

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

No S APCI 2011 0103

BETWEEN:

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

Appellants

- and -

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

Respondents

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

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Date of document: 27 August 2012

Filed on behalf of: The Plaintiff

Prepared by:

**Ashurst Australia**  
Level 26  
181 William Street  
Melbourne VIC 3000

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

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

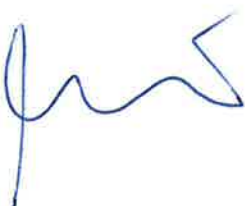
1. I am a partner in the firm Ashurst Australia. I have the care and conduct of this proceeding (the **Almond Land Rights Appeal Proceeding**) on behalf of the first respondent (**BOSI**). I am authorised to make this affidavit on behalf of BOSI.



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

#### **Timbercorp apportionment proceedings**

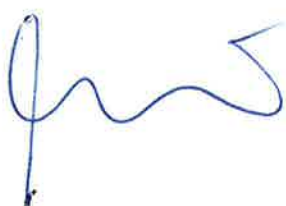
6. The First Affidavit relevantly sets out:
  - (a) at paragraphs 6 to 10, the background to the Apportionment Proceedings and the Almond Land Rights Proceeding including, at paragraph 8, the key issue for determination in each proceeding;
  - (b) at paragraphs 11 to 15, an overview of the Almond Land Rights Proceeding, including reference to:
    - (i) the order made in that proceeding, pursuant to rule 16.01(2) of the Rules, that certain parties be appointed as Representative Growers to represent the




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

### Compromises

7. As set out at paragraphs 23 and 24 of the First Affidavit, on 25 July 2012, the parties to each of the Apportionment Proceedings and this proceeding executed a Deed of Compromise for each such proceeding providing, in each case, for the compromise of the relevant proceeding. Each Compromise is conditional on (*inter alia*):
- (a) the Supreme Court of Victoria approving the Compromise and ordering that it shall be binding on the Growers represented by the Representative Growers in the relevant proceeding; and
  - (b) the Supreme Court of Victoria approving the Compromise in each of the other Apportionment Proceedings and this proceeding (as applicable).




8. I am informed by Jane Sheridan of Arnold Bloch Leibler (solicitors for Timbercorp Securities Limited (in Liquidation)) and believe that, since execution of the Deeds of Compromise, notification has been provided to the Growers in the Timbercorp MIS the subject of each Deed of Compromise with respect to a number of issues including the terms and effect of the Deed of Compromise, and the necessity of, and procedure for, obtaining Court approval. In each case, the notice provided to Growers also stated that a hearing for the approval of the Compromise is anticipated to commence in October 2012.

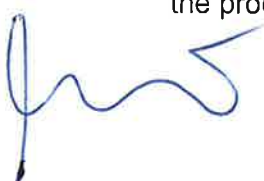
**Referral of the Almond Land Rights Appeal Proceeding to the trial division of the Supreme Court**

9. I am informed by Chris Fenwick, a solicitor employed by Ashurst Australia, and verily believe that on 24 August 2012 he received an email from Matthew Boisseau, the Associate to the Honourable Justice Osborn, in relation to this proceeding. In light of:

- (a) Mr Boisseau's email to Mr Fenwick; and
- (b) an email dated 27 August 2012 from Ms Jenny Murray of the Supreme Court of Victoria Court of Appeal to his Honour Justice Judd in relation to this proceeding (a copy of which was sent to my firm (and others) and forwarded to me) attaching an unauthenticated copy of orders by consent dated 24 August 2012 which I understand to have been made by their Honours Justices Buchanan and Osborn of the Court of Appeal on 24 August 2012;

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

- (a) for the hearing and determination of any application to approve the Compromise of the proceeding (**Compromise Application**); or




- (b) if Justice Judd deems fit, for the purpose of making directions for the hearing and determination of the Compromise Application by another judge of the trial division.

Now produced and shown to me marked "**RWM-1**" is a true copy of all emails (including attachments) referred to in this paragraph of my affidavit.

### **Approval applications**

10. As noted above, by summons dated 27 August 2012, BOSI issues the Approval Application in respect of the Almond Land Rights Appeal Proceeding.
11. By summons dated 27 August 2012, filed on behalf of BOSI in the BB Olives Rights Proceeding, BOSI issues the Approval Application in respect of that proceeding.
12. I am informed by Clint Hinchin of Allens (solicitors for ANZ) and verily believe that by summonses dated 27 August 2012 filed on behalf of ANZ in the Solara Rights Proceeding and the Liparoo and Yungera Rights Proceeding, ANZ issues the Approval Applications in respect of those proceedings.
13. I am informed by Ms Sheridan of Arnold Bloch Leibler (solicitors for Fenceport) and verily believe that, by summons dated 27 August 2012, filed on behalf of Fenceport in the Fenceport Rights Proceeding, Fenceport issues the Approval Application in respect of that proceeding.
14. In light of the following matters, I believe that it is desirable that the Approval Application in respect of the Almond Land Rights Appeal Proceeding be managed, heard and determined concurrently with the Approval Applications in respect of the Apportionment Proceedings:
  - (a) the rights of the parties arising under the constituent documents for the Timbercorp MIS the subject of the Apportionment Proceedings and the Almond Land Rights Appeal Proceeding are the same or similar in each case;
  - (b) in determining the Approval Application for each of the Deeds of Compromise, the same threshold question arises in each case, namely, whether the Compromise is




for the benefit of the absent persons (ie the Growers represented in each proceeding by the Representative Growers) in accordance with rule 16.01(4) of the Rules. Therefore, approval of each Compromise will require consideration of a number of the same or similar questions; and

- (c) as stated above, each Deed of Compromise is conditional on (*inter alia*):
- (i) the Court approving the Compromise and ordering that it shall be binding on the Growers represented by the Representative Growers in the relevant proceeding; and
  - (ii) the Court approving the Compromise in each of the other Apportionment Proceedings and the Almond Land Rights Appeal Proceeding (as applicable).

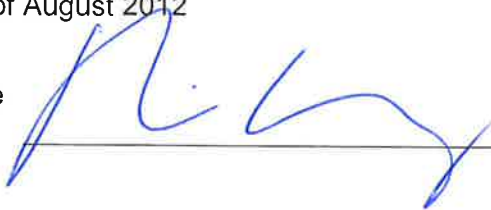
15. I respectfully request that this Honourable Court make directions for the conduct and hearing of the Approval Application in respect of the Almond Land Rights Appeal Proceeding.

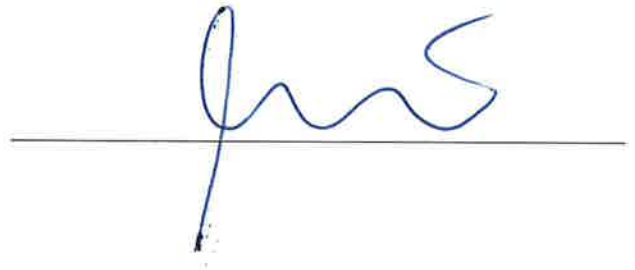
**AFFIRMED** by **Ross Whyte McClymont** at

Melbourne in the State of Victoria this

27th day of August 2012

Before me

A blue ink signature, appearing to be 'M. Murray', written over a horizontal line.

A blue ink signature, appearing to be 'Ross Whyte McClymont', written over a horizontal line.

MICHAEL MURRAY

Ashurst Australia

181 William Street, Melbourne Vic. 3000

An Australian legal practitioner within the meaning of the Legal Profession Act 2004

## SCHEDULE OF PARTIES

**GRAHAM GOLDENBERG**

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

First Appellant

and

**CHRISTOPHER MARK LITTLEY**

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

Second Appellant

and

**CONSTANTINE MOSHOPOULOS**

**(in his capacity as representative of the Participant Members in the 2006 Almond Project)**

Third Appellant

and

**DAVID BUTTERFIELD**

**(in his capacity as representative of the Participant Members in the 2007 Almond Project  
and as representative of the Members in the 2002 Private offer Scheme)**

Fourth Appellant

and

**BOSI SECURITY SERVICES LIMITED (ACN 009 413 852)**

**as trustee for**

**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED**

**(ACN 005 357 522) and BOS INTERNATIONAL (AUSTRALIA) LIMITED**

**(ACN 066 601 250) and WESTPAC BANKING CORPORATION (ACN 007 457 141)**

First Respondent

and

**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED**

**(ACN 005 357 522)**

Second Respondent

and

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

Third Respondent

and

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

Fourth Respondent

and

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

Fifth Respondent



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

No S APCI 2011 0103

BETWEEN:

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

Appellants

- and -

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

Respondents

**CERTIFICATE IDENTIFYING EXHIBIT**

Date of document: 27 August 2012

Filed on behalf of: The Plaintiff

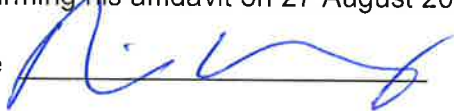
Prepared by:

**Ashurst Australia**  
Level 26  
181 William Street  
Melbourne VIC 3000

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

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

Before me



**'RWM-1'**

Copies of an email from Mr Boisseau to Mr Fenwick dated 24 August 2012 and an email from Ms Murray dated 27 August 2012 and attachment

**From:** [Matthew.Boisseau@supremecourt.vic.gov.au](mailto:Matthew.Boisseau@supremecourt.vic.gov.au) [<mailto:Matthew.Boisseau@supremecourt.vic.gov.au>]  
**Sent:** Friday, 24 August 2012 10:33 AM  
**To:** Fenwick Chris 3148  
**Subject:** Re: Goldenberg & Ors v BOSI Security Services Ltd & Ors S APCI 2012 0103

Dear Mr Fenwick,

I confirm that the Court of Appeal have made the orders in the form of the proposed minute of consent orders submitted to the Court.

Kind regards,

Matthew Boisseau ■ Associate to the Honourable Justice Osborn  
Court of Appeal, Supreme Court of Victoria ■ 210 William Street, Melbourne, 3000 ■ DX 210608  
☎ +61 (03) 9603 6624 ☎ +61 (03) 9670 8408 ✉ [matthew.boisseau@supremecourt.vic.gov.au](mailto:matthew.boisseau@supremecourt.vic.gov.au)

## Murray Michael 3861

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**From:** Fenwick Chris 3148  
**Sent:** Monday, 27 August 2012 1:47 PM  
**To:** Murray Michael 3861  
**Subject:** FW: Emailing: Goldenberg&Ors\_24Aug12.doc  
**Attachments:** Goldenberg&Ors\_24Aug12.doc

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**From:** Silverii, Jason [<mailto:Jason.Silverii@allens.com.au>]  
**Sent:** Monday, 27 August 2012 12:17 PM  
**To:** Hinchin, Clint  
**Cc:** Adams, Elyse  
**Subject:** FW: Emailing: Goldenberg&Ors\_24Aug12.doc

Clint

Below is the email that was sent to me this morning by the Court of Appeal.

The woman who sent it to me, Jenny, called me looking for a generic firm email address to which to send the orders. I told her to send it to me and I would find the right person.

Jason Silverii  
Senior Corporate Affairs Manager  
**Allens**  
DL +61 3 9613 8014  
M +61 420 924 348

**From:** [Jenny.B.Murray@supremecourt.vic.gov.au](mailto:Jenny.B.Murray@supremecourt.vic.gov.au) [<mailto:Jenny.B.Murray@supremecourt.vic.gov.au>]  
**Sent:** Monday, 27 August 2012 10:59 AM  
**To:** [Justice.Judd@supremecourt.vic.gov.au](mailto:Justice.Judd@supremecourt.vic.gov.au)  
**Cc:** [info@clarendonlawyers.com.au](mailto:info@clarendonlawyers.com.au); [legal.info@ashurst.com](mailto:legal.info@ashurst.com); [info@abl.com.au](mailto:info@abl.com.au); Silverii, Jason; [Debra.Thomas@justice.vic.gov.au](mailto:Debra.Thomas@justice.vic.gov.au); [coaregistry@justice.vic.gov.au](mailto:coaregistry@justice.vic.gov.au)  
**Subject:** Emailing: Goldenberg&Ors\_24Aug12.doc

Order from Friday 24 October fyi.

Regards  
Jenny Murray  
CoA

### PRIVATE & CONFIDENTIAL

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SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2011 0103

GRAHAM GOLDBERG & ORS ACORDING TO THE  
ATTACHED SCHEDULE OF PARTIES

v

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 WESTPACK BANKING CORPORATION (ACN 007 457 141) & ORS

---

<u>JUDGES:</u>	BUCHANAN and OSBORN JJA
<u>WHERE HELD:</u>	MELBOURNE
<u>DATES OF HEARING:</u>	24 August 2012
<u>DATE OF JUDGMENT/ORDER:</u>	24 August 2012

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ORDERS BY CONSENT

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<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the First Appellant Goldenberg	No appearances by leave of the Court	Clarendon Lawyers
For the Second Appellant Littley		Clarendon Lawyers
For the Third Appellant Moshopoulos		Clarendon Lawyers
For the Fourth Appellant Butterfield		Clarendon Lawyers

For the First Respondent Bosi  
Security Services

Ashurst Australia

For the Second Respondent  
Australia and New Zealand  
Banking Group

Allens

For the Third Respondent  
Almond Land

Arnold Bloch Leibler

For the Fourth Respondent  
Korda

Arnold Bloch Leibler

For the Fifth Respondent Chesser

Arnold Bloch Leibler

BUCHANAN JA:

1 In accordance with minutes of consent orders signed by the solicitors for the parties, copies of which will be placed on the Court file, the Court orders as follows:

1. The proceeding be remitted to the Honourable Justice Judd of the trial division of the Supreme Court:
  - (a) for the hearing and determination of any application to approve the compromise of the proceeding (Compromise Application);  
or
  - (b) if Justice Judd deems fit, for the purpose of making directions for the hearing and determination of the Compromise Application by another judge of the trial division.
2. There be no order as to costs.

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## SCHEDULE OF PARTIES

### BETWEEN

GRAHAM GOLDENBERG (in his capacity as representative of the Growers in the 2002 Almond Project)	First Appellant
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CHRISTOPHER MARK LITTLE (in his capacity as representative of the Growers in the 2005 Almond Project)	Second Appellant
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CONSTANTINE MOSHOPOULOS (in his capacity as representative of the Growers in the 2006 Almond Project)	Third Appellant
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DAVID BUTTERFIELD (in his capacity as representative of the Growers in the 2007 Almond Project and as representative of the Growers in the 2002 Private Offer Scheme)	Fourth Appellant
---	------------------

### AND

BOSI SECURITY SERVICES LIMITED (ACN 009 413 852) as trustee for AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522) and BOS INTERNATIONAL (AUSTRALIA) LIMITED (ACN 066 601 250) and WESTPAC BANKING CORPORATION (ACN 007 457 141)	First Respondent
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AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522)	Second Respondent
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ALMOND LAND PTY LTD (IN LIQUIDATION) (ACN 091 460 392)	Third Respondent
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MARK ANTHONY KORDA (in his capacity as liquidator of Almond Land Pty Ltd (in liquidation))	Fourth Respondent
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LEANNE KYLIE CHESSER (in her capacity as liquidator of Almond Land Pty Ltd (in liquidation))	Fifth Respondent
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