

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

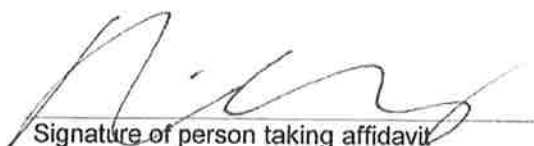
CERTIFICATE IDENTIFYING EXHIBIT "RWM-8"

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-8**" 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-8"

**Summons and Originating Motion filed in
Liparoo and Yungera 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 6604

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 #3 & ORS (ACCORDING TO THE
ATTACHED SCHEDULE)

Defendants

SUMMONS ON ORIGINATING MOTION – SPECIAL PROCEDURE
(Liparoo and Yungera 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: 120019388
(Clint Hinchin Clint.Hinchin@aar.com.au)

To: The First and Second Defendants

c/- their solicitors

Maddocks

140 William Street

Melbourne VIC 3000

The Third and Fourth Defendants

c/- their solicitors

Norton Rose Australia

Level 15, RACV Tower, 485 Bourke Street
Melbourne, Victoria, 3000

Graham Dace, Graham Goldenberg, Goran Runje, Graeme Philip Cole, Christopher Mark
Littley, 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 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)*:
 - (a) Graham Dace be appointed as the representative of the Growers in the 2001 Timbercorp Almond Project (ARSN 095 649 746);
 - (b) Graham Goldenberg be appointed as the representative of the Growers in the 2002 Timbercorp Almond Project (ARSN 099 611 935);
 - (c) Goran Runje be appointed as the representative of the Growers in the 2003 Timbercorp Almond Project (ARSN 103 197 299);

- (d) Graeme Phillip Cole be appointed as the representative of the Growers in the 2004 Timbercorp Almond Project (ARSN 108 336 670);
 - (e) Christopher Mark Littley be appointed as the representative of the Growers in the 2005 Timbercorp Almond Project (ARSN 112 935 092); and
 - (f) 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).
4. The persons appointed as representatives pursuant to paragraph 3 be joined as the fifth, sixth, seventh, eighth, ninth and tenth 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 fifth, sixth, seventh, eighth, ninth and tenth defendants have to the sale proceeds held on trust by the third and fourth defendants pursuant to paragraphs 6 and 7 of the orders made by the Honourable Justice Davies on 11 December 2009 in proceeding No. SCI 2009 10382 (*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 third and fourth defendants pursuant to paragraphs 6 and 7 of the Orders ought to be distributed between the plaintiff and the first, second, fifth, sixth, seventh, eighth, ninth and tenth 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 16 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 Alfens 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

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 #3**

First Defendant

and

**OIM#5 PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ACN 118 204 701) AS
TRUSTEE FOR TIMBERCORP ORCHARD TRUST #5**

Second 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 #3 AND RECEIVER AND MANAGER OF
OIM#5 IN ITS CAPACITY AS TRUSTEE FOR TIMBERCORP ORCHARD TRUST #5**

Third 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 #3 AND RECEIVER AND MANAGER OF
OIM#5 IN ITS CAPACITY AS TRUSTEE FOR TIMBERCORP ORCHARD TRUST #5**

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 5
S CI 2011 6604

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 #3 & ORS (ACCORDING TO THE
ATTACHED SCHEDULE)**

Defendants

**ORIGINATING MOTION BETWEEN PARTIES
(Liparoo and Yungera 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: 120019368
(Clint Hinchon Clint.Hinchon@aar.com.au)

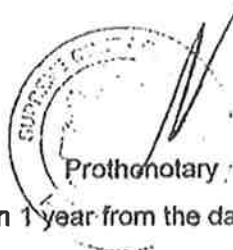
TO THE DEFENDANTS

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.

- 6 DEC 2011

FILED:



THIS ORIGINATING MOTION is to be served within 1 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 third and fourth defendants pursuant to paragraphs 6 and 7 of the orders made by the Honourable Justice Davies on 11 December 2009 in proceeding No. SCI 2009 10382 (*Orders*).
4. A declaration as to what, if any, right the first and second defendants have to the sale proceeds held on trust by the third and fourth defendants pursuant to paragraphs 6 and 7 of the *Orders*.
5. A declaration as to how the sale proceeds held on trust by the third and fourth defendants pursuant to paragraphs 6 and 7 of the *Orders* ought to be distributed between the plaintiff and the first and second defendants.
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 Level 27, 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 Level 27, 530 Collins Street, Melbourne VIC 3000.
5. The address of the first and second defendants is Level 32, 360-374 Collins Street, Melbourne VIC 3000.
6. The address for service of the first and second defendants is at the offices of Maddocks, of 140 William Street, Melbourne VIC 3000.
7. The address of the third and fourth 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 third and fourth 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 # D
S CI 2011 6604

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 #3

First Defendant

and

OIM#5 PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ACN 118 204 701) AS
TRUSTEE FOR TIMBERCORP ORCHARD TRUST #5

Second 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 #3 AND RECEIVER AND MANAGER OF
OIM#5 IN ITS CAPACITY AS TRUSTEE FOR TIMBERCORP ORCHARD TRUST #5

Third 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 #3 AND RECEIVER AND MANAGER OF
OIM#5 IN ITS CAPACITY AS TRUSTEE FOR TIMBERCORP ORCHARD TRUST #5

Fourth Defendant

Form 4A

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

List # D
S CI 2011 6604

BETWEEN

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

Plaintiff

and

~~Overarching Obligations Certification~~ (RECEIVERS AND MANAGERS APPOINTED (ACN 112 691 997) AS
TRUSTEE FOR TIMBERCORP ORCHARD TRUST #3 & 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 Hinchon Clint.Hinchon@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

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 #3**

First Defendant

and

**OIM#5 PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ACN 118 204 701) AS
TRUSTEE FOR TIMBERCORP ORCHARD TRUST #5**

Second 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 #3 AND RECEIVER AND MANAGER OF
OIM#5 IN ITS CAPACITY AS TRUSTEE FOR TIMBERCORP ORCHARD TRUST #5**

Third 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 #3 AND RECEIVER AND MANAGER OF
OIM#5 IN ITS CAPACITY AS TRUSTEE FOR TIMBERCORP ORCHARD TRUST #5**

Fourth Defendant

Form 4B

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

List ^D
S CI 2011 6604

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 #3 & 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: 120019368)
(Clint Hinchon 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 HINCHON

Legal practitioner 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 #3**

First Defendant

and

**OIM#5 PTY LTD (RECEIVERS AND MANAGERS APPOINTED) (ACN 118 204 701) AS
TRUSTEE FOR TIMBERCORP ORCHARD TRUST #5**

Second 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 #3 AND RECEIVER AND MANAGER OF
OIM#5 IN ITS CAPACITY AS TRUSTEE FOR TIMBERCORP ORCHARD TRUST #5**

Third 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 #3 AND RECEIVER AND MANAGER OF
OIM#5 IN ITS CAPACITY AS TRUSTEE FOR TIMBERCORP ORCHARD TRUST #5**

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

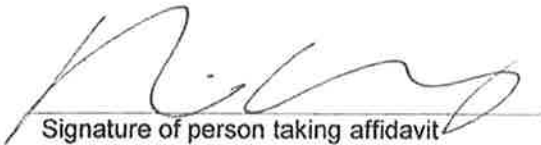
CERTIFICATE IDENTIFYING EXHIBIT "RWM-9"

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-9" 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-9"

**Summons and Originating Motion filed in
Fenceport Rights Proceeding on
13 December 2011**

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

r 45.05(6)

S CI 2011 6777

IN THE MATTER OF an application by
FENCEPORT PORT PROPRIETARY LIMITED (ACN 139 604 121),
OLIVECORP LAND PTY LTD (IN LIQUIDATION) (ACN 090 141 512),
MARK ANTHONY KORDA (in his capacity as liquidator of Olivecorp Land Pty Ltd (in
liquidation), and
MARK FRANCIS XAVIER
for declarations as to rights to moneys held on trust

**FENCEPORT PROPRIETARY LIMITED (ACN 139 604 121)
& ORS (according to the attached Schedule)**

Plaintiffs

SUMMONS ON ORIGINATING MOTION - SPECIAL PROCEDURE

Date of document: 13 December 2011
Filed on behalf of: The Plaintiffs

Prepared by:
ARNOLD BLOCH LEIBLER
Lawyers and Advisers
Level 21
333 Collins Street
MELBOURNE 3000

Solicitor's Code: 54
DX 38455 Melbourne
Tel: 9229 9999
Fax: 9229 9900
Ref: 01-1601361

(Leonie Thompson - lthompson@abl.com.au)

TO: Con Moshopolous,
Pauline Emma Hammer,
David Sydney Butterfield,
Graham Goldenberg and
Shun King Li
c/- their solicitors
Clarendon Lawyers
Level 17, North Rialto Tower
525 Collins Street
Melbourne VIC 3000

You are summoned to attend before the Court constituted by a Judge of the Court on the hearing of an application by the plaintiff for judgment or an order in respect of the relief or remedy sought in the originating 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 16.01(2) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic):
 - (a) Con Moshopolous be appointed as representative of the Growers in the 2000 Timbercorp Olive Project (Private Offer) (Unregistered);
 - (b) Pauline Emma Hammer be appointed as representative of the Growers in the 2001 Timbercorp Olive Project (ARSN 094 383 082);
 - (c) David Sydney Butterfield be appointed as representative of the Growers in the 2002 Timbercorp Olive Project (ARSN 098 233 455);
 - (d) Graham Goldenberg be appointed as representative of the Growers in the 2003 Timbercorp Olive Project (ARSN 104 648 473); and
 - (e) Shun King Li be appointed as representative of the Growers in the 2004 Timbercorp Olive Project (ARSN 108 744 378).
- 3 Pursuant to Rules 9.02 and/or 9.06(b) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic), the five persons appointed pursuant to paragraph 2, above, be joined as the first, second, third, fourth and fifth defendants (**Grower Defendants**) respectively in this proceeding.
- 4 The third and fourth plaintiffs (**Liquidators**) pay from the Net Boort Proceeds (as that term is defined in paragraph 7 of the orders made by the Honourable Justice Croft on 12 November 2009 in Supreme Court of Victoria proceeding no. 9998 of 2009) to Clarendon Lawyers (the solicitors for the Grower Defendants) the legal costs and disbursements incurred in this proceeding by the Grower Defendants on a solicitor and client basis pursuant to Rule 63.32(2)(a) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) within 14 days of presentation to the Liquidators by Clarendon Lawyers of a tax invoice for those legal costs and disbursements or a bill of costs prepared and certified by an appropriately qualified costs consultant as agreed by the Liquidators and the Grower Defendants.
- 5 Pursuant to Rule 45.05 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) the plaintiffs have leave to proceed by originating motion in Form 5C.

- 6 The plaintiffs are granted leave to file and serve an amended originating motion on the defendants on or before 4:00pm on Tuesday 20 December 2010:
- (a) that conforms with Form 5C;
 - (b) that lists the Grower Defendants as the first, second, third, fourth and fifth defendants in this proceeding;
 - (c) seeking a declaration as to what (if any) rights the Growers represented by the Grower Defendants have to the net sale proceeds held on trust by the first defendant pursuant to paragraph 7 of the orders of the Honourable Justice Croft on 12 November 2009 in Supreme Court of Victoria proceeding no. 9998 of 2009; and
 - (d) amending paragraph 4 of the Originating Motion to read, "A declaration as to how the Net Boort Proceeds should be distributed between the first plaintiff, the second plaintiff, and the Growers represented by the first, second, third, fourth and fifth defendants."
- 7 That paragraph 11 of the orders made by the Honourable Justice Croft in Supreme Court proceeding no. 9998 of 2009 be discharged in relation to exhibit MAK-18 to the affidavit of Mark Anthony Korda filed on 10 November 2009 in that proceeding.
- 8 The proceeding be listed for further directions on Friday 24 February 2012.
- 9 Further directions for the conduct of the proceeding.
- 10 Such other orders as the Court deems fit.

The application will be heard before the Honourable Justice Davies in Old High Court No. 3, Supreme Court, 450 Little Bourke Street, Melbourne, on Friday 16 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

13 DEC 2011



This document was filed by Arnold Bloch Leibler of Level 21, 333 Collins Street, Melbourne, solicitors for the plaintiffs.

SCHEDULE OF PARTIES**FENCEPORT PROPRIETARY LIMITED (ACN 139 604 121)**

First Plaintiff

and

OLIVECORP LAND PTY LTD (IN LIQUIDATION) (ACN 090 141 512)

Second Plaintiff

and

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

Third Plaintiff

and

MARK FRANCIS XAVIER**(in his capacity as liquidator of Olivecorp Land Pty Ltd (in liquidation))**

Fourth Plaintiff

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

r 5.02(2)

S CI 2011 6777

IN THE MATTER OF an application by
FENCEPORT PORT PROPRIETARY LIMITED (ACN 139 604 121),
OLIVECORP LAND PTY LTD (IN LIQUIDATION) (ACN 090 141 512),
MARK ANTHONY KORDA (in his capacity as liquidator of Olivecorp Land Pty Ltd (in
liquidation), and
MARK FRANCIS XAVIER
for declarations as to rights to moneys held on trust

FENCEPORT PROPRIETARY LIMITED (ACN 139 604 121)
& ORS (according to the attached Schedule)

Plaintiffs

ORIGINATING MOTION
(where no defendant)

Date of document: 13 December 2011
Filed on behalf of: The Plaintiffs

Prepared by:
ARNOLD BLOCH LEIBLER
Lawyers and Advisers
Level 21
333 Collins Street
MELBOURNE 3000

Solicitor's Code: 54
DX 38455 Melbourne
Tel: 9229 9999
Fax: 9229 9900
Ref: 01-1601361

(Leonie Thompson - lthompson@abl.com.au)

TAKE NOTICE that the Plaintiffs will apply to the Court on 16/12/2011 at 10:00am at Court 3
450 LITTLE BOURKE STREET MELBOURNE for the following relief sought by the Plaintiffs:-

- 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 A declaration as to what (if any) right the first plaintiff has to the net sale proceeds held on trust by the second plaintiff pursuant to paragraph 7 of the orders of the Honourable Justice Croft on 12 November 2009 in Supreme Court of Victoria proceeding no. 9998 of 2009 (**Net Boort Proceeds**).

- 3 A declaration as to what (if any) right the second plaintiff has to the Net Boort Proceeds.
- 4 A declaration as to how the Net Boort Proceeds should be distributed between the first plaintiff and the second plaintiff.
- 5 Any other order that the Court deems fit.

DATE: 13 December 2011


Arnold Bloch Leibler

Arnold Bloch Leibler

Solicitors for the Plaintiffs

FILED

13 DEC 2011


Prothonotary

The address of the Plaintiffs is

~~at their solicitors~~

~~Arnold Bloch Leibler~~

Level 24, 333 Collins Street

Melbourne VIC 3000

SCHEDULE OF PARTIES

FENCEPORT PROPRIETARY LIMITED (ACN 139 604 121)

First Plaintiff

and

OLIVECORP LAND PTY LTD (IN LIQUIDATION) (ACN 090 141 512)

Second Plaintiff

and

MARK ANTHONY KORDA

(in his capacity as liquidator of Olivecorp Land Pty Ltd (in liquidation))

Third Plaintiff

and

MARK FRANCIS XAVIER

(In his capacity as liquidator of Olivecorp Land Pty Ltd (in liquidation))

Fourth Plaintiff

Dated: 13 December 2011

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

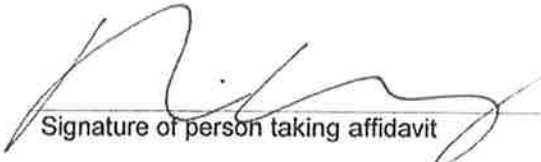
CERTIFICATE IDENTIFYING EXHIBIT "RWM-10"

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-10**" 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-10"

Notice of Appeal filed on 11 July 2011

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

BETWEEN

File No. of 2011

GRAHAM GOLDENBERG & ORS (according to the Schedule)

Appellants

and

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

Respondents

NOTICE OF APPEAL

Date of Document: 11 July 2011

Filed on behalf of the appellants

Prepared by:

Clarendon Lawyers

Level 17

North Rialto Tower

525 Collins Street

Melbourne VIC 3000

Solicitor Code:

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Ref:

MJF:1100297

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TAKE NOTICE that the appellants intend to appeal to the Court of Appeal against the judgment of the Honourable Justice Davies delivered on 27 June 2011 in proceeding number 10699 of 2009.

ORDERS / JUDGMENT APPEALED FROM

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.

GROUNDS OF APPEAL

The following definitions apply in these grounds of appeal:

- (a) **2002 Projects** means ARSN 099 611 935: 2002 Timbercorp Almond Project and the Private Offer: 2002 Timbercorp Almond Project ;
- (b) **2005, 2006 and 2007 Projects** means ARSN 112 935 092: 2005 Timbercorp Almond Project, ARSN 118 387 974: 2006 Timbercorp Almond Project and ARSN 122 511 040: 2007 Timbercorp Almond Project respectively;

- (c) **Fund** means the fund created pursuant to the Order;
- (d) **Liquidators** means the fourth and fifth respondents;
- (e) **Order** means the order of the Honourable Justice Robson made 9 October 2009 in Supreme Court proceeding number 9408 of 2009;
- (f) **Projects** means the 2002 Projects and the 2005, 2006 and 2007 Projects;
- (g) **SPD** means the sale and purchase deed identified in paragraph [19] of the reasons for judgment, in respect of which settlement took place on 2 December 2009; and
- (h) **TSL** means Timbercorp Securities Ltd, the RE of the Projects (which retained its AFSL notwithstanding its liquidation).

These grounds of appeal otherwise adopt the definitions used in the learned trial judge's reasons of 15 June 2011.

1. Her Honour:

- (a) erred in fact and law in finding (at [30] and [31]) that the Growers needed to establish that they held rights of a proprietary (as distinct from a contractual) nature in and with respect to the Almond Assets that were converted into the Fund;
- (b) erred in fact in finding (at [28]) that, in making the Order, the Honourable Justice Robson intended to refer only to proprietary rights (as distinct from contractual rights), when the material before his Honour in the various proceedings before him relating to the Projects included the project documents for the 2002 Projects;
- (c) erred in fact and law in finding (at [48]) that the Growers in the 2002 Projects have no claim on the Fund;
- (d) erred in fact and law in finding (at [79]) that the Growers in the 2005, 2006 and 2007 Projects have no claim on the Fund in respect of their right to use and exploit the water licences; and
- (e) should have found that:
 - i. there was no limitation under the Order to proprietary rights;
 - ii. a claim could be made on the Fund on account of rights of a contractual nature that were given up¹ in order to allow the sale of the Almond Assets to proceed and the Fund to be created; and accordingly

¹ That is to say, contractual rights that would have been specifically enforceable notwithstanding the liquidation of AL and TSL and were "given up" in much the same way as the Growers' proprietary rights were given up upon extinguishment pursuant to the Order.

- iii. Growers in the 2002 Projects have a claim on the Fund to the value of their rights as identified at [46]; and
- iv. Growers in the 2005, 2006 and 2007 Projects have (in addition to their proprietary rights as identified at [53] – [71] and [73(a)]) a claim on the Fund to the value of their rights to use and exploit the water licences as identified at [72].

2. Her Honour:

- (a) having found that: *“the definition of ‘Almondlot’ reflects that an Almondlot comprised a bundle of rights constituting the Growers’ “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” (at [67]; see also [68] to [71]), erred in fact and law in finding that:*
 - i. there was no demise of water rights under the head leases and sub-leases (at [72]);
 - ii. it would not be a derogation from the grant by AL or TSL to interfere with or to deny the Growers access to those assets (at [74]);
 - iii. that the promise of rights to use and enjoy those assets was not a promise that touched on and concerned the land (at [75] to [78]); and
- (b) should have found that:
 - i. the definition of “Lease” in the Head Leases from AL to TSL includes a right to use and exploit the Water Licences and, accordingly, the right to use and enjoy the Water Licences formed part of the demise from AL to TSL;
 - ii. alternatively, having granted to TSL rights with respect to water, it would be a derogation from the grant by AL to TSL to interfere with TSL’s right to exploit those water licences;
 - iii. alternatively, the inclusion of those rights in the grant is a promise by AL to TSL to supply water that touches on and concerns the land;
 - iv. further or alternatively, the grant by AL to TSL in clause 3.2 of the various Grower sub-leases (to all of which, AL was a party) was a promise that touched upon and concerned, and was a right appurtenant to, TSL’s head lease;
 - v. accordingly, AL granted to TSL rights with respect to water that were part of the grant or touched upon and concerned TSL’s head lease and created an interest of a proprietary nature; and

- vi. accordingly, (assuming, contrary to Ground 1 above, that it is necessary to show a proprietary right in order to make a claim on the Fund) the grant to the Growers in the 2005, 2006 and 2007 Projects of an Almondlot that included rights with respect to water means that the Growers in those schemes have a proprietary right to exploit the Water Licences.

3. Her Honour:

- (a) having found (at [73] and [79]) that Growers held some rights that entitled them to claim on the Fund for the value of those rights, erred in law in finding (at [118] and [121]) that the land and orchards subject to the Growers' rights² had to be sold to a new entity before any such value could be established; and
- (b) having found (at [110] and [115]) that there is a market for hire of replacement REs and that there was a chance for restructure of the managed investment schemes, erred in fact and law in finding (at [116]) that there was no evidential foundation for the Court to evaluate that chance; and
- (c) having found (at [124]) that it is reasonable to surmise that Growers would have passed the various resolutions to enable relevant constitutional changes to be effected, erred in fact and law in finding (at [124]) that the absence of an actual restructure proposal foreclosed valuation of the chance of restructure; and therefore
- (d) erred in finding (at [137]) that there was no possibility, other than a theoretical possibility, that the projects would have continued if the Growers' rights had not been extinguished; and
- (e) should have found that:
 - i. the said Growers' rights (and other rights as contended for in paragraph 2 above) would, as a matter of law, endure notwithstanding the insolvency of Almond Land Pty Ltd;
 - ii. the capacity for sale of the reversion was not a condition precedent to Growers' rights having value;
 - iii. in the circumstances that obtained in October 2009, where Growers' rights could only be extinguished upon the Court ordering that the Liquidators of TSL (as RE of the schemes) were justified in extinguishing those rights (i.e. upon realisation or preservation of their value), a scheme was viable if there was a market for

² That is to say, in the case of the 2005, 2006 and 2007 Projects, the reversion.

hire of replacement REs, there was a chance for restructure of the scheme and there was a chance (alternatively, likelihood on the balance of probabilities) that the payments required of scheme members over time would equal or exceed the expenses necessary to carry on the scheme over time; and therefore

iv. the Growers' rights had value capable of assessment.

4. Her Honour's finding (at [87]) that the Growers' rights under the Projects as they were structured held no value at the time of extinguishment in accordance with the Order and her Honour's finding (at [83] and [87]) that the Projects "*were at risk of imminent and inevitable termination*" were contrary to the evidence and the weight of the evidence when, immediately before that time:-

- (a) the Growers enjoyed the right to have the registered schemes wound up in accordance with their constitutions;
- (b) the Growers had not exercised the right to have the registered schemes wound up in accordance with their constitutions;
- (c) an application by the Liquidators for winding up of the registered schemes had earlier been adjourned *sine die*;
- (d) the Growers enjoyed the right to reconstitute the Projects;
- (e) the Growers' proprietary rights and enforceable contractual rights could only be extinguished by TSL (through the agency of the Liquidators) if TSL (and the Liquidators) complied with s.601FC(1)(c) (and s.601FD(1)(c)) of the *Corporations Act 2001* and procured an order of the Court that they were so justified; and
- (f) the Order was made in circumstances where the Court rejected the Liquidators' application for a direction that they would be justified in accepting an offer of \$6m as the price for extinguishment of the Growers' rights.

5. Her Honour erred in fact and law in finding (at [136]) that the Growers' counterfactual was purely speculative and (at [137]) "*wishful thinking*", when (whatever factors, including those referred to at [135], might have borne upon the chance to derive value from the Growers' rights over time) the Growers had (until extinguishment pursuant to the Order) both the right and the commercial opportunity to keep AL out of possession of the land upon which the Projects had been carried on.

6. Further and alternatively, Her Honour:

- (a) erred in finding (at [166]) that the Court was not obliged to consider the question of marriage value; and
 - (b) should have found that:
 - i. there was no market for the Growers' rights given up so that settlement of the SPD could take place; and
 - ii. there was no market for, and there was no evidence of the value of, the Banks' rights given up so that settlement of the SPD could take place; or, in any event
 - iii. the aggregate value of the Growers' rights and the Banks' rights was significantly less than the amount of the Fund; and accordingly
 - iv. the question of marriage value fell to be resolved; and
 - v. the marriage value is that portion of the Fund remaining after payment of the Liquidators' costs and expenses and deduction of the value³ of the Growers' rights given up so that settlement of the SPD could take place and deduction of the value⁴ of the Banks' rights given up so that settlement of the SPD could take place; and
 - vi. the marriage value should be apportioned evenly between the Banks and the Growers.
7. If (contrary to Ground 3 above) a finding that a replacement RE would have been appointed to the schemes is a pre-condition for establishment that Growers' rights had value, her Honour's finding (at [132]) that the possibility that HML would have consented to act as RE cannot be made out is contrary to the evidence and the weight of the evidence, in that:-
- (a) as her Honour found (at [128]), Mr Knox's evidence was to the effect that HML was willing to act as permanent RE of the registered schemes and manager of the unregistered scheme if it would not assume (pursuant to s.601FS) substantial liabilities (particularly to the Banks) upon appointment;
 - (b) thus, HML had consented to be appointed temporary RE in July 2009, conditionally only upon the effect of s.601FS;

³ Her Honour found the Growers' proprietary rights had no value and did not attribute any value to their contractual rights.

⁴ Her Honour did not (and could not, given the absence of evidence) value the reversionary and contractual rights over which the Banks held security.

- (c) her Honour ought to have dealt with and accepted the Growers' submission that a replacement RE would not have assumed (pursuant to s.601FS or otherwise) the substantial liabilities to the Banks;
- (d) alternatively, her Honour ought to have dealt with and accepted the Growers' submission that the Deeds of Covenant would have operated to prevent the Banks from claiming upon a replacement RE;
- (e) if, as a matter of fact and law, HML would not have assumed such substantial liabilities, the condition deposed to by Mr Knox would have been fulfilled and it is irrelevant that HML might have been concerned about the effect of s.601FS;
- (f) her Honour placed (at [125]) excessive weight upon the fact that proposed extraordinary resolutions for replacement of the RE of the schemes were adjourned on 23 July 2009, that they did not identify the proposed replacement RE and that there were insufficient numbers in attendance at the meeting to pass the proposed resolutions, when the evidence established that the resolution for adjournment was previously authorised by the Court to be put to the hastily convened meeting;
- (g) the legal advice obtained by HML in August 2009 indicated that HML would not assume liability to the Banks and, accordingly, her Honour erred (at [132]) in giving weight to the fact that the legal advice did not deal with HML's concern as to directions from receivers that might be appointed by the Banks;
- (h) HML's further conditional consent to be appointed temporary RE was provided in October 2009 in the circumstances described in *Re Timbercorp Securities Ltd (In liq) (No. 3) (2009) 74 ACSR 626* at [64];
- (i) having found (at [110] and [115]) that there was a market for hire of replacement REs, her Honour placed excessive weight upon the conduct and concerns of HML;
- (j) her Honour erred in finding (at [134]) that "*Mr Knox's unchallenged and unequivocal evidence was that HML would not have [be appointed as permanent RE]*", when Mr Knox had also given the evidence referred to at paragraph 7(a) above.
- (k) her Honour placed (at [125]) excessive weight upon the fact that a replacement RE would not have been appointed before settlement of the SPD, when Growers' rights could not have been extinguished except in accordance with the Order (so that, absent the Order, Growers would have had ample time to find a replacement RE); and

- (l) her Honour placed (at [119]) excessive weight on the fact that the Liquidators were concerned about deterioration of the orchards through lack of maintenance, when the alternatives of passive reliance on rights, reconstitution and winding up remained available to Growers and were only given up upon extinguishment pursuant to the Order.

JUDGMENT/ORDERS SOUGHT BY THE APPELLANTS

1. Order 1 and the words after the second comma in order 4 of the orders of the Honourable Justice Davies made on 27 June 2011 (**the 27 June orders**) be set aside.
2. The First Respondent reconstitute the Fund with an amount equal to the total of the amounts paid to it pursuant to orders 2, 3, 4 and 5 of the 27 June orders.
3. The Second Respondent reconstitute the Fund with an amount equal to the total of the amounts paid to it pursuant to orders 2, 3, 4 and 5 of the 27 June orders.
4. The costs of the Growers of and incidental to the appeal be paid out of the reconstituted Fund.
5. The proceeding be remitted to the Honourable Justice Davies for further hearing and determination in accordance with the reasons of the Court of Appeal.
6. Such further or other orders as the Court deems fit.

DATED: 11 July 2011

Clarendon Lawyers
Clarendon Lawyers

SCHEDULE OF PARTIES

GRAHAM GOLDENBERG

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

First Appellant

and

CHRISTOPHER MARK LITTLE

(in his capacity as representative of the Participant Growers in the 2005 Almond Project)

Second Appellant

and

CONSTANTINE MOSHOPOULOS

(in her capacity as representative of the Participant Growers in the 2006 Almond Project)

Third Appellant

and

DAVID BUTTERFIELD

(in his capacity as representative of the Participant 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 (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)

First Respondent

and

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED

(A.C.N. 005 357 522)

Second Respondent

and

ALMOND LAND PTY LTD (IN LIQUIDATION) (A.C.N 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-11"

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
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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-11**" 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-11"

**Agreed summary for the Court of Appeal filed on
12 December 2011**

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 attached)

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 attached)

Respondents

SUMMARY FOR COURT OF APPEAL
IN ACCORDANCE WITH PRACTICE STATEMENT CA 2 OF 1995

A. Summary of proceedings and issues

1. Proceedings in which the plaintiff, first and fifth to eighth defendants made claims against a fund held in trust resulting from the sale of certain assets by second to fourth defendants.

Parties in proceeding below

2. The parties in the proceeding below were:

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) (BOSI)

Plaintiff

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

First defendant

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

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 Participant Growers in the 2005 Almond Project)	Sixth defendant
CONSTANTINE MOSHOPOULOS (in her capacity as representative of the Participant Growers in the 2006 Almond Project)	Seventh defendant
DAVID BUTTERFIELD (in his capacity as representative of the Participant Growers in the 2007 Almond Project and as representative of the Growers in the 2002 Private Offer Scheme)	Eighth defendant

Steps in proceeding below

3. On 15 December 2009, **BOSI**, as the plaintiff, instituted Proceeding No. SCI 10699 of 2009 (**Rights Proceeding**), seeking declarations as to its, the first defendant's (**ANZ**) and the fifth to eighth defendants' (**Growers**) rights, if any, to sale proceeds held in an interest bearing trust account pursuant to orders of Robson J, and how those sale proceeds ought be distributed. The background to the proceeding is set out in the Summary of Facts below.
4. The Rights Proceeding was heard by Davies J over 12 days in February 2011 and March 2011.
5. 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 whole net sale proceeds.
6. By orders dated 27 June 2011, the funds were distributed to BOSI and ANZ, subject to certain ancillary orders that are not relevant to this appeal.

Major issues in the Rights Proceeding and their disposition

7. The claimants to the net sale proceeds were BOSI and ANZ on the one hand (**Secured Creditors**) and the Growers on the other hand. The liquidators did not claim any portion of the net sale proceeds.
8. The primary issues for determination were as follows:

- (1) the intent and effect of Robson J's orders made on 9 October 2009 (described below in the summary of facts), and in particular whether:
 - (A) as the Growers contended, Robson J found that claims could be made on the net sale proceeds for the value of rights extinguished to allow the sale to proceed; or
 - (B) as the Secured Creditors contended, the effect of Robson J's orders was to preserve any claim to an entitlement to a share of the net sale proceeds, which claim remained to be established in the Rights Proceeding;
 - (2) whether the nature of the interests the Growers had in respect of the assets sold was of a kind that afforded them an entitlement to a share of the net sale proceeds; and
 - (3) if so, the value of such entitlement.
9. Prior to commencement of the trial the parties filed an agreed list of issues with the Court, a copy of which is annexed to this summary.
10. In relation to the primary issues the subject of the Rights Proceeding, Davies J decided that:
- (1) the claimants on the net sale proceeds were required to show a proprietary interest in the assets sold. Robson J's orders simply preserved the Growers' ability to assert their claim to a share of the net sale proceeds. It remained incumbent upon the Growers in the Rights Proceeding to found their entitlement to a share of the net sale proceeds. In order to do so, they needed to establish that they held rights of a proprietary nature in and with respect to the assets that were converted into the fund constituted by the net proceeds from the sale of the assets;
 - (2) the Growers in the 2002 Projects whose rights were contained in licence and joint venture agreements had only contractual rights to the land, the almond trees, the capital works and the water licences. Those contractual rights did not give Growers an interest in the net sale proceeds constituted by the sale of the almond assets. Her Honour held the Growers only acquired rights of a proprietary nature in the almonds that were grown (and there was no fruit on the trees at the time of the sale of the assets). They did not acquire any proprietary interest in the land, the almond trees, the capital works or the water licences.

Accordingly, these Growers had no entitlement to share in the fund constituted by the sale of the assets; and

- (3) the Growers in the 2005-2007 Projects whose rights were contained in sub-leases held leasehold interests, held rights of a proprietary nature in the land, almond trees and capital works, but only had contractual rights in the water licences. Their proprietary rights entitled these Growers to make a claim on the net sale proceeds to be determined by reference to the value of those rights pre-extinguishment;
 - (4) as to the value of the Growers' rights,¹ the Growers' case was analogous to a loss of opportunity claim;
 - (5) it was theoretically possible for the Growers to appoint a replacement responsible entity and re-structure the various schemes;
 - (6) however, there were numerous obstacles to the appointment of a replacement responsible entity and re-structure of the schemes and the prospects of such an appointment and re-structure were no more than a mere hope. Accordingly, the Growers' rights had no value.
11. Justice Davies held that the Secured Creditors were entitled to receive the entire amount of the net sale proceeds as the amounts secured were greater than the net sale proceeds held in trust and the Growers have failed to establish their entitlement.

Issues on appeal

12. The Appellants (**Growers**) challenge:
- (1) the findings of the learned trial Judge that:
 - (a) the Growers needed to establish that they held rights of a proprietary (as distinct from a contractual) nature in and with respect to the assets that were converted into the net sale proceeds [*paragraph 1(a) of the Grounds of Appeal*];
 - (b) Justice Robson's Orders intended to only refer to proprietary rights (as distinct from specifically enforceable contractual rights) when the material relating to all the relevant Projects was before his Honour in the various proceedings [*paragraph 1(b) of the Grounds of Appeal*];
 - (c) the Growers with licence and joint venture agreements have no claim on the net sale proceeds [*paragraph 1(c) of the Grounds of Appeal*]; and

¹ Although it was unnecessary to do so, Davies J's analysis of the valuation issues concerned the 2002 projects as well as the 2005-2007 projects: reasons at [81].

- (d) the Growers with sub-leases have no claim on the net sale proceeds in respect of their right to use and exploit the water licences [*paragraph 1(d) of the Grounds of Appeal*];
- (2) the conclusion arrived at by the learned trial Judge that:
 - (a) there was no demise of water rights under the head leases and sub-leases [*paragraph 2(a)(i) of the Grounds of Appeal*];
 - (b) it would not be a derogation from the grant by Almond Land Pty Ltd (in liquidation) or Timbercorp Securities Limited (in liquidation) to interfere with or to deny the Growers access to those assets [*paragraph 2(a)(ii) of the Grounds of Appeal*]; and
 - (c) the promise of rights to use and enjoy those assets was not a promise that touched on and concerned the land [*paragraph 2(a)(iii) of the Grounds of Appeal*],
 even though the learned trial Judge found that "*the definition of 'Almondlot' reflects that an Almondlot comprised a bundle of rights constituting the Growers' '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'*";
- (3) the findings of the learned trial Judge that:
 - (a) the land and orchards subject to the Growers' rights had to be sold to a new entity before any value could be established [*paragraph 3(a) of the Grounds of Appeal*];
 - (b) although having found that there is a market for hire of replacement responsible entities and there was a chance for restructure of the managed investments schemes, there was no evidential foundation for the court to evaluate that chance [*paragraph 3(b) of the Grounds of Appeal*];
 - (c) although having found that it is reasonable to surmise that Growers would have passed the various resolutions to enable the relevant constitutional changes to be effected, that the absence of an actual restructure proposal foreclosed valuation of the chance of restructure and that it was only a theoretical possibility that the projects would have continued if the Growers' rights had not been extinguished [*paragraph 3(c) and 3(d) of the Grounds of Appeal*];
 - (d) for the purposes of Justice Robson's Orders the Growers' rights under the projects as they were structured held no value at the time of the extinguishment and that the projects "*were at risk of imminent and*

- inevitable termination*", which was contrary to the evidence and the weight of the evidence [paragraph 4 of the Grounds of Appeal];
- (e) the Growers' counterfactual was purely speculative and "*wishful thinking*", which is contrary to the evidence and the weight of the evidence [paragraph 5 of the Grounds of Appeal];
 - (f) the question of marriage value did not arise [paragraph 6(a) of the Grounds of Appeal]; and
 - (g) the learned trial Judge failed to consider the possibility that Huntley Management Ltd would have consented to act as replacement responsible entity, which was contrary to the evidence and the weight of the evidence [paragraph 7 of the Grounds of Appeal].
13. By their notice of contention dated 23 November 2011, the Creditors contend that Davies J's finding that the Growers were not entitled to share in the net sale proceeds should be affirmed, but on the additional or alternative ground that, in respect of the interests of the 2005-2007 Growers:
- 1. her Honour correctly held that the Growers had no proprietary interest in the water licences;
 - 2. her Honour ought to have held that the Growers in those projects had no proprietary interest in the almond trees or capital works (but rights of a contractual nature only); and
 - 3. her Honour ought to have held that the Growers' leasehold interests in the land and any entitlement under the leases to use or enjoy the almond trees or the capital works:
 - (a) were in the nature of encumbrances; and
 - (b) did not form any part of the subject matter of the sale under the Sale and Purchase Deed (SPD).

Interlocutory orders in the appeal

14. Associate Justice Lansdowne made orders in the nature of an interlocutory timetable on 29 September 2011.
15. An interlocutory application was made by the Growers for a pre-emptive costs order that was dismissed by consent on 13 October 2011.

B. Summary of facts

16. The factual background is contained in paragraphs 12 to 24 of the reasons for judgment of Davies J. These, and some additional relevant facts, are set out below.
17. The Timbercorp group had been in the business of agribusiness investment. The group's primary business activities were the establishment, development, marketing, operating and management of primary industry based projects, the acquisition of land, water rights and infrastructure and the provision of finance to investors in projects, which included managed investment schemes for the cultivation and harvesting of almonds for commercial gain.
18. Timbercorp Ltd (TL) was the parent entity of the Timbercorp Group and a publicly listed company on the Australian Securities Exchange. At the time that the Timbercorp group was placed under administration on 23 April 2009, the group had 33 managed investment schemes registered with the Australian Securities and Investments Commission under Part 5C of the *Corporations Act* 2001 (**the Act**). Timbercorp Securities Ltd (TSL), a wholly owned subsidiary of TL and the holder of an Australian Financial Services Licence, was the responsible entity (RE) of these schemes. It was charged with the responsibility of operating the schemes and performing the functions conferred on it by the schemes' constitutions as prescribed by s 601FB of the Act. These schemes included four of the five almond projects which are the subject of the proceeding, namely the 2002, 2005, 2006 and 2007 almond projects (collectively referred to as **the registered projects**). The Timbercorp group also managed private offer investment schemes that were not required to be registered under Part 5C of the Act nor required to be operated by an RE. Those schemes included the other almond project the subject of the proceeding namely, the 2002 private offer almond project (**the 2002 private offer project**) managed by Almond Management Pty Ltd (AM), another TL subsidiary.
19. The registered projects and the 2002 private offer project (collectively, the **almond projects**) had used commercial almond orchards established by Almond Land Pty Ltd (in liquidation) (AL) on its land and used AL's infrastructure, including its water licences and irrigation equipment. Although the legal structures differed, it was a key feature of each project that the almond assets remained AL's property (subject, of course, to whatever rights were enjoyed by the Growers). Pursuant to the project documents, the Growers were only given rights to use and occupy AL's property for the terms of their

projects and for the purpose of cultivating and harvesting almonds (the **Growers' rights**).

20. On 23 April 2009 the third and fourth defendants (the **liquidators**) were appointed as administrators of the Timbercorp group of companies.
21. On 29 June 2009, the creditors voted for the Timbercorp group of companies to be wound up, and the companies were placed into liquidation.
22. The liquidators investigated the financial position of the Timbercorp group and the viability of the various horticultural operations of the group, including the viability of the almond projects. The liquidators concluded that the companies in the Timbercorp group were hopelessly insolvent and specifically that TSL and AM had no funds to meet obligations to third party managers and were unable to continue managing the almond projects, which still had many years to run to completion. The liquidators would not invoice the Growers for the contributions that were due from them for the 2010 crop because of the insolvency of the Timbercorp companies and the inability of TSL and AL to continue to perform or implement their obligations in relation to the projects.
23. The liquidators also investigated the insolvency and long term viability of the almond projects. They determined that the almond projects were insolvent as the projected proceeds of sale for the 2010 harvest were less than the total operating expenditure and, in the liquidators' view based on their investigations, those projects had no long term viability in any event.
24. The liquidators decided that the only option available to them was to wind up the almond projects. In June 2009 they applied for, and obtained, a direction from the Court in Proceeding No. SCI 7114 of 2009 that they were justified in applying to wind up the registered almond projects formally and in mid-July 2009 the Court heard the winding up applications.
25. 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 (according to the Secured Creditors) or establishing the level of enthusiasm of Growers for taking steps to enable (according to the Growers) 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.

26. 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, 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.
27. 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 18 August 2009, in Proceeding No. SCI 7114 of 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 which power, they undertook, would not be exercised unless and until they were so authorised by the Court after a further hearing on notice to the Growers. The Court declined the application to 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.
28. 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, the SPD for the sale of the almond assets to Olam for \$128 million was executed.

29. The assets sold under the SPD were:

- (1) the Properties;
- (2) the Water Rights;
- (3) the Almond Orchards;
- (4) subject to clause 10.3, the benefit of the almond contracts.

"Properties" was a reference to "the real property owned by [AL]"; "Water Rights" was a reference to the permanent water rights and licences issued to AL under the *Water Act* 1989 (Vic) and AL's water allocation balance as at completion of the sale; and "Almond Orchards" was a reference to "the almond trees situated on the Properties and includes the future crop from those trees". In other words, the assets sold were the assets that the Growers used for the purposes of their projects.

30. The terms of the SPD included that Olam's purchase was conditional upon the liquidators having obtained a direction from the Court that they were justified in causing TSL and AM to terminate or surrender the "grower leases" (defined as the Growers' subleases or licence and joint venture agreements (as the case may be) under the almond projects), and also upon the Secured Creditors' agreement to discharge or release their securities, as the amounts owed to them at the time exceeded the purchase price payable.

31. On 5 October 2009, in Proceeding No. SCI 9408 of 2009, the liquidators, TSL in its capacity as RE of the registered projects, AM in its capacity as the manager of the 2002 private offer project, AL as the owner of the almond assets, and TL sought directions from the court under ss 477(2)(b), 511 and 568(1)(a) of the Act, first: that the liquidators were justified in entering into and performing the SPD; and second: that they were justified in procuring TSL and AM to extinguish all of the Growers' rights in respect of the almond assets. The liquidators also sought directions from the Court that they were justified in accepting an offer from the banks in relation to the apportionment of the net proceeds. The Secured Creditors had offered the Growers \$6 million (net of costs) out of the sale proceeds in full satisfaction for the Growers' rights transferred or surrendered to enable Olam to obtain clear title to the almond assets. The liquidators had formed the view that the offer should be accepted having regard, *inter alia*, to a report from a special purpose liquidator appointed to give independent consideration to the apportionment of the sale proceeds.

32. On 9 October 2009, Justice Robson decided that the directions sought should be made, other than the direction with respect to the liquidators' acceptance of the Secured Creditors' offer which his Honour declined to make (**Justice Robson's Orders**). His

Honour reasoned that there was uncertainty as to precisely what property rights of the Growers were to be terminated or surrendered as part of the consideration for the sale price of \$128 million. It was his Honour's view that it was not possible to assess fairly, according to law, the value of the rights being surrendered on behalf of the Growers until those rights were identified. His Honour also observed that the Secured Creditors were only entitled to that portion of the sale proceeds that represented the property over which they held securities. His Honour was of the view that he could not determine on the material before him whether the Secured Creditors' offer was an appropriate apportionment according to law and, accordingly, that he could not direct that the liquidators were justified in accepting that offer.

33. As a result, his Honour directed that the liquidators were not justified in entering into an agreement to accept \$8 million to extinguish the Growers' rights in accordance with the terms of the Secured Creditors' offer. However, his Honour held 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.
34. Justice Robson 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 (*Re Timbercorp Securities Ltd. (in liq.)* (No. 3) (2009) 74 ACSR 626).
35. The terms of his Honour's orders were *inter alia*:
 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.
 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.

9. Insofar as the Growers have any rights to the assets the subject of the SPD nothing in orders 1 to 5 above, or any action taken thereunder by the [liquidators], will prejudice those rights for the purposes of their claim to all or any part of the Net Proceeds.

36. Settlement of the sale of the almond assets to Olam occurred on 2 December 2009. TSL surrendered, with effect on and from 2 December 2009, all of the rights, title and interests of the Growers in the registered almond projects "in, arising under, or in connection with" the grower sub-leases and licences and "those parts of all of the Almondlots as were located on the land" on which the almond projects were conducted. AL and AM disclaimed the licences and joint venture agreements relating to the Almondlots allotted to each grower under that project. The Secured Creditors also released and discharged their securities in so far as they were held over the almond assets sold. The net sale proceeds were placed into an interest bearing trust account in accordance with Justice Robson's Orders, pending the hearing and determination of the Rights Proceeding.

Date: 12 December 2011

.....
Clarendon Lawyers
Solicitors for the Appellants

.....
Blake Dawson
Solicitors for the First Respondent

.....
Allens Arthur Robinson
Solicitors for the Second Respondent

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 Participant Growers in the 2005 Almond Project)

Second Appellant

CONSTANTINE MOSHOPOULOS (in her capacity as representative of the Participant Growers in the 2006 Almond Project)

Third Appellant

DAVID BUTTERFIELD (in his capacity as representative of the Participant 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

Timbercorp List of Issues

NOTE: In this List of Issues, capitalised expressions used in the orders of the Honourable Justice Robson made on 9 October 2009 in VSC matter number 9408 of 2009 (**Orders of Robson J**) have the meanings ascribed to them in those orders.

Rights of the parties to share in the Net Proceeds

1. In determining the entitlements of the parties to the Net Proceeds, is the relevant inquiry:
 - (a) [*As contended for by the Growers:*] What were the nature and extent of the rights (if any) of the parties in respect of the assets the subject of the SPD immediately before the extinguishment of Grower Rights that took place pursuant to paragraphs 1 and 2 of the Orders of Robson J? or
 - (b) [*As contended for by the Banks:*] What were the nature and extent of the rights or interests (if any) of the Participant Growers in the respective Almond Projects (**Growers**) in respect of the Almond Assets sold to Olam?
2. Having regard to the Deeds of Covenant executed by the Banks in favour of the Growers¹:
 - (a) what were the nature and extent of the rights (if any) of the Growers in respect of:
 - (i) use and occupation of the almond orchards?
 - (ii) the Almond Trees?
 - (iii) the Capital Works?
 - (iv) the Water Licences?
 - (b) were their rights (if any) in respect of each of the foregoing:
 - (i) proprietary in nature, by reason:
 - (A) that they formed part of the demise to the Participant Growers under the Sub-leases / licences?
 - (B) that they were the subject of leasehold covenants? In particular:
 - I. do the relevant covenants touch on and concern the land?
 - II. are those rights appurtenant to the Growers' leasehold interests?
 - III. would it be a derogation from the grant to interfere with those rights?

¹ In view of the existence of the Deeds of Covenant and the concession by the Banks that they enure in favour of the Growers, the Growers do not press their contentions based on *Inwards v Baker* and *Barnes v Addy*.

- (ii) purely contractual in nature?
 - (iii) specifically enforceable in any and, if so, in what manner?
3. What were the nature and extent of the rights of the Banks in respect of the assets the subject of the SPD? In particular:
- (a) in respect of the registered schemes (to which ss 601FS(2)(d) and 601GA(2) apply):
 - (i) do their constitutions specify an indemnity out of scheme property in favour of TSL(RE) in respect of the liabilities incurred by TSL(RE) to the Banks?
 - (ii) in incurring its liabilities to the Banks, did TSL(RE) perform its duties properly?
 - (iii) would TSL(RE)'s liabilities to the Banks become liabilities of any replacement responsible entity, such as Huntley Management Ltd (HML), appointed in place of TSL(RE)?
 - (b) would the Deeds of Covenant operate so that the Banks could be restrained by Growers from suing a replacement RE or Project Manager (such as HML) in respect of the liabilities of TSL(RE) or Almond Management?
 - (c) are the Banks correct in their contention that, in or about October 2009, Growers' rights in respect of the Almond Projects were liable to inevitable and imminent extinction?
 - (d) are the Banks correct in their contention that, as secured creditors, having regard to the terms of, and amounts outstanding under, their facilities, they are entitled to the Net Proceeds after the value of the Growers' entitlement (if any) has been deducted?
 - (e) alternatively to (d), are the Growers correct in their contention that the secured creditors' rights must be separately identified and valued?

Value of the parties' entitlement to the Net Proceeds

4. If yes to (e) above and if there is a shortfall between, on the one hand, the combined value of the Grower's rights and the Banks' rights and, on the other hand, the Net Proceeds, how is that 'marriage value' to be apportioned?

Secured creditors' entitlements

5. If yes to 3(e) above:
- (a) how are the secured creditors' rights to be valued?
 - (b) to what share of the Net Proceeds are the Banks entitled?

Growers' entitlements

Valuation methodology

6. If the Growers are entitled to any part of the Net Proceeds, the parties' respective experts agree that the correct method of valuing that entitlement is by way of a discounted cash flow analysis of the net present value of the Growers' future income stream from the respective Almond Project(s) in which they invested.

Law with respect to loss of a chance

7. Assuming the value of Growers' rights is to be assessed as the present value of the income stream from the respective Almond Project(s) in which they invested, what are the correct tests to be applied in determining that value? In particular:

(a) must the Growers establish:

- (i) on the balance of probabilities; or
- (ii) to some other and, if so, what degree of proof,

that the Almond Projects would have proceeded to the end of their scheduled life on the assumptions provided to their experts?

- (b) assuming establishment to the requisite standard that the Almond Projects would have so proceeded, is the present value of the future income stream to be reduced by a factor taking into account the degree of probability or possibility found?

Participant Growers' assumptions

8. Is the Court satisfied (refer to issue 7(a) above) that, at the time of the making of the Orders of Robson J, the Almond Projects would have run their full term on the following basis (as per the instructions provided to the Growers' valuation experts):

- (a) a new entity, for example HML, would have been appointed to replace Almond Management permanently as Project Manager of the 2002 Private Offer Scheme; and
- (b) that new RE would have been appointed to replace permanently TSL as responsible entity of the other (registered) Almond Projects; and
- (c) changes would have been effected to the constitutions and constituent documents of the Almond Projects² to replace the management fees payable to the responsible entity³ with handover, custodian / administration and responsible entity fees as set out

² And, in the case of the 2002 Private Offer Scheme, the project and management agreement.
³ Project Manager under the 2002 Private Offer Scheme.

in Table 1 in paragraph 11 of the affidavit of John Huntley Knox sworn 2 August 2010; and

- (d) the new responsible entity of the Almond Projects (other than the 2002 Private Offer scheme) would have assumed the responsibilities of Almond Management under the management agreements; and
- (e) the land upon which the Almond Projects were conducted would have been sold to one or more purchasers who, subject to and as set out in the following subparagraphs, would have agreed to become parties to the agreements which made up the legal structure of the schemes; and
- (f) the purchaser(s) of the land would have assumed the obligation to carry out and pay for all necessary capital works in relation to the Almond Projects, *alternatively* the Growers would have agreed to fund (by offsetting the necessary amounts against rent otherwise payable) and carry out such capital works; and
- (g) the purchaser(s) of the land would have assumed the obligation to obtain and pay for any necessary permanent or temporary water rights in relation to the Almond Projects, *alternatively* the Growers would have agreed to obtain and pay (by offsetting the necessary amounts against rent otherwise payable) for such water rights; and
- (h) (if necessary) the licence and joint venture arrangements to which Almond Land was a party, in the context of the 2002 Private Offer Scheme and the 2002 Almond Project, would have been assigned to the purchaser(s) of the scheme land; and
- (i) the lease and sub-lease arrangements:
 - (i) to which Almond Land (as land owner) and Almond Management as Project Manager of the 2002 Private Offer Scheme; and
 - (ii) to which Almond Land (as land owner) and TSL as responsible entity of the 2002 Almond Project, the 2005 Almond Project, the 2006 Almond Project and the 2007 Almond Project,
 were parties would have been assigned to the purchaser(s) of the land and the replacement Project Manager / responsible entity (as the case may be); and
- (j) prior to (or immediately following) the purchase of the land, the 2007 Annuello and 2007 Menegazzo sub-leases would have been amended by the new responsible entity so as to re-set the rent payable by the Growers to a "market-rent"; and
- (k) prior to (or immediately following) the purchase of the land, the 2002, 2005 and 2006 scheme documents would have been amended so as to ensure that surplus of Growers'

sub-lease rent or licence fees over and above the head lease rent would be refunded to Growers?

9. If 'yes' to question 8:

- (a) is the value of the Growers' income streams from the respective Almond Project(s) in which they invested to be discounted further by reference to the percentage chance that such income streams would have been realised?
- (b) having regard to the expert evidence, what is the value of the Growers' entitlement to the Net Proceeds?

10. In light of the above, to what share of the Net Proceeds are the Growers entitled?

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

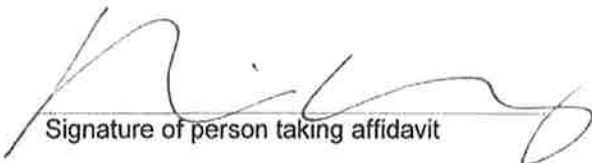
CERTIFICATE IDENTIFYING EXHIBIT "RWM-12"

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
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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-12**" 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-12"

**Order made by Registrar Pedley of the
Court of Appeal on 17 April 2012**

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

S APCI 2011 0103

BETWEEN:

GRAHAM GOLDENBERG (in his capacity as representative
of the Growers in the 2002 Almond Project) and others
(according to the schedule attached)

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) & others (according to the schedule attached)

Respondents

ORDER OF THE COURT OF APPEAL

JUDICIAL OFFICER:	Judicial Registrar Pedley
DATE MADE:	17 April 2012
ORIGINATING PROCESS:	Notice of appeal
HOW OBTAINED:	By consent of the parties
ATTENDANCE:	Not applicable
OTHER MATTERS:	The Court notes the minute of consent orders signed by the parties.



THE COURT OF APPEAL ORDERS BY CONSENT THAT:

Amendments to the Note of Proposed Contents

1. Paragraph 10 of the orders made by Associate Justice Lansdowne on 29 September 2011 (as varied by the orders made by Judicial Registrar on 28 March 2012) be vacated and in lieu thereof the following order be made:

1.1. The appellants file in electronic form and serve on or before 16 April 2012:

a) a revised agreed note of proposed contents of the appeal book (**proposed contents**) complying with the following requirements:

(i) subject to sub-paragraph (ii) below, the proposed contents be limited to:

(A) portions of documents or portions of transcript referred to in the summary or submissions; and

- (B) other Court documents required by the Registrar's Notes on the Preparation of Appeal Books,
- (ii) the proposed contents is to contain a complete copy of one exemplar lease and sub-lease in respect of each of the:
 - (A) 2002 Timbercorp Almond Project (Private Offer No. 1)
 - (B) 2002 Timbercorp Almond Project ARSN 099 611 935
 - (C) 2005 Timbercorp Almond Project ARSN 112 935 092
 - (D) 2006 Timbercorp Almond Project ARSN 118 387 974
 - (E) 2007 Timbercorp Almond Project ARSN 122 511 040; and
- (b) proposed directions for the preparation of the appeal book and any further required directions if all parties agree on these directions and seek that they be made in chambers.

Contents of Appeal Book

2. The contents of the appeal book are settled in accordance with the note of proposed contents filed 16 April 2012.

Preparation and Delivery of Appeal Book

3. The appellant prepare the appeal book as settled and deliver one copy to the Registrar and one copy to each respondent on or before 7 May 2012 in the following format:
 - 3.1. looseleaf (in a lever arch folder);
 - 3.2. double-sided, only where practicable;
 - 3.3. transcript not repaginated;
 - 3.4. reasons for judgment not repaginated;
 - 3.5. transcript to be in a discrete volume or volumes;
 - 3.6. exhibits to be in a discrete volume or volumes.
4. The appellant make any corrections required by the Registrar to the appeal book and deliver to the Registrar 3 copies of the appeal book as so corrected (or a further 2 copies if no corrections are required) and 3 copies to each respondent (or a further 2 copies if no corrections are required) within 14 days of being notified if any corrections are required.
5. The solicitor for the appellant provide written certification that the copies of the corrected appeal book delivered to the Registrar and to each respondent are in accordance with the Registrar's corrections.
6. On delivery of the appeal book with any necessary corrections in accordance with these orders the appeal is placed in the list of appeals for hearing.



Summary and Submissions with Appeal Book References

7. The parties file and serve the agreed summary and their submissions amended solely to replace existing references to documents or transcript with references to appeal book pages on or before 21 days prior to the date fixed for hearing of the appeal.

Combined Folder of Authorities

8. The parties comply with Court of Appeal Practice Statement No. 1 of 2006 paragraphs 10.4 and 10.5 in relation to the preparation of a combined folder of authorities.
9. The appellant file three copies of the combined folder of authorities and serve a copy on each respondent no later than 7 days prior to the date fixed for hearing of the appeal.

Special Hearing Requirements

10. The appeal is to be listed for hearing on a date not before 15 October 2012.

Costs

11. The costs of and associated with the preparation of this order are costs in the appeal.

Liberty to Apply

12. The parties have liberty to apply to the Registrar for further directions.

DATE AUTHENTICATED: 23 May 2012

Rjs: 23/5/12



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 Participant Members in the 2005
Almond Project) Second appellant

CONSTANTINE MOSHOPOULOS (in her capacity as
representative of the Participant Members in the 2005
Almond Project) Third appellant

DAVID BUTTERFIELD (in his capacity as representative
of the Participant Members in the 2005 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 Australian 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

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

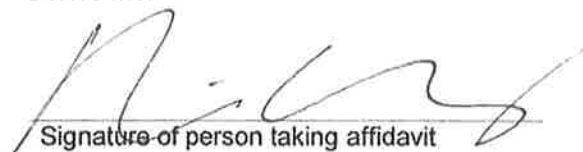
CERTIFICATE IDENTIFYING EXHIBIT "RWM-13"

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-13**" 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-13"

**Letter from Allens to the Associate to Davies J
dated 26 July 2012**

Date 26 July 2012
From Clint Hinchin / Jonathan Joseph
To Ms Chloe Cameron, Senior Associate to the
Honourable Justice Davies, Supreme Court of Victoria,
Melbourne
Email chloe.cameron@supremecourt.vic.gov.au

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Correspondence
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DX 30999 Melbourne
www.allens.com.au

Copy to Ross McClymont / Chris Fenwick, Ashurst

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chris.fenwick@ashurst.com

Copy to Jane Sheridan / Megan Grose, Arnold Bloch Leibler

Email jsheridan@abl.com.au
mgrose@abl.com.au

Copy to Michael Fernon / Celia Armstrong, Clarendon Lawyers

Email Michael.Fernon@clarendonlawyers.com.au
Celia.Armstrong@clarendonlawyers.com.au

Copy to Philip Jones / Steven Tang, Maddocks

Email Philip.Jones@maddocks.com.au
steven.tang@maddocks.com.au

Copy to David Porter / Kirk Warwick, Norton Rose

Email david.porter@nortonrose.com
kirk.warwick@nortonrose.com

Copy to Court of Appeal Registry, Attention: Robert Schade

Email coaregistry@supremecourt.vic.gov.au

Confidential Email

Dear Ms Cameron

Timbercorp apportionment proceedings

Please see attached.

Attach
Our Ref JXJM:120019368

jxjm A0121914708v2 120019368 26.7.2012

Allens is an independent partnership operating in alliance with Linklaters LLP

This email (including all attachments) may contain personal information and is intended solely for the named addressee. It is confidential and may be subject to legal or other professional privilege. Any confidentiality or privilege is not waived or lost because this email has been sent to you by mistake. If you have received it in error, please let us know by reply email, delete it from your system and destroy any copies. This email is also subject to copyright. No part of it should be reproduced, adapted or communicated without the written consent of the copyright owner. Any personal information in this email must be handled in accordance with the Privacy Act 1988 (Cth). We may collect personal information about you in the course of our dealings with you. Our privacy statement (www.allens.com.au/general/privacy.htm) tells you how we usually collect and use your personal information and how you can access it. Emails may be interfered with, may contain computer viruses or other defects and may not be successfully replicated on other systems. We give no warranties in relation to these matters. If you have any doubts about the authenticity of an email purportedly sent by us, please contact us immediately.

26 July 2012

Ms Chloe Cameron
Senior Associate to the
Honourable Justice Davies
Supreme Court of Victoria
210 William Street
Melbourne VIC 3000

By Email

Dear Ms Cameron

Timbercorp apportionment proceedings

We act on behalf of Australia and New Zealand Banking Group Limited (**ANZ**) in Supreme Court of Victoria Proceeding No. S CI 2011 6604 and S CI 2011 6606 (respectively, the **Liparoo and Yungera Rights Proceeding** and the **Solara Rights Proceeding**). We also act for ANZ in Supreme Court of Victoria (Court of Appeal) Proceeding No. APCI 2011 0103 (**Almond Land Rights Appeal Proceeding**).

This letter is written on behalf, and with the authority, of the parties in each of the following proceedings:

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

(together, the **Timbercorp Apportionment Proceedings**).

This letter is being copied to the solicitors for each of the other parties in each of the Timbercorp Apportionment Proceedings.

Deeds of compromise for each of the Timbercorp Apportionment Proceedings, in each case subject to court approval, have been executed by each of the parties to each such proceeding.

The representative growers in each of the Timbercorp Apportionment Proceedings are preparing to give appropriate notice to the growers they respectively represent in relation to the relevant

Our Ref JXJM:120019368

jxjm A0121914708v2 120019368 26.7.2012

compromise.

The parties to the Timbercorp Apportionment Proceedings intend for applications to be issued imminently to the Court pursuant to rule 16.01(4) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) for (among other things) approval of each of the compromises and orders that they be binding on the absent persons represented by the representative growers (together, the **approval applications**).

Prior to making the approval applications, the parties to the Almond Land Rights Appeal Proceeding intend to seek an order from the Court of Appeal that the proposed approval application in that proceeding be referred to the same judge appointed to manage, hear and determine the approval applications in connection with the other Timbercorp Apportionment Proceedings (the **approval judge**).

In the circumstances, the parties respectfully request that her Honour Justice Davies makes enquiries to facilitate the appointment by the Court of an approval judge to give directions in connection with the approval applications and, in turn, to hear and determine the approval applications.

In appointing the approval judge, the parties respectfully request that the Court has regard to the following requests of the parties (which take into account the steps the parties will be required to undertake in connection with the compromises in advance of the hearing of the approval applications, and also take into account the availability of the parties' respective counsel who have been involved in these matters for a considerable period):

- (a) the directions hearings for the approval applications be heard concurrently (with an estimated duration of two hours) at a time convenient to the Court in the week beginning 27 August 2012; and
- (b) the substantive hearings for the approval applications be heard concurrently (with an estimated duration of two days) at a time convenient to the Court not earlier than 24 October 2012 and as soon as possible thereafter, and preferably by 9 November 2012.

The parties would be grateful if the Court could notify the parties of the appointed approval judge at the earliest convenient time so that:

- (a) the parties to the Almond Land Rights Appeal Proceeding can inform the Court of Appeal as soon as possible; and
- (b) the parties to each of the Timbercorp Apportionment Proceedings can make applications on summons to the Court for orders for the hearing of the approval applications and orders relating to the filing of affidavits and submissions by the parties.

We would be grateful if you could confirm whether Justice Davies is content to proceed as requested above without the need for an appearance by the parties.

The parties would also be pleased to receive an indication as to whether her Honour requires any order to be made in each of the first instance Timbercorp Apportionment Proceedings requiring that the approval applications be made to the appointed approval judge. If so, we would be pleased to arrange for appropriate minutes of proposed consent orders to be provided without delay.

We look forward to hearing from you.

Yours sincerely



Clint Hinch
Partner
Allens
clint.hinch@allens.com.au
T +61 3 9613 8924

Jonathan Joseph
Senior Associate
Allens
jonathan.joseph@allens.com.au
T +61 3 9613 8663

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

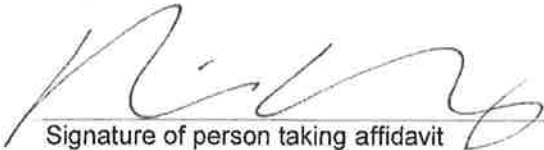
CERTIFICATE IDENTIFYING EXHIBIT "RWM-14"

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-14**" 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-14"

**Letter from Allens to Court of Appeal Registry
dated 26 July 2012**

Date 26 July 2012
From Clint Hinchin / Jonathan Joseph
To Court of Appeal Registry
Attention: Robert Schade
Email coaregistry@supremecourt.vic.gov.au

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Celia.Armstrong@clarendonlawyers.com.au
Copy to Phillip Jones / Steven Tang, Maddocks
Email Phillip.Jones@maddocks.com.au
steven.tang@maddocks.com.au
Copy to David Porter / Kirk Warwick, Norton Rose
Email david.porter@nortonrose.com
kirk.warwick@nortonrose.com
Copy to Ms Chloe Cameron, Senior Associate to the Honourable
Justice Davies, Supreme Court of Victoria, Melbourne
Email chloe.cameron@supremecourt.vic.gov.au

Confidential Email

Dear Mr Schade

Timbercorp apportionment proceedings

Please see attached.

Attach

Our Ref JXJM:120019368

jxjm A0121942514v1 120019368 26.7.2012

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16

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Allens > < Linklaters

26 July 2012

Court of Appeal Registry
Level 2, 436 Lonsdale Street
Melbourne VIC 3000

By Email

Attention: Mr Robert Schade

Dear Mr Schade

Timbercorp apportionment proceedings

Further to your telephone conversation with Jonathan Joseph of this firm on 19 July 2012, we confirm that we act on behalf of Australia and New Zealand Banking Group Limited (ANZ) in Supreme Court of Victoria (Court of Appeal) Proceeding No. APCI 2011 0103 (*Almond Land Rights Appeal Proceeding*).

We also act on behalf of ANZ in Supreme Court of Victoria Proceeding No. S CI 2011 6604 and S CI 2011 6606 (respectively, the *Liparoo and Yungera Rights Proceeding* and the *Solara Rights Proceeding*).

In this letter, the *Timbercorp Apportionment Proceedings* means, collectively, the following proceedings:

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

This letter is written on behalf, and with the authority, of the parties in each of the Timbercorp Apportionment Proceedings and is being copied to the solicitors for each of those parties.

Each of the Timbercorp Apportionment Proceedings includes (as applicable) one or more parties appointed pursuant to rule 16.01(2) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) as the representative of the investors (often referred to as growers) in the managed

Our Ref JXJM:120019368

jxjm A0121942514v1 120019368 26.7.2012

investment scheme(s) the subject of that proceeding.

Deeds of compromise, in each case subject to court approval, have been executed by each of the parties to each of the Timbercorp Apportionment Proceedings.

The parties to the Timbercorp Apportionment Proceedings propose that applications will be issued imminently made returnable before a judge in the trial division of the Supreme Court pursuant to rule 16.01(4) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) for (among other things) approval of each of the compromises and orders that they be binding on the absent persons represented by the appointed representatives (together, the **approval applications**).

Prior to making the approval applications, the parties to the Almond Land Rights Appeal Proceeding seek an order from the Court of Appeal (the **proposed referral order**) referring the proposed approval application in that proceeding to the same judge appointed by the trial division of the Supreme Court to manage, hear and determine the approval applications in connection with the other Timbercorp Apportionment Proceedings (the **approval judge**).

On behalf of each of the parties to the Timbercorp Apportionment Proceedings, we have today sent a letter by email to the Associate of Justice Davies of the trial division of the Supreme Court requesting that her Honour arrange for the appointment of an approval judge at the earliest convenient time. We will notify the Court of Appeal as soon as the parties are informed of the approval judge.

In the circumstances, the purpose of this letter is for the parties to the Almond Land Rights Appeal Proceeding to seek guidance from the Court of Appeal Registry as to whether, in order for the Court of Appeal to consider the parties' request for the proposed referral order:

- (a) this letter will suffice; or
- (b) a summons with supporting affidavit material needs to be issued at the Court of Appeal Registry and, if so, whether a hearing before the Court of Appeal is required.

Please provide any such guidance by return correspondence by email to the parties' respective solicitors or, if more convenient, by telephone call to Jonathan Joseph of this firm. In the event that the Court of Appeal is prepared to make the proposed referral order on the basis of this letter, we enclose the form of order the parties would propose.

The parties would be grateful for the Court of Appeal's urgent attention to this request given the parties' intention not to issue the approval applications until the proposed referral order has been made.

We look forward to hearing from you.

Yours sincerely



Clint Hinch
Partner
Allens
clint.hinch@allens.com.au
T +61 3 9813 8924

Jonathan Joseph
Senior Associate
Allens
jonathan.joseph@allens.com.au
T +61 3 9613 8663

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

S APCI 2011 0103

BETWEEN

GRAHAM GOLDENBERG (in his capacity as representative of the
Members in the 2002 Almond Project) & ORS (according to the schedule
attached)

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
attached)

Respondents

PROPOSED MINUTE OF CONSENT ORDER OF THE COURT OF APPEAL

JUDICIAL OFFICER:

DATE MADE:

ORIGINATING PROCESS: Notice of Appeal

HOW OBTAINED: In chambers

ATTENDANCE: Not applicable

OTHER MATTERS: The Court of Appeal notes the following matters.

1. Deeds of compromise have been executed by the parties to each of the following proceedings (*Timbercorp Apportionment Proceedings*) for the compromise of each such proceeding:
 - (a) this proceeding;
 - (b) Supreme Court of Victoria Proceeding No. 2011 6604;
 - (c) Supreme Court of Victoria Proceeding No. 2011 6606;
 - (d) Supreme Court of Victoria Proceeding No. 2010 1354; and
 - (e) Supreme Court of Victoria Proceeding No. 2011 6777

(together, the ***Deeds of Compromise***).

2. It is a condition precedent to each of the Deeds of Compromise that:
 - (a) there be court approval of all of the Deeds of Compromise pursuant to rule 16.01(4) of the Supreme Court (General Civil Procedure) Rules 2005 (Vic); and
 - (b) in respect of each such compromise, orders be made that the compromise shall be binding on the absent persons who are represented by the representative(s) appointed in the relevant Timbercorp Apportionment Proceedings to represent the interests of those persons.
3. The parties to the Timbercorp Apportionment Proceedings propose that applications will be issued imminently made returnable before a judge in the trial division of the Supreme Court pursuant to rule 16.01(4) of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) for (among other things) the approvals and orders required to satisfy the condition precedent to each of the Deeds of Compromise (each, an ***approval application*** and together, the ***approval applications***).

THE COURT OF APPEAL ORDERS THAT:

1. Any approval application to be made for approval of the deed of compromise in this proceeding be referred to the same judge of the trial division of the Supreme Court allocated to manage, hear and determine the approval applications in connection with the Deeds of Compromise in the Timbercorp Apportionment Proceedings other than this proceeding.

2. The parties bear their own costs of and associated with the preparation of this order.
3. The parties have liberty to apply to the Registrar for further directions.

Date: 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 Participant Growers in the 2005
Almond Project)

Second Appellant

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

Third Appellant

DAVID BUTTERFIELD (in his capacity as representative
of the Participant 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

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

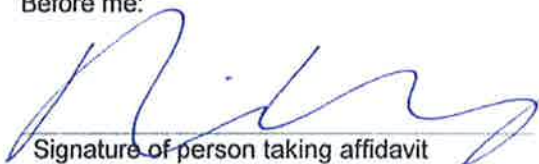
CERTIFICATE IDENTIFYING EXHIBIT "RWM-15"

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-15**" 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-15"

**Email from Michael Symons to Jonathan Joseph
dated 9 August 2012**

From: Michael.Symons@justice.vic.gov.au (mailto:Michael.Symons@justice.vic.gov.au)
Sent: Thursday, 9 August 2012 1:00 PM
To: Joseph, Jonathan
Cc: Cella Armstrong; chongming.goh@maddocks.com.au; Fenwick Chris 3148; Hinchey, Clint;
david.porter@nortonrose.com; dbriggs@abl.com.au; Jing Chang; Jane Sheridan (js Sheridan@abl.com.au);
kirk.warwick@nortonrose.com; Meagan Grose; Michael Fernon; Philip.Jones@maddocks.com.au; McClymont Ross
3025; 'steven.tang@maddocks.com.au'
Subject: Re: Timbercorp apportionment proceedings

Dear Practitioners,

Following Mr Joseph's email, I have made enquiries concerning an appropriate date and time for the directions hearing in the week of 27 August 2012.

Justice Judd will be available for a directions hearing at 10am on Friday 31 August 2012.

As I have discussed with Mr Joseph over the telephone a few minutes ago, this does not necessarily mean that Justice Judd will be the judge who hears the proposed approval applications.

Regards

Michael Symons | Associate to the Honourable Justice Judd
Supreme Court of Victoria | 210 William Street Melbourne 3000 | DX 210608
T +61 (03) 9603 8128 F +61 (03) 9670 8408 E michael.symons@supremecourt.vic.gov.au

NOTE: Practitioners are referred to Paragraph 5 of Practice Note 10 of 2011. Any correspondence with Associates must be sent simultaneously to all other parties and must be confined to uncontroversial matters. Telephone communications must be confined to administrative and routine matters. Requests for legal or procedural advice will not be answered.

"Joseph, Jonathan" <Jonathan.Joseph@allens.com.au>

03/08/2012 14:15

To "michael.symons@supremecourt.vic.gov.au"
<michael.symons@supremecourt.vic.gov.au>

cc: Michael Fernon <Michael.Fernon@clarendonlawyers.com.au>, "Hinchey, Clint"
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<js Sheridan@abl.com.au>, Cella Armstrong
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<dbriggs@abl.com.au>

Subject: Timbercorp apportionment proceedings

Dear Mr Symons

I refer to our telephone conversations this week concerning our letter to the Associate to Justice Davies dated 26 July 2012 (copy attached) in connection with the Timbercorp Apportionment Proceedings (as defined in our letter). As with that letter, this email is sent to you on behalf, and with the authority, of the parties to each of the Timbercorp Apportionment Proceedings.

As you are aware, in our letter, we requested that her Honour Justice Davies **make enquires to facilitate** the appointment by the Court of a judge to give directions in respect of, and **hear, the proposed approval** applications (as defined in our letter). We understand that his Honour Justice Judd is kindly attending to this request.

We also requested, in our letter, that the Court have regard to the parties' request that a date for the hearing of the approval applications be set after 24 October 2012 and preferably before 9 November 2012. In agreeing on this period, the parties took into account the availability of counsel for each of the parties to the relevant proceedings.

Since the date of our letter, we have been informed by Clarendon Lawyers, the solicitors for the representative growers, that Queens Counsel for the representative growers is due to commence a 70 day trial on 29 October 2012. Accordingly, Clarendon Lawyers has informed us that their clients no longer seek a hearing date in the period referred to in our letter.

In the circumstances, the parties now respectfully request that the Court list the hearings for the proposed approval applications (with an estimated duration of two days) on those of the following dates most suitable to the Court: 4, 5, 8, 10, 12, 16 and 17 October 2012.

We confirm that, as set out in our letter, the parties still seek that the approval applications be listed for directions (with an estimated duration of two hours) at a time convenient to the Court in the week beginning 27 August 2012.

The parties look forward to hearing further from you at your earliest convenience.

Yours sincerely

Jonathan Joseph
Senior Associate
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[attachment "Letter to the Associate to Justice Davies dated 26 July 2012.pdf" deleted by Michael Symons/Person/DOJ]

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