

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

Nos 8870 and 9510 of 2009

List B

COMMERCIAL COURT

BETWEEN

TIMBERCORP LIMITED (IN LIQUIDATION)
ACN 055 185 067

First Plaintiff

and

TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)
ACN 092 311 469

Second Plaintiff

PLANTATION LAND LIMITED
ACN 090 443 333

Defendant

SECOND AFFIDAVIT OF MARK ANTHONY KORDA

Date of document: 19 October 2009
Filed on behalf of: the Plaintiffs

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I, **MARK ANTHONY KORDA** of Level 24, 333 Collins Street, Melbourne, in the State of Victoria, Chartered Accountant, **SAY ON OATH** that:

- 1 I previously made an affidavit in this proceeding on 9 October 2009 (**First Affidavit**). Capitalised terms in this affidavit have the same meaning as capitalised terms in the First Affidavit.
- 2 I have read the defence and the affidavit of Alan Fisher filed by PLL in this proceeding.

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- 3 In paragraph 36(b)(ix) of the defence, it is stated that the liquidators have sought to use money paid by growers as a source for payment of outstanding rental to the defendant. That is correct. Each tender of rental arrears to PLL was from the maintenance fees that were paid by the Growers for past maintenance services rendered. In the First Affidavit (in paragraph 6), I referred to these fees as the Management Funds. The background to this is as follows.
- 4 Each Grower entered into a management agreement under which TSL was engaged as an independent contractor to carry out the Plantation Services during the Term in accordance with the Management Plan. Under the management agreements, the Growers were obliged to pay a plantation management fee annually in arrears (**Management Fee**). The due date in respect of the 1998 and 1999 Forestry Schemes was 31 May each year. On 18 May 2009, I caused a letter to be sent to the Growers in the 1998 and 1999 Forestry Schemes containing an invoice which required payment by 31 May 2009 of: (i) the Management Fee in arrears for the 2008/2009 financial year, and (ii) the rent in advance for the 2009/2010 financial year. Now produced and shown to me and marked "**MAK-8**", "**MAK-9**" and "**MAK-10**" is a sample copy of this letter and invoices to the Growers in the 1998 and 1999 Forestry Schemes. The invoices sought a total payment of \$4,006,737.30 in Management Fees. As at 16 October 2009, a total of \$3,258,622.60 had been received. The Liquidators decided that these moneys could be used in relation to the Forestry Schemes. It was these moneys that were used to tender the PLL rent, as described in paragraph 6 of the First Affidavit. A decision about the use of these monies had not yet been made when I made my 3 July 2009 affidavit in Federal Court Proceeding 497 of 2009 (referred to below). By contrast, the Liquidators formed the opinion that the rent payments made by Growers under the invoices should be held on trust, as they were for future rent in respect of land relating to the relevant Forestry Scheme, and could be applied only for that purpose. Those moneys were not spent and are still held on trust.
- 5 In paragraph 36(b)(ix) of the defence, it is stated that I had 'previously deposed in affidavits filed in this Court and the Federal Court that the plaintiffs did not have sufficient funds to pay quarterly instalments in circumstances where the liquidators have subsequently tendered outstanding rental to the defendant from money paid by growers for maintenance fees'. It is correct that in other affidavits I have stated that the Liquidators did not have sufficient funds to pay rent. However, I was speaking in global terms about the ability of Timbercorp and TSL to meet its rental obligations

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under all the leases which relate to land that is the subject of the Forestry Schemes, not just PLL Leases.

- 6 For example, in the affidavit which I made on 3 July 2009 in Federal Court proceeding VID 497 of 2009 (a copy of which, excluding exhibits, is produced and shown to me and marked "**MAK-11**"), I stated (in paragraphs 36 and 37) that 'as at 23 April 2009, being the date of our appointment as administrators, [Timbercorp] had paid, in advance, the rent in respect of the PLL Lease for the period up to 30 June 2009. [Timbercorp] is hopelessly insolvent and did not have funds available to it from which it could pay rent in respect of the period after 30 June 2009', and 'as at 29 June 2009, being the date of our appointment as liquidators, [Timbercorp] remained hopelessly insolvent and did not have funds available to it from which it could pay the quarterly advance instalment of rent which became due under the PLL Lease on 30 June 2009'. At the time of swearing that affidavit, Timbercorp and TSL did not have funds available to them from which they could pay the quarterly instalment of rent due on all the leases of all landlords in respect of the Forestry Schemes, which was about \$7.2 million.
- 7 Similarly, in the affidavit which I made on 29 September 2009 in Supreme Court proceeding 9299 of 2009 (a copy of which, excluding exhibits, is produced and shown to me and marked "**MAK-12**"), I stated (in paragraphs 44 and 45) that 'on 1 July 2009, approximately \$7.2 million of rental payments became due and payable by TSL for three months' rent to 30 September 2009 in relation to properties relevant to the Forestry Schemes (the Forestry Properties). The total annual rental liability for the Forestry Properties is approximately \$27 million.' and that 'TSL is hopelessly insolvent and is unable to make these rental payments'. Since our original appointment as administrators, Timbercorp and TSL have not been in a position to pay the outstanding rental for all the leases in the Forestry Schemes. Nor will they be in a position to pay the outstanding rental for all the leases, until the completion of the SPD. However as stated in paragraph 7 of the First Affidavit, if relief against forfeiture is granted Timbercorp and TSL are in a position to pay the rental arrears to PLL from the Management Funds.
- 8 In my 3 July 2009 affidavit I referred only to the rent which had become due on one particular PLL Lease (the Hawker Treefarm lease) because that was the only lease which was the subject of Federal Court proceeding VID 497 of 2009. The Liquidators commenced that proceeding in order to provide some certainty in relation to our

obligation to pay the lessors of land used for the Forestry Schemes sums for use and occupancy. We required a contradictor in that proceeding. The Liquidators' solicitors, Arnold Bloch Leibler, asked PLL to act as the respondent, and PLL agreed to do so. One of the PLL Leases (relating to Hawker Treefarm) was selected as the subject of the proceeding. Now produced and shown to me and marked "**MAK-13**" is a bundle of correspondence between Arnold Bloch Leibler and PLL's solicitors, Maddocks relating to Federal Court Proceeding 497.

- 9 In late June and early July 2009 Ms Chesser and I faced a dilemma. At that time if we took any positive steps to adopt the leases used for the Forestry Schemes (including the PLL Leases), then it may have resulted in costs for use and occupation of the land ranking in priority as an expense of the liquidation, and we may have given up our right to disclaim the leases. If we took no steps in relation to the leases, we risked termination of the leases for default. Some landlords served on the Liquidators notices under s 568(8) of the Corporations Act, requiring us to decide within 28 days whether to disclaim the leases. These notices were the subject of Federal Court proceeding VID 541 of 2009, referred to in the First Affidavit (paragraph 4). PLL did not serve a s 568(8) notice.
- 10 The SPD (to which I referred in paragraph 5 of the First Affidavit) contemplates the delivery to the Purchaser of deeds of surrender of relevant sub leases. The background to this is as follows.
- 11 As the Timbercorp Sale Process was progressing, Ms Chesser and I came to the view that in order to achieve the best outcome for the Growers and other creditors of the Timbercorp Group Companies, it was necessary to offer potential bidders clear title to the trees under the Forestry Schemes. In order to achieve this, it was going to be necessary for the Grower sub leases to be terminated or surrendered. The constitutions of the Forestry Schemes did not give express power to TSL, as the responsible entity, to terminate or surrender the sub leases. Ms Chesser and I decided, consistently with the responsible entity's obligation under s 601GC(1) of the Corporations Act, that an amendment to the constitutions to provide such a power would not adversely affect the rights of Growers.
- 12 On 13 August 2009 the Liquidators applied to the Federal Court in proceeding VID 595 of 2009 for an order that TSL, as the responsible entity, was justified in amending the constitutions of the Forestry Schemes to include a power to surrender the Grower

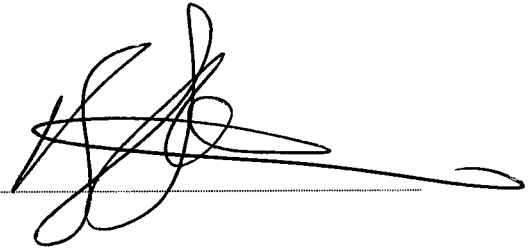
sub leases. On 18 August 2009 Finkelstein J made the order. Now produced and shown to me and marked **"MAK-14"** and **"MAK-15"** respectively is a copy of the amended originating process and a copy of the order of Finkelstein J in that proceeding. Following the order, the constitutions were amended. Now produced and shown to me and marked **"MAK-16"** are copies of the deeds of amendment to the constitutions for the Forestry Schemes.

- 13 On 29 September 2009 the Liquidators applied to this Court (proceeding 9299 of 2009) for a direction that we were justified in procuring TSL as the responsible entity to enter into and perform the SPD. The hearing was held on 29 September 2009, and on that day Pagone J made an order in relation to the entry into and performance of the SPD, including the surrender of the Grower sub leases. Now produced and shown to me and marked **"MAK-17"** is a copy of the originating process in Supreme Court Proceeding 9299. Now produced and shown to me and marked **"MAK-18"** is a copy of the order of Pagone J in Supreme Court proceeding 9299 of 2009.
- 14 Prior to completion of the SPD, TSL, in its capacity as responsible entity and on the Growers' behalf will enter into deeds of surrender with the relevant sub lessor (Timbercorp or TSL). This will satisfy the condition precedent as to surrender of sub leases under the SPD. The final form of this deed of surrender has not yet been settled. However the deed of surrender will include provisions that entitle the Growers to receive (collectively) a substantial part of the balance of the purchase price under the SPD, after paying Commonwealth Bank of Australia (**CBA**), the secured creditor, which has insisted on receiving full payment of its debt (approximately \$152m) in order to discharge its securities (as referred to in Pagone J's orders in Supreme Court proceeding 9299 of 2009, and as reflected in a condition precedent under the SPD). The precise amount of the consideration payable to each Grower has not yet been determined. It will be determined by apportioning the total amount available between the Growers having regard to, among other things, the relative ages of the trees of the relevant Forestry Schemes.
- 15 In 2000 Timbercorp and PLL entered into a management agreement. Now produced and shown to me and marked **"MAK-19"** is a copy of the Management Agreement, as amended. A prospectus was issued in respect of each of the Forestry Schemes. Now produced and shown to me and marked **"MAK-20"** is a copy of those prospectuses.

SWORN at Melbourne in the State of)
Victoria by **MARK ANTHONY KORDA** this)
19th day of October 2009)



Before me:



BRIDGET ELLEN SLOCUM
Arnold Bloch Leibler
Level 21, 333 Collins Street
Melbourne 3000
An Australian Legal Practitioner within the
meaning of the Legal Profession Act 2004