

IN THE FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY

NOTICE OF FILING

This document was filed electronically in the Federal Court of Australia on

CASE DETAILS

Case Number:

Case Description:

District Registry:

Document Type:



Warwick Soden

Dated:

Registrar

Note

This Notice forms part of the document and contains information that might otherwise appear elsewhere in the application. The Notice must be included in the document served on each party to the proceeding.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION

No. VID 541 of 2009

IN THE MATTER OF TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)
ACN: 092 311 469

AND

IN THE MATTER OF TIMBERCORP LIMITED (IN LIQUIDATION)
ACN: 055 185 067

TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)

ACN 092 311 469

and OTHERS

Plaintiffs

and

WA CHIP & PULP CO. PTY LTD

and OTHERS

ACN 008 720 518

Defendants

AFFIDAVIT

TABLE OF CONTENTS

Document number	Details	Page
1.	Exhibit CJP-1 is a copy of a sample New Sublease dated 27 February 2007 between WA Chip & Pulp Co. Pty Ltd and Timbercorp Securities Limited	4
2.	Exhibit CJP-2 is a copy of a sample Old Sublease, dated 30 June 1998 between Bunnings Treefarms Pty Ltd (now WACAP Treefarms Pty Ltd) and Timbercorp Eucalypts Limited (now Timbercorp Limited)	4
3.	Exhibit CJP-3 is a copy of a Rent Default Notice issued by WACAP Treefarms Pty Ltd to Timbercorp Limited	5

Filed on behalf of the First and Second Defendants by

BLAKE DAWSON

Level 32, Exchange Plaza
2 The Esplanade
Perth WA 6000

Tel: 08 9366 8000

DX: 169 Perth

Fax: 08 9366 8111

Email: paul.mac@blakedawson.com

Ref: ACSC PHYM 09 2007 6478

4.	Exhibit CJP-4 is a copy of a Rent Default Notice issued by WA Chip & Pulp Co. Pty Ltd to Timbercorp Securities Limited.	5
5.	Exhibit CJP-5 is a copy of the letter dated 15 June 2009, in which the liquidators sought the consent of landlords to a rent standstill period	5
6.	Exhibit CJP-6 is a copy of the email dated 16 June 2009, in which WAPRES requested further information from the liquidators regarding the rent standstill proposal	5
7.	Exhibit CJP-7 is a copy of the letter dated 22 June 2009, whereby WAPRES rejected the liquidators' request for a rent standstill period	6
8.	Exhibit CJP-8 is a copy of a Powerpoint slide provided by the administrators to the creditors' committee regarding the success of the rent standstill proposal	6
9.	Exhibit CJP-9 is a copy of the Notice issued by WA Chip & Pulp Co. Pty Ltd and WACAP Treefarms Pty Ltd to Timbercorp Limited and Timbercorp Securities Limited pursuant to section 568(8) <i>Corporations Act 2001</i>	6
10.	Exhibit CJP-10 is a copy of the letter dated 22 July 2009, whereby the liquidators' solicitors confirmed that they received the Notices	6
11.	Exhibit CJP-11 is a copy of the letter dated 13 July 2009, whereby the liquidators requested a second rent standstill period	6
12.	Exhibit CJP-12 is a copy of the email dated 22 July 2009, whereby the liquidators' solicitors informed WAPRES that they would seek an extension of time to decide whether to disclaim the Subleases	6
13.	Exhibit CJP-13 is a schedule of deadlines for WAPRES' firebreaks work programs	7
14.	Exhibit CJP-14 is a copy of the letter dated 2 July 2009, whereby the liquidators informed WAPRES that they do not intend to use or occupy the land, or comply with any obligations under the Subleases	7

On 29 July 2009, I, **CHRISTOPHER JOHN PALMER** of WA Plantation Resources Pty Ltd, Level 2, 53 Victoria Street, Bunbury in the State of Western Australia, General Manager, say on oath:

1. I am the General Manager, Corporate Services of WA Plantation Resources Pty Ltd. I make this affidavit in support of the First and Second Defendants' response to the Plaintiffs' originating process dated 23 July 2009. I have held this role for 9 years. I have been involved in the woodfibre and forestry industries for 18 years.
2. The matters deposed to in this affidavit are true to my own knowledge except where otherwise stated. Where I refer to matters based on information or belief, the source of that information or belief is identified.




Background

3. WA Plantation Resources Pty Ltd was formed by Marubeni Corporation, an international trading house dealing in pulp, paper, woodfibre and many other global commodities, and is now jointly owned by Marubeni Corporation and Nippon Paper Industries, one of Japan's leading pulp and paper manufacturers to invest in the plantation business in Australia. On 1 October 2000, WA Plantation Resources Pty Ltd acquired WA Chip & Pulp Co. Pty Ltd and WACAP Treefarms Pty Ltd from Wesfarmers and since then, these companies have traded together under the brand of WAPRES (**separately and together, "WAPRES"**). Prior to this acquisition, WA Chip & Pulp Co. Pty Ltd had been operating its woodchip production and export business since 1976 while WACAP Treefarms Pty Ltd had been operating the plantation business since 1989 under the ownership of Wesfarmers and/or Bunnings Limited.
4. WAPRES operates principally in the woodfibre industry in Western Australia. The group is involved in all phases of the woodfibre production chain, including but not limited to investing in and managing plantations, harvesting plantation crops, the operation of woodchipping facilities and the export of woodchips.
5. As part of its eucalypt treefarming operations, WAPRES enters into leases of land with landholders across Western Australia. Over the last 20 years, WAPRES, or its predecessors, has established commercial relationships with nearly 400 separate landholders for the purposes of treefarming. Before WAPRES considers leasing land from landholders, it must satisfy itself that the land is capable of growing a commercial crop. Amongst the important matters to be considered are the potential productivity of the site (important factors being suitable clearing and fertiliser history, soil type, soil depth and rainfall), distance from market, cost of land rent and silvicultural costs.
6. The lease agreements entered into between WAPRES and each landowner are known as "Head Leases". Part of WAPRES' business involves further subleasing to third parties some of the land which is the subject of these Head Leases. These third parties include Timbercorp Limited (formerly, Timbercorp Eucalypts Limited) and more lately Timbercorp Securities Limited (**separately and together, "Timbercorp"**). There are also subleases to other third parties that are not relevant to this application.
7. From around 1992, WAPRES entered into various sublease agreements with Timbercorp. Under these sublease agreements, WAPRES subleased land to Timbercorp for the purposes of allowing Timbercorp to plant trees on the land, maintain the trees until mature enough for harvesting, and to subsequently sell the wood derived from the harvested trees. As at 29 July 2009, there were 92 separate subleases (**together, the Subleases**) on foot with Timbercorp, covering around 7,699 hectares of land.
8. I believe that Timbercorp's principal operations relate to facilitating investment in plantations, by way of managed investment schemes (**MIS**). The responsible entity under the MIS was at all times an entity in the Timbercorp group. As part of the operations of the MIS, Timbercorp further subleased the land subject of the Subleases to various investors (**Growers**).




Subleases

9. The initial maximum term under each of the Subleases is 12 years. The duration of this term represents the period required for trees to be planted, grown to maturity and harvested. The process of the initial planting, tending, maturing and harvesting of the trees is known as a "rotation".
10. As at 23 April 2009, of the 92 Subleases, Timbercorp Securities Limited is the sublessee in 66 of the subleases (**New Subleases**), and Timbercorp Limited is the sublessee in 26 of the subleases (**Old Subleases**).
11. Under all of the Old Subleases, Timbercorp has the right to elect to plant a second rotation of trees. To accommodate the length of time required for a second rotation of trees to mature and be harvested, the Old Subleases contained provisions for the extension of the initial term of the Sublease subject to certain conditions.
12. In the course of negotiations between representatives of Timbercorp and representatives of WAPRES between around 2002 to 2004, Timbercorp indicated that it wished to elect to extend the term of the Old Subleases, but did not wish to comply with the conditions for extension of term under the Old Subleases. Between around 2002 to 2004, WAPRES and Timbercorp agreed to negotiate revised terms for a new set of sublease agreements so that Timbercorp might obtain the advantage of carrying out a second rotation without extending the Old Subleases. From around 2004, the parties began entering into New Subleases.
13. Attached to this affidavit and marked "**CJP-1**" is a true copy of a sample New Sublease dated 27 February 2007 between WA Chip & Pulp Co. Pty Ltd and Timbercorp Securities Limited.
14. Attached to this affidavit and marked "**CJP-2**" is a true copy of a sample Old Sublease, dated 30 June 1998 between Bunnings Treefarms Pty Ltd (now WACAP Treefarms Pty Ltd) and Timbercorp Eucalypts Limited (now Timbercorp Limited).

Rent obligations of Timbercorp under the Subleases

15. Under the Old Subleases, annual rent is payable by Timbercorp on 30 June of each year.
16. Under the New Subleases, annual rent is payable by Timbercorp in quarterly instalments on 31 March, 30 June, 30 September and 31 December of each year.
17. The Old Subleases and the New Subleases contain different provisions relating to WAPRES' rights in the event that Timbercorp defaults in its obligation to pay rent.
18. Under the terms of the Old Subleases (see for example clause 10.3(a) of the Sublease attached to this affidavit and marked "**CJP-2**", as referred to in paragraph 14), if Timbercorp defaults in its obligation to pay rent, WAPRES must issue a default notice to Timbercorp requiring Timbercorp to remedy the default (**Rent Default Notice**). If the default is not remedied within 6 months after WAPRES has served a Rent Default Notice, WAPRES is entitled to terminate the Sublease.

19. Under the terms of the New Subleases (see for example clause 9.2(a) of the Sublease attached to this affidavit and marked "**CJP-1**", as referred to in paragraph 13), if Timbercorp defaults in its obligation to pay rent, WAPRES must issue a Rent Default Notice to Timbercorp requiring Timbercorp to remedy the default. If the default is not remedied within 30 days of WAPRES having given a Rent Default Notice, WAPRES is entitled to terminate the Sublease.
20. When the Old Subleases were in the process of being replaced by the New Subleases, the parties re-negotiated the length of the period available to the lessee to rectify a rent default. The 6 month period under the Old Subleases was changed to 30 days under the New Subleases in recognition of the fact that the lessor needed to deal expeditiously with lessees who were in default of their obligation to pay rent.
21. As at the date of this affidavit, I understand that Timbercorp has defaulted on each and every Sublease by failing to pay rent due and payable to WAPRES on 30 June 2009, being the annual rent due and payable under the Old Subleases and the quarterly rent due and payable under the New Subleases.
22. As at the date of this affidavit, the total amount of rent owing under the Old Subleases is \$637,194.
23. As at the date of this affidavit, the total amount of rent owing under the New Subleases is \$405,905.
24. On 1 July 2009, WAPRES issued Rent Default Notices to Timbercorp in respect of each Sublease.
25. In total, 17 Rent Default Notices were issued by WACAP Treefarms Pty Ltd to Timbercorp. Attached to this affidavit and marked "**CJP-3**" is a copy of a Rent Default Notice issued by WACAP Treefarms Pty Ltd to Timbercorp Limited.
26. In total, 75 Rent Default Notices were issued by WA Chip & Pulp Co. Pty Ltd to Timbercorp. Attached to this affidavit and marked "**CJP-4**" is a copy of a Rent Default Notice issued by WA Chip & Pulp Co. Pty Ltd to Timbercorp Securities Limited.

Request for standstill

27. By letter dated 15 June 2009, the liquidators sought the consent of all landlords, including WAPRES, to a standstill arrangement in relation to the Subleases, whereby there would be a standstill on the payment of rent for the period from 1 July 2009 to 30 September 2009. Attached to this affidavit and marked as "**CJP-5**" is a true copy of the letter.
28. In response to the liquidators' proposal referred to in paragraph 27 above, WAPRES sent an email dated 16 June 2009 to the liquidators, requesting further information to assist WAPRES to reach a decision regarding the liquidators' proposal. Attached to this affidavit and marked as "**CJP-6**" is a true copy of the email. As at the date of this affidavit, the liquidators have made no response to this email.



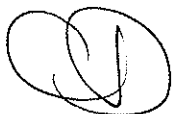

29. By letter dated 22 June 2009, WAPRES sent a formal response to the liquidators' letter of 15 June 2009 referred to in paragraph 27 above rejecting their request, in the absence of any supportive information. Attached to this affidavit and marked as "**CJP-7**" is a true copy of the letter.
30. To my knowledge, the only statement that the administrators or the liquidators have made to date in relation to their request for a standstill arrangement is that 6% of landlords had replied affirmatively, 42% had declined and 52% had not responded. Attached to this affidavit and marked as "**CJP-8**" is a true copy of a Powerpoint slide provided by the administrator to the creditors' committee meeting on 25 June 2009, together with my notes of the administrator's further explanation of the matter.

Disclaimer of Subleases

31. On 3 July 2009, WA Chip & Pulp Co. Pty Ltd and WACAP Treefarms Pty Ltd issued a notice to the liquidators in respect of both the New Subleases with Timbercorp Securities Limited and the Old Subleases with Timbercorp Limited under section 568(8)(a) of the *Corporations Act 2001* (**Notice**). Attached to this affidavit and marked as "**CJP-9**" is a true copy of the Notice.
32. On 22 July 2009, the liquidators confirmed by letter from their solicitor, Arnold Bloch Leibler, that they received the Notice on 6 July 2009, referring only to Timbercorp Securities Limited. Attached to this affidavit and marked as "**CJP-10**" is a true copy of the letter.
33. By letter dated 13 July 2009, the liquidators once again sought the consent of, among others, WAPRES to a rent standstill period ending on 30 September 2009. Attached to this affidavit and marked as "**CJP-11**" is a true copy of the letter.
34. WAPRES has not responded to this request, as no further information was provided following WAPRES' request for additional information referred to in paragraph 28 above.
35. By email dated 22 July 2009, I was informed by Ms Lucy Kirwan of Arnold Bloch Leibler, on behalf of the liquidators, that they intended to file an application on 23 July 2009 for an extension of time to decide whether to disclaim property under section 568(8) of the *Corporations Act 2001* to 30 September 2009. Attached to this affidavit and marked as "**CJP-12**" is a true copy of the email.

Compliance with silvicultural and environmental practices

36. Under the terms of the Head Leases and the Subleases, WAPRES and Timbercorp must each comply with sound silvicultural and environmental practices adopted within the forestry industry, as well as all laws and regulations relating to the use and occupancy of the relevant leased areas.
37. These obligations include, but are not limited to, establishing and/or maintaining firebreaks each year in preparation for the fire season. From my experience, there are two ways in which firebreaks may be established and/or maintained, namely slashing or spraying. Slashing involves manually cutting the target plants. The spraying process involves spraying target plants and inspecting the area to determine the success of spraying. It is a time-consuming process, as it takes some time for the target plants to be eliminated after they have been sprayed. However, of the two, spraying is the preferred method as it is more cost effective.




38. Attached to this affidavit and marked "**CJP-13**" is a schedule setting out WAPRES' firebreak work schedule. The schedule contains the final compliance dates for each Shire, by which firebreaks have to be established. In addition, the schedule sets out the dates by which spraying would need to be completed, and final inspections of the sprayed areas to take place, in order to meet the compliance date deadlines.
39. In respect of the matters referred to above, Timbercorp would have to follow a substantially similar schedule in order to comply with its obligations under the Subleases.
40. By letter dated 2 July 2009, the liquidators informed WAPRES that they do not intend to use or occupy the land and that the liquidators would not comply with any obligations under the Subleases. Attached to this affidavit and marked as "**CJP-14**" is a true copy of the letter.
41. As set out in paragraph 40 above, I believe that the liquidators have clearly indicated their intention not to perform any of the obligations under the Subleases. There is, therefore, a real risk that the required firebreak programs will not be established by Timbercorp before 30 September 2009, as required by law, and the covenants set out in the Head Leases and Subleases (see for example clause 4.2 and 4.3 of the sublease attached to this affidavit and marked "**CJP-2**", as referred to in paragraph 14). In these circumstances, Timbercorp will have failed to comply with sound silvicultural and environmental practices or laws and regulations relating to the use and occupancy of the relevant leased areas.
42. A failure by Timbercorp to comply with the firebreak regulations may:
- (a) lead to legal actions against WAPRES as occupier;
 - (b) place WAPRES in breach of its Head Lease obligations and risk termination of the Head Leases by the landowners;
 - (c) invalidate fire insurance (and put the commercial value of the crops at stake);
 - (d) expose the community to increased risk of uncontained fire; and
 - (e) expose the occupier to consequential public liability risk.
43. If the liquidators are granted an extension of time to disclaim, I believe that there is a real possibility that WAPRES will be required to assume, at its own cost, Timbercorp's obligations to establish the required firebreak programs in order to avoid breaching its own obligations under the Head Leases.
44. I understand that the most cost effective way to implement a firebreak program is to spray the weeds and other target plants with a pesticide, which takes some time to eliminate all the plants. Because of this time requirement, there is a real possibility that there would not be sufficient time to carry out the spraying and ensure that all the target plants are eliminated, if nothing is done before 30 September. The cost of carrying out all firebreak maintenance after 30 September would, therefore, be considerably greater than if the work schedule as set put in **CJP-13** was carried out. This would be a considerable additional cost incurred by WAPRES, which would, in effect, be

performing Timbercorp's obligations under the Subleases. Furthermore, this is a cost that would not be incurred if WAPRES had earlier control of the plantations and could therefore include them in its standard firebreak program.

45. Several of the plantations have only recently been harvested. As such, immediate decisions regarding the manner in which the second rotation is to be established are required. If new plantings are required, or "infill" to compensate for failed coppice is necessary, then an extension of time for this decision until after 30 September will mean that effective action is not possible this winter and the decision must be deferred until the next planting season in 2010. The effect of this delay is therefore not measured in weeks and months but a full year of growth will be lost.

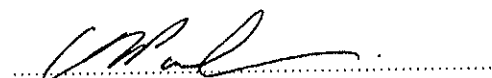
Commercial impact if disclaimer period extended

46. There is little certainty of any resolution to the Timbercorp sale process by 30 September 2009. Based on the liquidators' position to date, there is a considerable risk that the next quarterly rent payments owing to WAPRES on 30 September 2009 will not be paid, exposing WAPRES to a further loss of about \$400,000. Prolonging the uncertainty by granting the Plaintiff's application will serve only to further undermine WAPRES' commercially untenable position.
47. Furthermore, WAPRES is not the landowner of any property subject to the Subleases. WAPRES has its own obligations in its capacity as a lessee under the Head Leases, including but not limited to an obligation to pay rent. WAPRES' next rent payment under all of the Head Leases is due on 30 September 2009 when approximately \$500,000 will be payable and this will have to be funded from WAPRES' financing facilities, the levels of which were not negotiated with this additional requirement in mind. WAPRES is reluctant to approach its own financiers to fund an amount that is rightfully due to be paid by the sublessee, and I am not confident of a supportive response from them.
48. Failure by WAPRES to pay the rent due on the Head Leases, the next quarterly instalment of which is due on 30 September, will result in WAPRES being in default of the Head Leases and risk the Head Leases being terminated by the landowners. Such a default will destroy WAPRES' public reputation, rendering any continuation of its business by land leasing impossible. It is therefore necessary for WAPRES to act quickly to prevent such an outcome, and further delay imposes further risk.
49. I refer to paragraphs 44 and 62 of the affidavit of Mark Korda sworn on 23 July 2009 in support of the application, where the liquidators say that Timbercorp is hopelessly insolvent. Based on this, I believe that Timbercorp will not be in a position to rectify its failure to meet its rent payments as and when they fall due. The longer the period of uncertainty, the more WAPRES is placed in an extremely difficult and invidious position, not only because of the significant additional expense, but also because of the loss of the opportunity to take reasonable steps to mitigate the inevitable losses, including by, for example, seeking to enter into arrangements with new sublessees who would be in a position to meet all rent obligations under the Subleases. This loss of opportunity will



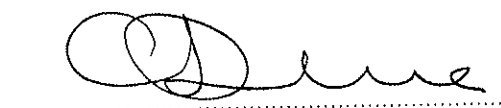

exacerbate WAPRES' already invidious position of having to meet its own rent obligations when they fall due, while being deprived of rent revenue from its sublessees.

Sworn by the abovementioned deponent at)
 Bunbury in the State of Western Australia)
)



Christopher John Palmer

Before me:



Gregory John Dunne

A legal practitioner who has
 held a practice certificate for
 at least 2 years and who holds
 a current practice certificate

An Australian Legal
 Practitioner within
 the meaning of the
 Legal Profession Act
 2008

