

[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.

[138] In so concluding I have taken into account the numerous other arguments advanced by the parties in support of their case on this issue. Where I have not dealt with an argument it is because the argument did not, in my view, materially bear upon the outcome having regard to the way in which I have analysed the case and reached my conclusion.<sup>152</sup>

*Expert evidence on the value of the growers' rights*

[139] Each of the parties led expert evidence on the valuation of the growers' rights under the projects on the assumption that the projects continued to term. That assumption was not founded in the evidence. It is strictly unnecessary to deal with that expert evidence in view of my conclusion that the projects were unviable unless restructured, and that the continuation to full term on a restructured basis was no more than a mere theoretical possibility on the state of the evidence. However, in case I am wrong, I should deal with certain aspects of the expert evidence.

*(a) The role of an expert witness*

[140] This arises for comment because senior counsel for the growers abandoned reliance on their expert evidence, conceding that their experts lacked independence "even to the extent of appearing to actively cheer for the growers, kick goals for the growers".<sup>153</sup> The lack of independence was plainly evident from the testimony of those witnesses which revealed that they had assumed the role of the advocate in forming their opinions and did not bring objectivity and independence to bear in forming their opinions.

[141] The courts repeatedly emphasise that the role of an expert witnesses is to provide independent assistance to the court on matters within the area of expertise of the witness, not for the expert to act as an advocate for a party. The reason is clear. On matters calling for special knowledge, the court relies on expert evidence to furnish the judge with the knowledge that the judge requires in order to determine the case. Independence and objectivity are therefore critical facets of the expert's retainer as a witness in litigation, as an expert's evidence is admitted for the purpose of assisting the judge to decide the case impartially, presented with all the matters that may bear upon the outcome. The court will not be assisted by an expert's evidence unless the court has confidence that the

<sup>152</sup>. *Kheirs Financial Services* at [103].

<sup>153</sup>. Transcript of proceeding, 21 March 2011, 886.

Mr Churchill varied according to the inputs used and the integers that he took into account, but all values were predicated on the projects continuing to full term on some restructured basis.

5 [147] Mr Churchill attributed substantial negative values to the rights of the growers in the 2006 and 2007 projects, despite the assumption that they continued to full term. Mr Churchill largely attributed positive values to the rights of the growers in both 2002 projects and the 2005 project. Those values of course were predicated on the projects continuing under some restructured basis.

10 [148] The growers did not challenge Mr Churchill's valuation methodology but they sought to improve the values placed by Mr Churchill on the rights of the growers in each of the projects by challenging aspects of integers and inputs used by Mr Churchill in the application of the valuation methodology.

15 (i) Assumptions contended for by the growers

[149] First the growers contended that the valuation should be conducted on the assumptions that:

- 20 (a) a new permanent RE of the registered projects and a new permanent project manager of the 2002 private scheme (either HML or some other entity) would have been appointed and the leases and subleases/ licence and joint venture agreements would have been assigned to it;
- (b) the fee structure for remuneration of the REs and the project manager under the project documents would have been replaced with the fixed fees that HML would have charged if it had been appointed;
- 25 (c) any rent received by the RE under the subleases in excess of the rent payable by the RE to the landlord would be refunded to the growers;
- (d) the management agreements would have been terminated; and
- (e) the purchaser(s) of the land would have continued to fund the capital works and water rights (previously paid for by AL) or the growers
- 30 would have funded the water and non-water capital expenditure of the almond projects over their entire terms.<sup>156</sup>

35 [150] These assumptions are not sustainable on the evidence. First the evidence was to the contrary. The evidence was that no purchaser could be found for the land and orchards which was prepared to purchase those assets subject to the growers' rights. Second, there is no basis on the evidence for a contention that the same legal structure would have been adopted by a hypothetical purchaser. Third, there is no basis on the evidence for a contention that the water and non-water capital expenditure (capex) would have continued to be funded.

40 [151] The growers argued that the court could make the assumption that a purchaser of the land could be found who was willing to fund the capex because the rental on the land had a value allowing for those costs. It was put that the rental stream would have vastly exceeded the capital expenditure and water cost requirements for each scheme (with the exception of the 2002 projects, where there was only a relatively small requirement for expenditure on infrastructure capital). The evidence was quite to the contrary however — that is, the evidence

50 <sup>156</sup>. Another assumption was that prior to or immediately following the purchase of the land, the 2007 Annuello and 2007 Menegazzo sublease would have been amended by the new RE so as to re-set the rent payable by the growers to a market rent. This assumption was not pressed in final submissions: Growers' closing submissions: Rights and valuation issues (11 March 2011), 39 [10.43].

schemes from the perspective of the investors, which would take into account tax benefits from participation. Accordingly Mr Churchill used the IRRs and grossed them up to arrive at an IRR which took into account investors' tax benefits. He explained that he did this on the basis that:

5 ... any investor considering buying growers' rights would take into account the benefit to that buyer of the tax deductions as well.

[157] The grossing up undertaken by Mr Churchill was done by taking the project IRR and dividing it by (1 minus the applicable marginal tax rate).  
10 Mr Churchill explained that:

I conducted some basic calculations to see what the differential was in recharacterising the capital amounts as a deductible amount and found that whilst it wasn't a perfect relationship, that an adjustment of the tax rate consistently approximated the difference, that is the deduction, the value of the deductions available to investors in MISs was approximately equal to the tax rate differential between alternative investments and MISs.<sup>158</sup>  
15

[158] Mr Churchill performed two alternative calculations, one involving a personal tax rate of 48.5% and the other involving a personal tax rate of 41.5%. Mr Churchill's view was that the personal tax rate of 48.5% was a more appropriate proxy because of research that suggested that the average investor in schemes of this kind was in the highest marginal bracket.  
20

[159] Senior counsel for the growers criticised the logic of the grossing up. I do not accept the criticism as the analysis did not lack logic, in my view, but was well reasoned and realistic. As Mr Churchill explained, a median IRR at 11.6% was "below the same expected return for a fully liquid fully diversified portfolio of the ASX200 as at 2 December 2009 (12.54%)".<sup>159</sup> Mr Churchill considered that, without the tax advantages, investor appetite for highly illiquid investments with complex overlay structures such as the agricultural managed investment schemes (MIS), at a rate of return of 11.6%, would be miniscule or non-existent because those schemes would attract a higher risk profile, but a lower return, than an investor would obtain from investment in an ASX200 portfolio. As Mr Churchill reasoned, if the MIS return was to be less than the ASX200 return, investors would not be attracted to the MIS schemes, without the tax benefits. And the fact was that these projects were designed and marketed as tax effective structures with tax advantages for investors supported by product rulings from the ATO.  
25  
30  
35

[160] Mr Churchill conducted two forms of cross checks on the reliability of his methodology. These cross checks were sufficiently consistent to provide some level of confirmation.  
40

[161] In the circumstances, I am persuaded by Mr Churchill's reasoning that the discount rate of 25% is justified and appropriate.

(iii) The cost of temporary water

45 [162] Third, the growers challenged Mr Churchill's input for the costs of temporary water. It was common ground that an integer in the calculation of value of the growers' rights was the cost of temporary water that would be needed to meet water allocation shortfalls, expected to be 5% of the water requirements

50 <sup>158</sup>. Transcript of proceeding, 28 February 2011, 785.

<sup>159</sup>. *First Churchill Report* (29 October 2010), p 13 [69].

[165] Accordingly, I conclude on the evidence that a temporary water price of \$185/ML was appropriate to be used as the input in Mr Churchill's valuation.

#### G. Bank's rights with respect to the almond assets

5 [166] In view of my conclusion about the operation and effect of Robson J's orders, the question of the marriage principle does not arise.

10 [167] The growers did not contest, and I am satisfied that the banks have established, that they held securities over the almond assets sold to Olam to the extent of the amounts outstanding under their respective loan facilities. Those securities entitled the banks to receive the entire amount of the net proceeds as the amounts secured were greater than the net sale proceeds presently held in trust and the growers have not been successful in establishing their entitlement.

#### 15 H. Orders

[168] I will stand the matters over for a period of 7 days to enable the banks to prepare a form of orders giving effect to my conclusions and for the question of costs, if any, to be argued.

20

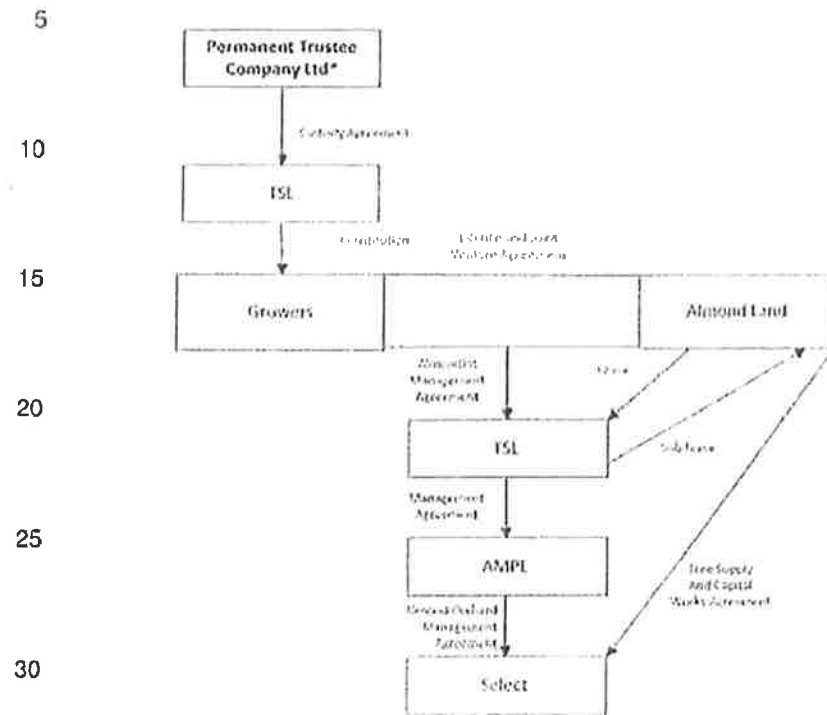
#### Schedule of parties

S CI 2009 10699

BETWEEN:

- |    |  |                   |
|----|--|-------------------|
| 25 | BOSI SECURITY SERVICES LTD (ACN 009 413 852) AS TRUSTEE FOR AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD (ACN 005 357 522) AND BOS INTERNATIONAL (AUST) LTD (ACN 066 601 250) AND WESTPAC BANKING CORPORATION LTD (ACN 007 457 141) | Plaintiff         |
| 30 | - and -  |                   |
|    | AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD (ACN 005 357 522)  | First Defendant   |
| 35 | ALMOND LAND PTY LTD (IN LIQUIDATION) (ACN 091 460 392)   | Second Defendant  |
|    | MARK ANTHONY KORDA (IN HIS CAPACITY AS LIQUIDATOR OF ALMOND LAND PTY LTD (IN LIQUIDATION))   | Third Defendant   |
| 40 | LEANNE KYLIE CHESSER (IN HER CAPACITY AS LIQUIDATOR OF ALMOND LAND PTY LTD (IN LIQUIDATION))   | Fourth Defendant  |
|    | GRAHAM GOLDENBERG (IN HIS CAPACITY AS REPRESENTATIVE OF THE GROWERS IN THE 2002 ALMOND PROJECT)  | Fifth Defendant   |
| 45 | CHRISTOPHER MARK LITTLE (IN HIS CAPACITY AS REPRESENTATIVE OF THE GROWERS IN THE 2005 ALMOND PROJECT)  | Sixth Defendant   |
| 50 | CONSTANTINE MOSHOPOULOS (IN HER CAPACITY AS REPRESENTATIVE OF THE GROWERS IN THE 2006 ALMOND PROJECT)  | Seventh Defendant |

## Schedule B

Schedule B  
2002 Almond Project

\*Not a business in Trust Company for duty purposes

Form 43A

Rule 43.06(3)

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

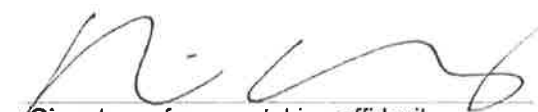
CERTIFICATE IDENTIFYING EXHIBIT "RWM-5"

Date of document: 15 August 2012  
Filed on behalf of: The First Respondent  
Prepared by:  
**Ashurst Australia**  
Level 26  
181 William Street  
MELBOURNE VIC 3000

Solicitor's Code: 53  
DX: 187  
Tel: (03) 9679 3000  
Fax: (03) 9679 3111  
Ref: 03 2010 2555  
Attention: Ross McClymont  
Email: ross.mcclymont@ashurst.com

This is the exhibit marked "RWM-5" now produced and shown to Ross Whyte McClymont at the time of  
affirming the person's affidavit on 15 August 2012.

Before me:

  
Signature of person taking affidavit

**Michael Patrick Murray**  
Ashurst Australia, 181 William St, Melbourne, Victoria 3000  
An Australian Legal practitioner within the meaning of the Legal  
Profession Act 2004

"RWM-5"

Orders made by Davies J dated 27 June 2011

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) Plaintiff

- and -

AUSTRALIA AND NEW ZEALAND BANKING GROUP  
LIMITED (ACN 005 357 522) Defendants  
and others according to the schedule attached

**COURT RECORD OF HEARING**

---

JUDGE:	The Honourable Justice Davies
DATE MADE:	27 June 2011
ORIGINATING PROCESS:	Originating Motion filed 15 December 2009
HOW OBTAINED:	On return of the orders of the Honourable Justice Davies made 15 June 2011
ATTENDANCE:	Mr. P Anastassiou of Senior Counsel with Mr. R G Craig and Ms. K Foley of Counsel for the Plaintiff  Ms. W Harris of Senior Counsel for the First Defendant  Dr. O Bigos of Counsel for the Second to Fourth Defendants  Mr. G Bignmore of Her Majesty's Counsel with Mr. S Hopper of Counsel for the Fifth to Eighth Defendants
OTHER MATTERS:	A. The fifth to eighth defendants by their counsel hereby

jointly undertake that, subject to any other order of the Court, they will not lodge any further invoices for payment by the second defendant in respect of expenses incurred by Steven Lynch and Grey Barnden (Growers' Experts) in the course of this proceeding.

B. The plaintiff and the first defendant (the Banks) by their counsel, hereby jointly undertake that:

(i) subject to any other order of the Court and A. above, if the solicitors for the fifth to eighth defendants lodge any further invoices for payment by the second defendant in respect of legal expenses incurred in the course of this proceeding, the Banks will re-constitute the trust fund created by paragraph 7 of the orders of the Honourable Justice Robson dated 9 October 2009 in proceeding 9408 of 2009, in the amount of the value of the fund as determined by the Court.

(ii) if the second, third or fourth defendants incur any further costs in relation to the proceeding in excess of the Retention Amount, after the date by which the Committee of Inspection or the Court determines the Liquidators' Amount in accordance with order 4, the Banks will pay to the second, third or fourth defendants those further costs (including legal costs) on a full indemnity basis.

C. The plaintiff by its counsel hereby acknowledges that any payments made to it in accordance with these orders are without prejudice to the rights of the second, third and fourth defendants to make claims against them arising out of the liquidation of the second defendant.

#### THE COURT ORDERS THAT:

1. The plaintiff and first defendant are entitled to the Net Proceeds of \$122,632,862 (calculated as \$128,000,000 of gross proceeds, less \$78,138 of settlement costs and \$5,289,000 of costs and expenses of the liquidators of Timbercorp Securities Limited (in liq), Almond Management Pty Ltd (in liq), Timbercorp Limited (in liq) and Almond Land Pty Ltd (in liq) which costs and expenses were approved by the Committee of Inspection of the second defendant at its meeting on 29 April 2010) held by the second defendant pursuant to paragraph 7 of the orders of the Honourable Justice Robson dated 9 October 2009 in proceeding 9408 of 2009:
  - (a) *plus* all interest accrued thereon until the date provided for in orders 2 and 3;

- (b) less all amounts paid to Clarendon Lawyers in accordance with paragraph 3 of the orders made in this proceeding on 22 March 2011 and paragraph 10 of the orders made in this proceeding on 22 December 2009;
- (c) less the sum of \$25,425.00 (excl GST) paid in respect of mediator's fees pursuant to paragraph 11 of the orders of the Honourable Justice Davies dated 5 November 2010; and
- (d) less the sum of \$3,000,000 (**Retention Amount**)

(together, the **Judgment Proceeds**), in the amount and proportions set out in paragraphs 2 and 3 below.

2. On or before 4pm on 6 July 2011, the third and fourth defendants cause the second defendant pay the plaintiff the sum of 63.28% of the Judgment Proceeds.
  3. On or before 4pm on 6 July 2011, the third and fourth defendants cause the second defendant pay the first defendant the sum of 36.72% of the Judgment Proceeds.
  4. The third and fourth defendants are entitled to such part of the Retention Amount relating to their costs, expenses and remuneration (including GST) incurred in relation to the care, protection, preservation, realisation and/or distribution of the Net Proceeds (including the second, third and fourth defendants costs of and incidental to this proceeding and any costs associated with the determination of the Liquidators' Amount, on a full indemnity basis) as is approved at a meeting of the Committee of Inspection of the second defendant to be called by the third and fourth defendants or by order of the Court in default of such approval (**Liquidators' Amount**), and the plaintiff and the first defendant are entitled to the balance of the Retention Amount (including interest accrued thereon) (**Banks' Amount**).
  5. The third and fourth defendants cause the second defendant to pay the Liquidators' Amount to the third and fourth defendants and the Banks' Amount to the Banks in the following proportions:
    - a. 63.28% to the plaintiff; and
    - b. 36.72% to the first defendant;
- by 1 August 2011, or such later date as is agreed by the plaintiff and the first, second, third and fourth defendants, or by order of the Court in default of agreement.
6. The question of the costs of the proceeding, if any, is reserved.
  7. On or before 4pm on 20 July 2011, the plaintiff and first defendant file and serve on the other parties and on the Growers' Experts engaged by the fifth to eighth defendants any affidavits and submissions in relation to the costs of the proceeding.
  8. On or before 4pm on 17 August 2011, the second to eighth defendants file and serve any affidavits and submissions in relation to the costs of the proceeding.
  9. The proceeding is adjourned to 10:00am on 22 August 2011, for the determination of the question of the costs of the proceeding, if any.

10. Liberty to apply.

DATE AUTHENTICATED:

**5 July 2011**

**PROTHONOTARY**

JH 05/07/11

SCHEDULE OF PARTIES

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)	Plaintiff
---	-----------

- and -

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522)	First Defendant
--	-----------------

ALMOND LAND PTY LTD (IN LIQUIDATION) (ACN 091 460 392)	Second Defendant
---	------------------

MARK ANTHONY KORDA (IN HIS CAPACITY AS LIQUIDATOR OF ALMOND LAND PTY LTD (IN LIQUIDATION))	Third Defendant
--	-----------------

LEANNE KYLIE CHESSER (IN HER CAPACITY AS LIQUIDATOR OF ALMOND LAND PTY LTD (IN LIQUIDATION))	Fourth Defendant
--	------------------

GRAHAM GOLDENBERG (IN HIS CAPACITY AS REPRESENTATIVE OF THE GROWERS IN THE 2002 ALMOND PROJECT)	Fifth Defendant
---	-----------------

CHRISTOPHER MARK LITTLE (IN HIS CAPACITY AS REPRESENTATIVE OF THE GROWERS IN THE 2005 ALMOND PROJECT)	Sixth Defendant
---	-----------------

CONSTANTINE MOSHOPOULOS (IN HER CAPACITY AS REPRESENTATIVE OF THE GROWERS IN THE 2006 ALMOND PROJECT)	Seventh Defendant
---	-------------------

DAVID BUTTERFIELD (IN HIS CAPACITY AS REPRESENTATIVE OF THE GROWERS IN THE 2007 ALMOND PROJECT AND AS A REPRESENTATIVE OF THE GROWERS IN THE 2002 PRIVATE OFFER SCHEME)	Eighth Defendant
---	------------------



Form 43A

Rule 43.06(3)

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

CERTIFICATE IDENTIFYING EXHIBIT "RWM-6"

Date of document: 15 August 2012  
Filed on behalf of: The First Respondent  
Prepared by:  
**Ashurst Australia**  
Level 26  
181 William Street  
MELBOURNE VIC 3000

Solicitor's Code: 53  
DX: 187  
Tel: (03) 9679 3000  
Fax: (03) 9679 3111  
Ref: 03 2010 2555  
Attention: Ross McClymont  
Email: ross.mcclymont@ashurst.com

This is the exhibit marked "RWM-6" now produced and shown to Ross Whyte McClymont at the time of  
affirming the person's affidavit on 15 August 2012.

Before me:



Signature of person taking affidavit

**Michael Patrick Murray**  
Ashurst Australia, 181 William St, Melbourne, Victoria 3000  
An Australian Legal practitioner within the meaning of the Legal  
Profession Act 2004

**"RWM-6"**

**Summons and Originating Motion filed in  
BB Olives Rights Proceeding on  
16 March 2010**

Form 46A

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

LIST E

No. S 41 2010 1354

BETWEEN:

**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)**

Plaintiff

and

**B.B OLIVES PTY LTD (IN LIQUIDATION)  
(A.C.N. 083 992 367) & ORS (according to the attached Schedule)**

Defendants

**SUMMONS**

Date of document: 16 March 2010

Filed on behalf of: The Plaintiff

Prepared by:

**Blake Dawson**

Level 26

181 William Street

MELBOURNE VIC 3000

Solicitor's Code: 53

DX: 187

Tel: (03) 9679 3000

Fax: (03) 9679 3111

Ref: RWM CHFE

Attention: Mr R McClymont

Email: [ross.mcclymont@blakedawson.com](mailto:ross.mcclymont@blakedawson.com)

TO: The Defendants  
c/- their solicitors  
Arnold Bloch Leibler  
Level 21, 333 Collins Street  
Melbourne VIC 3000

Michael Charles Vicary, Pamela Jan Dry and David Butterfield  
c/- their solicitors  
Clarendon Lawyers  
Level 17  
North Rialto Tower  
525 Collins Street  
Melbourne VIC 3000

Boundary Bend Limited ACN 115 131 667  
151 Broderick Road  
Lara VIC 3212

You are summoned to attend before the Court on the hearing of an application by the plaintiff for orders that:

1. Pursuant to Rule 45.05 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) the requirements of Rules 5.03(1) and 8.02 are dispensed with.
2. Pursuant to Rule 45.05 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) the plaintiff has leave to proceed by originating motion in Form 5C.
3. Pursuant to rule 16.01(2) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic):
  - (a) Michael Charles Vicary be appointed as the representative of the Growers in the 2006 Timbercorp Olive Project (ARSN 119 182 179);
  - (b) Pamela Jan Dry be appointed as the representative of the Growers in the 2007 Timbercorp Olive Project (ARSN 123 155 715); and,
  - (c) David Butterfield be appointed as the representative of the Growers in the 2008 Timbercorp Olive Project (ARSN 129 307 722).
4. The persons appointed pursuant to paragraph 3 above, be joined as the seventh, eighth, and ninth defendants in the proceeding pursuant to rule 9.02 and/or rule 9.06(b) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).
5. The plaintiff is granted leave to file and serve an amended originating motion on the defendants on or before 4pm on 26 March 2010:
  - (a) incorporating a declaration as to what, if any, right the Growers represented by the seventh, eighth, and ninth defendants have to the sale proceeds held on trust by the first defendant pursuant to paragraph 8 of the Orders; and
  - (b) amending paragraph 5 of the Originating Motion to read "A declaration as to how the sale proceeds held on trust by the first defendant pursuant to paragraph

8 of the Orders ought to be distributed between the plaintiff and the second, seventh, eighth and ninth defendants."

6. The plaintiff is granted leave to proceed against Almond Land Pty Ltd A.C.N. 091 460 992 (in liquidation), B.B. Olives Pty Ltd A.C.N 083 992 367 (in liquidation) and Timbercorp Limited A.C.N. 055 185 067 (in liquidation) pursuant to s.471B of the *Corporations Act 2001* (Cth).
7. Paragraph 11 of the orders made by the Honourable Justice Croft in proceeding No.9998 of 2009 be discharged, insofar as it relates to exhibit MAK-19 to the affidavit of Mark Anthony Korda sworn 10 November 2009 in proceeding No.9998 of 2009.
8. Further directions for the conduct of the proceeding.
9. Such other orders as the Court deems fit.

The application will be heard before Justice Davies of the Supreme Court at 210 William Street, Melbourne, on 19 March 2010 at 12 noon or so soon afterwards as the business of the Court allows.

FILED:

16 MAR 2010



This summons was filed by Blake Dawson of Level 26, 181 William Street, Melbourne 3000, Solicitors for the Plaintiff.

SCHEDULE

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

No.

BETWEEN:

**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)**  
Plaintiff  
and

**B.B OLIVES PTY LTD (IN LIQUIDATION)  
(A.C.N. 083 992 367)**

First Defendant

and

**ALMOND LAND PTY LTD (IN LIQUIDATION) (A.C.N 091 460 392)**

Second Defendant

and

**TIMBERCORP LIMITED (IN LIQUIDATION) (A.C.N. 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 CHESSEER  
(in her capacity as liquidator of Almond Land 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

Form 5C  
IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMERCIAL AND EQUITY DIVISION  
COMMERCIAL COURT

Rules 5.02(2), 45.05(2)(b)

LIST E

No. S 21 2010 1354

BETWEEN:

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)

Plaintiff

and

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

Defendants

**ORIGINATING MOTION**

Date of document: 16 March 2010  
Filed on behalf of: The Plaintiff  
Prepared by:  
**Blake Dawson**  
Level 26  
181 William Street  
MELBOURNE VIC 3000

Solicitor's Code: 53  
DX: 187  
Tel: (03) 9679 3000  
Fax: (03) 9679 3111  
Ref: RWM CHFE  
Attention: Mr R McClymont  
Email: ross.mcclymont@blakedawson.com

**TO THE DEFENDANTS**

**TAKE NOTICE** that this proceeding by originating motion has been brought against you by the plaintiff for the relief or remedy set out below.

**IF YOU INTEND TO DEFEND** the proceeding you must attend before the Court at the time and place named in the summons served with this originating motion.

**FILED**

16 MAR 2010

Prothonotary

**THIS ORIGINATING MOTION** is to be served within one year from the date it is filed or within such further period as the Court orders.

**THE PLAINTIFF SEEKS THE FOLLOWING ORDERS:**

1. Pursuant to Rule 45.05 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) the requirements of Rules 5.03(1) and 8.02 are dispensed with.
2. Pursuant to Rule 45.05 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) the plaintiff has leave to proceed by originating motion in Form 5C.
3. A declaration as to what, if any, right the plaintiff has to the sale proceeds held on trust by the first defendant pursuant to paragraph 8 of the orders made by the Honourable Justice Croft on 12 November 2009 in proceeding No. 9998 of 2009 (**Orders**).
4. A declaration as to what, if any, right the second defendant has to the sale proceeds held on trust by the first defendant pursuant to paragraph 8 of the Orders.
5. A declaration as to how the sale proceeds held on trust by the first defendant pursuant to paragraph 8 of the Orders ought to be distributed between the plaintiff and the second defendant.
6. Any other order the Court deems fit.

DATE 16 March 2010



**Blake Dawson**

Solicitors for the Plaintiff

1. Place of trial – Melbourne.
2. This originating motion was filed for the plaintiff by Blake Dawson, of Level 26, 181 William Street, Melbourne VIC 3000.
3. The address of the plaintiff is Level 27, 45 Clarence Street, Sydney NSW 2000.
4. The address for service of the plaintiff is at the offices of Blake Dawson, of Level 26, 181 William Street, Melbourne VIC 3000.
5. The address of the first defendant is Level 8, 461 Bourke Street, Melbourne VIC 3000.
6. The address of the second defendant is Level 8, 461 Bourke Street, Melbourne VIC 3000.
7. The address of the third defendant is Level 8, 461 Bourke Street, Melbourne VIC 3000.
8. The address of the fourth defendant is Level 24, 333 Collins Street, Melbourne, VIC 3000.
9. The address of the fifth defendant is Level 24, 333 Collins Street, Melbourne, VIC 3000.
10. The address of the sixth defendant is Level 24, 333 Collins Street, Melbourne, VIC 3000.

**SCHEDULE**

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

No.

**BETWEEN:**

**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)**  
Plaintiff

and

**B.B OLIVES PTY LTD (IN LIQUIDATION)  
(A.C.N. 083 992 367)**

First Defendant

and

**ALMOND LAND PTY LTD (IN LIQUIDATION) (A.C.N 091 460 392)**

Second Defendant

and

**TIMBERCORP LIMITED (IN LIQUIDATION) (A.C.N. 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 Almond Land 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

Form 43A

Rule 43.06(3)

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

CERTIFICATE IDENTIFYING EXHIBIT "RWM-7"

Date of document: 15 August 2012  
Filed on behalf of: The First Respondent  
Prepared by:  
**Ashurst Australia**  
Level 26  
181 William Street  
MELBOURNE VIC 3000

Solicitor's Code: 53  
DX: 187  
Tel: (03) 9679 3000  
Fax: (03) 9679 3111  
Ref: 03 2010 2555  
Attention: Ross McClymont  
Email: ross.mcclymont@ashurst.com

This is the exhibit marked "RWM-7" now produced and shown to Ross Whyte McClymont at the time of  
affirming the person's affidavit on 15 August 2012.

Before me:



Signature of person taking affidavit

**Michael Patrick Murray**  
Ashurst Australia, 181 William St, Melbourne, Victoria 3000  
An Australian Legal practitioner within the meaning of the Legal  
Profession Act 2004

**"RWM-7"**

**Summons and Originating Motion filed in  
Solara Rights Proceeding on  
6 December 2011**

Form 45B

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

List 10  
S CI 2011 6606

BETWEEN

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522)

Plaintiff

and

OIM#2 PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) AS  
TRUSTEE FOR TIMBERCORP ORCHARD TRUST #2 & ORS (ACCORDING TO THE  
ATTACHED SCHEDULE)

Defendants

SUMMONS ON ORIGINATING MOTION – SPECIAL PROCEDURE  
(Solara Rights Proceeding)

Date of document: 8 December 2011

Filed on behalf of: The Plaintiff

Prepared by:

Allens Arthur Robinson  
Lawyers  
530 Collins Street  
Melbourne VIC 3000

Solicitor code: 21455  
DX 30999 Melbourne  
Tel 9614 1011 Fax 9614 4861  
Ref CCHM:MKWM:120039226  
(Clint Hinchen Clint.Hinchen@aar.com.au)

To: The First Defendant

c/- their solicitors

Maddocks

140 William Street

Melbourne VIC 3000

The Second and Third Defendants

c/- their solicitors

Norton Rose Australia

Level 15, RACV Tower, 485 Bourke Street

Melbourne, Victoria, 3000

Robert Bugden and Elizabeth Bugden

c/- their solicitors

Clarendon Lawyers

Level 17

North Rialto Tower

525 Collins Street

Melbourne VIC 3000

You are summoned to attend before the Court consisted by a Judge of the Court on the hearing of an application by the Plaintiff for judgment or orders in respect of the relief or remedy sought in the origination motion as follows:

1. Pursuant to rule 45.05 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic), the requirements of Rules 5.03(1) and 8.02 are dispensed with.
2. Pursuant to rule 45.05 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic), the plaintiff has leave to proceed by originating motion in Form 5C.
3. Pursuant to rule 16.01(2) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic), Robert Bugden and Elizabeth Bugden be appointed as representatives of the Growers in the 2005 Timbercorp Citrus Project (ARSN 114 091 299).
4. The persons appointed as representatives pursuant to paragraph 3 be joined as the fourth defendants in the proceeding pursuant to rule 9.02 and/or rule 9.06(b) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).
5. The plaintiff is granted leave to file and serve an amended originating motion on the defendants on a date to be fixed:
  - (a) incorporating a declaration as to what, if any, right the Growers represented by the fourth defendants have to the sale proceeds held on trust by the second and third defendants pursuant to paragraph 4 of the orders made by the Honourable Justice Davies on 26 February 2010 in proceeding No. SCI 2010 398 (*Orders*); and
  - (b) amending paragraph 5 of the Originating Motion to read "A declaration as to how the sale proceeds held on trust by the second and third defendants pursuant to

paragraph 4 of the Orders ought to be distributed between the plaintiff and the first and fourth defendants."

6. Subject to any further order of the Court, this proceeding be managed and heard together with proceeding number
7. Further directions for the conduct of the proceeding.
8. Such other orders as the Court deems fit.

The application will be heard before the Honourable Justice Davies of the Supreme Court of Victoria, at Court No 3, Ground Floor, Old High Court, 450 Little Bourke Street, Melbourne, on 18 December 2011 at 10:00am or so soon afterwards as the business of the Court allows.

If the application is heard by an Associate Judge, he or she may, as appropriate:

- (a) hear and determine the application or refer it to another Associate Judge or a Judge of the Court for hearing and determination;
- (b) by consent of the defendants, give the judgment;
- (c) place the proceeding in the list of cases for trial and give directions for the filing and service of affidavits or otherwise.

If the application is heard by a Judge of the Court, he or she may make any order he or she considers appropriate.

FILED: - 6 DEC 2011

  
Prothonotary

This summons was filed by Allens Arthur Robinson of Level 27, 530 Collins Street, Melbourne, Victoria, 3000 solicitors for the Plaintiff.

**SCHEDULE**

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

**S CI 2011**

**List E**

**B E T W E E N**

**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522)**

**Plaintiff**

**and**

**OIM#2 PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) AS  
TRUSTEE FOR TIMBERCORP ORCHARD TRUST #2**

**First Defendant**

**and**

**MICHAEL FUNG IN HIS CAPACITY AS RECEIVER AND MANAGER OF OIM#2 PTY LTD  
(RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) IN ITS CAPACITY AS  
TRUSTEE FOR TIMBERCORP ORCHARD TRUST #2**

**Second Defendant**

**and**

**PAUL WILLIAM KIRK IN HIS CAPACITY AS RECEIVER AND MANAGER OF OIM#2 PTY LTD  
(RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) IN ITS CAPACITY AS  
TRUSTEE FOR TIMBERCORP ORCHARD TRUST #2**

**Third Defendant**

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

List # 0

**BETWEEN**

SCI 2011 6666

**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522)**

Plaintiff

and

**OIM#2 PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) AS  
TRUSTEE FOR TIMBERCORP ORCHARD TRUST #2 AND ORS ACCORDING TO THE  
SCHEDULE ATTACHED**

Defendants

**ORIGINATING MOTION BETWEEN PARTIES  
(Solara Rights Proceeding)**

Date of document: 6 December 2011

Filed on behalf of: The Plaintiff

Prepared by:

**Allens Arthur Robinson  
Lawyers  
530 Collins Street  
Melbourne VIC 3000**

Solicitor code: 21455  
DX 30999 Melbourne  
Tel 9614 1011 Fax 9614 4661  
Ref CCHM: 120039226  
(Clint Hinchin [Clint.Hinchin@aar.com.au](mailto:Clint.Hinchin@aar.com.au))

TO THE DEFENDANTS

TAKE NOTICE that this proceeding by originating motion has been brought against you by the plaintiff for the relief or remedy set out below.

IF YOU INTEND TO DEFEND the proceeding, you must attend before the Court at the time and place named in the summons served with this originating motion.

FILED: - 6 DEC 2011

Prothonotary

THIS ORIGINATING MOTION is to be served within one year from the date it is filed or within such further period as the Court orders.

THE PLAINTIFF SEEKS THE FOLLOWING ORDERS:

1. Pursuant to Rule 45.05 of the *Supreme Court (General Civil Procedures) Rules 2005* (Vic) the requirements of Rules 5.03(1) and 8.02 are dispensed with.
2. Pursuant to Rule 45.05 of the *Supreme Court (General Civil Procedures) Rules 2005* (Vic) the plaintiff has leave to proceed by originating motion in Form 5C.
3. A declaration as to what, if any, right the plaintiff has to the sale proceeds held on trust by the second and third defendants pursuant to paragraph 4 of the orders made by the Honourable Justice Davies on 26 February 2010 in proceeding No. SCI 2010 398 (*Orders*).
4. A declaration as to what, if any, right the first defendant has to the sale proceeds held on trust by the second and third defendants pursuant to paragraph 4 of the *Orders*.
5. A declaration as to how the sale proceeds held on trust by the second and third defendants pursuant to paragraph 4 of the *Orders* ought to be distributed between the plaintiff and the first defendant.
6. Any other order the Court deems fit.

DATE 6 December 2011



**Allens Arthur Robinson**  
Solicitors for the Plaintiff

1. Place of trial - Melbourne
2. This originating motion was filed for the plaintiff by Allens Arthur Robinson, of 530 Collins Street, Melbourne, Victoria, 3000.
3. The address of the plaintiff is Level 14, 100 Queen Street, Melbourne VIC 3000.
4. The address for service of the plaintiff is at the offices of Allens Arthur Robinson, of 530 Collins Street, Melbourne, Victoria, 3000.
5. The address of the first defendant is Level 32, 360-374 Collins Street, Melbourne VIC 3000.
6. The address for service of the first defendant is at the offices of Maddocks, of 140 William Street, Melbourne VIC 3000.
7. The address of the second and third defendants is at the offices of PricewaterhouseCoopers of Freshwater Place, Level 19, 2 Southbank Boulevard, Southbank, VIC 3006.
8. The address for service of the second and third defendants is at the offices of Norton Rose Australia, of Level 15, RACV Tower, 485 Bourke Street, Melbourne VIC 3000.

**SCHEDULE**

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

**List E**

**BETWEEN**

**SCI 2011**

**AUSTRALIA AND NEW ZEALAND BANKING GROUP (ACN 005 357 522)**

**Plaintiff**

**and**

**OIM#2 PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) AS  
TRUSTEE FOR TIMBERCORP ORCHARD TRUST #2**

**First Defendant**

**and**

**MICHAEL FUNG**

**~~DAVID LAURENCE MCEVOY~~ IN HIS CAPACITY AS RECEIVER AND MANAGER OF OIM#2  
PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) AS TRUSTEE FOR  
TIMBERCORP ORCHARD TRUST #2**

**Second Defendant**

**and**

**PAUL WILLIAM KIRK IN HIS CAPACITY AS RECEIVER AND MANAGER OF OIM#2 PTY LTD  
(RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) AS TRUSTEE FOR  
TIMBERCORP ORCHARD TRUST #2**

**Third Defendant**

Form 4A

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

List 80  
S CI 2011 6606

BETWEEN

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522)

Plaintiff

and

OIM#2 PTY LTD (RECEIVERS AND MANAGERS APPOINTED (ACN 112 691 997) AS  
TRUSTEE FOR TIMBERCORP ORCHARD TRUST #2 & ORS (ACCORDING TO THE  
ATTACHED SCHEDULE)

Defendants

OVERARCHING OBLIGATIONS CERTIFICATION

Date of document: 5 December 2011

Filed on behalf of: The Plaintiff

Prepared by:

Allens Arthur Robinson  
Lawyers  
530 Collins Street  
Melbourne VIC 3000

Solicitor code: 21455  
DX 30999 Melbourne  
Tel 9614 1011 Fax 9614 4661  
Ref (CCHM: 120019368)  
(Clint Hitchen [Clint.Hitchen@aar.com.au](mailto:Clint.Hitchen@aar.com.au))

I, JONTY EPHRON, a Director of ANZ Lending Services, an organisational branch of the plaintiff which is responsible for the care and conduct of this proceeding, am authorised to make this certification on the plaintiff's behalf.

In accordance with section 41 of the Civil Procedure Act 2010, I certify to the Court that I have read and understood the overarching obligations set out in sections 16 to 26 of that Act and the paramount duty set out in section 16 of the Act.

5 December 2011



JONTY EPHRON on behalf of the  
Plaintiff

**SCHEDULE**

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

S CI 2011

**List E**

**BETWEEN**

**AUSTRALIA AND NEW ZEALAND BANKING GROUP (ACN 005 357 522)**

**Plaintiff**

**and**

**OIM#2 PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) AS  
TRUSTEE FOR TIMBERCORP ORCHARD TRUST #2**

**First Defendant**

**and**

**MICHAEL FUNG**

**~~DAVID LAURENCE MGEVOY~~ IN HIS CAPACITY AS RECEIVER AND MANAGER OF OIM#2  
PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) AS TRUSTEE FOR  
TIMBERCORP ORCHARD TRUST #2**

**Second Defendant**

**and**

**PAUL WILLIAM KIRK IN HIS CAPACITY AS RECEIVER AND MANAGER OF OIM#2 PTY LTD  
(RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) AS TRUSTEE FOR  
TIMBERCORP ORCHARD TRUST #2**

**Third Defendant**

7

Form 4B

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

List 5P  
S CI 2011 6606

BETWEEN

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522)

Plaintiff

and

OIM#2 PTY LTD (RECEIVERS AND MANAGERS APPOINTED (ACN 112 691 997) AS  
TRUSTEE FOR TIMBERCORP ORCHARD TRUST #2 & ORS (ACCORDING TO THE  
ATTACHED SCHEDULE)

Defendants

PROPER BASIS CERTIFICATION

Date of document: 5 December 2011

Filed on behalf of: The Plaintiff

Prepared by:

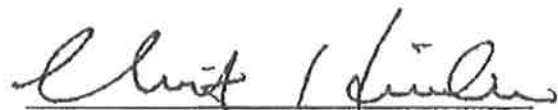
Allens Arthur Robinson  
Lawyers  
530 Collins Street  
Melbourne VIC 3000

Solicitor code: 21455  
DX 30999 Melbourne  
Tel 9614 1011 Fax 9614 4661  
Ref CCHM: 120039226  
(Clint Hinchon [Clint.Hinchon@aar.com.au](mailto:Clint.Hinchon@aar.com.au))

In accordance with section 42 of the Civil Procedure Act 2010, I, CLINTON CHARLES  
HINCHEN, certify to the Court that, in relation to the Originating Motion, filed on behalf of the  
plaintiff, on the factual and legal material available to me at present:

(a) each allegation of fact in the document has a proper basis.

5 December 2011



CLINTON CHARLES HINCHEN

Legal practitioner for the Plaintiff

**SCHEDULE**

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

**List E**  
**S CI 2011**

**BETWEEN**

**AUSTRALIA AND NEW ZEALAND BANKING GROUP (ACN 005 357 522)**

**Plaintiff**

**and**

**OIM#2 PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) AS  
TRUSTEE FOR TIMBERCORP ORCHARD TRUST #2**

**First Defendant**

**and**

**MICHAEL FUNG  
~~DAVID LAURENCE MCEVOY~~ IN HIS CAPACITY AS RECEIVER AND MANAGER OF OIM#2  
PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) AS TRUSTEE FOR  
TIMBERCORP ORCHARD TRUST #2**

**Second Defendant**

**and**

**PAUL WILLIAM KIRK IN HIS CAPACITY AS RECEIVER AND MANAGER OF OIM#2 PTY LTD  
(RECEIVERS AND MANAGERS APPOINTED) (ACN 112 691 997) AS TRUSTEE FOR  
TIMBERCORP ORCHARD TRUST #2**

**Third Defendant**