

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY

No. 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
(see attached Schedule of Parties)

Plaintiffs

PLANTATION LAND LIMITED
ACN 090 443 333

Defendant

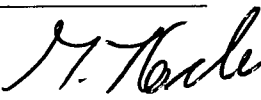

AFFIDAVIT

On 3 July 2009, I, **MARK ANTHONY KORDA**, of Level 24, 333 Collins Street, Melbourne, in the state of Victoria, Chartered Accountant, SAY ON OATH that:

- 1 I am the liquidator of the first plaintiff Timbercorp Securities Limited (**TSL**) and of the second plaintiff Timbercorp Limited (**TL**) with Leanne Kylie Chesser. Except where I otherwise indicate, I make this affidavit from my own knowledge. Where I depose to matters from information or belief, I believe those matters to be true. I am authorised by Ms Chesser to make this affidavit on her behalf. References in this affidavit to "we", "us", "our" or "ourselves" are references to Ms Chesser and me.
- 2 On 23 April 2009, we were appointed as voluntary administrators of TSL and of TL pursuant to section 436A of the *Corporations Act 2001 (Cth)* (**Act**). Other partners of

Filed on behalf of the Plaintiffs
ARNOLD BLOCH LEIBLER
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(Jane Sheridan)

- ## 1999 Eucalypts Scheme - Summary

- H. Herb
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- 10 TL sub-leased to each Grower, for the purpose of growing, tending and harvesting a plantation of eucalyptus trees (**Trees**), allocated three parcels of land (**Woodlots**) of approximately one hectare pursuant to sub-leases between TL and the Grower (**Sub-leases**). Each Grower was allocated Woodlots located in Western Australia, South Australia and Victoria. There are different Sub-leases for Woodlots in each of the States. A single document may, in effect, operate as a "master" document, setting out the terms of the Sub-leases for a number of different Growers in respect of a number of different parcels of land on which the Woodlots are located (**Plantations**). TL was entitled to receive rent from Growers under the Sub-lease. There are 27,555 Woodlots in the 1999 Eucalypts Scheme (excluding those recently burnt in fires) and 12 Sub-leases and master Sub-lease documents.
- 11 Each Grower engaged TL, pursuant to a management agreement (**Management Agreement**):
- (a) as an independent contractor, to carry out plantation services in accordance with a management plan; and
 - (b) as an agent, to harvest, sell or otherwise to account the wood derived from the Trees (**Wood**).
- 12 TL was entitled to a management fee from Growers under the Management Agreement. A single document may, in effect, operate as a "master" document, setting out the terms of the Management Agreement for a number of different Growers in respect of a number of different Plantations. There are four master Management Agreement documents.
- 13 Growers automatically had rights in relation to a single rotation of Trees, that is once the Trees had been harvested, the Growers rights ended. However, Growers could elect, at a specified time, to participate in a second rotation of Trees, so that the Growers' rights continued in relation to a second crop established from coppicing (re-growing trees from existing tree trunks) or replanting.
- 14 TL entered into agreements with forest contractors under which the majority of TL's obligations relating to the physical and technical establishment and maintenance of the Trees on specific Plantations under a Management Agreement was contracted to the forest contractors (**Plantation Services Agreement**).

- 15 In relation to some of the Woodlots, TL, as agent for each Grower, also entered into wood purchase agreements under which a purchaser agreed to purchase all the Wood grown on the Woodlots for a price determined in accordance with the agreement (**Wood Purchase Agreement**).
- 16 None of the land on which the Woodlots are located is owned by TL. It was leased or sub-leased by TL from external parties or from other companies within the Timbercorp group of companies.
- 17 Of the approximately 28,545 hectares of land used in the 1999 Eucalypts Scheme, approximately 21,480 hectares is leased from external parties pursuant to approximately 98 leases and the remaining approximately 7,065 hectares is leased from other Timbercorp companies pursuant to approximately 34 leases. The aggregate annual rental payable under those external leases is approximately \$6.5 million and under the internal leases is approximately \$2.15 million, making a total of approximately \$8.65 million.
- 18 On 4 December 2003, ASIC granted relief to TL to retire as responsible entity and appoint its wholly owned subsidiary, TSL as the new responsible entity for the 1999 Eucalypts Scheme. This change of responsible entity occurred with effect from 23 March 2004.
- 19 Following the change of responsible entity, a number of the documents relating to the 1999 Eucalypts Scheme, such as the Management Agreements and some of the Plantation Services Agreements, were novated pursuant to deeds of novation, with the effect that TSL became a party to those documents in place of TL.

Defendant's leased land

- 20 The Defendant has leased land which is used in the 1999 Eucalypts Scheme (**PLL Leased Land**). The PLL Leased Land totals approximately 4,829 hectares and is leased pursuant to 12 separate leases. The total annual rental payable to the Defendant in respect of the financial year ending 30 June 2010 is approximately \$1.5 million. Rent is generally payable quarterly in advance on each 30 June, 30 September, 31 December and 31 March.
- 21 The PLL Leased Land is in turn sub-leased to Growers pursuant to one or more Sub-leases. Rent is generally payable by Growers annually in advance on 31 May for the following financial year. While an invoice was rendered to Growers in May



M. Horde

2009 in respect of this payment, only approximately 50% of Growers have paid. Until the future of the 1999 Eucalypts Scheme is known, the amount paid is being held by us in a separate bank account.

22 Now produced and shown to me marked **MAK-4, MAK-5, MAK-6 and MAK-7**, respectively are a copy of:

- (a) a lease between the Defendant and TL dated 15 April 2000, as amended by a deed of variation dated 10 March 2008, relating to land known as the "Hawker Treefarm" (**PLL Land**) (and other land) (**PLL Lease**);
- (b) the Sub-lease dated 15 April 2000, as amended by a deed of variation with effect from 8 December 1999, under which some of the PLL Land (and other land) is sub-leased by TL to Growers (**PLL Land Sub-lease**) from which the Schedule of relevant Growers and details of their relevant Woodlots has been omitted;
- (c) the Management Agreement dated 30 June 1999 (as amended by a deed of variation with effect from 8 December 1999 and as novated by a novation agreement dated 28 April 2004), under which each relevant Grower engaged TSL as project manager of the PLL Land (**PLL Management Agreement**); and
- (d) the Plantation Services Agreement (as amended by deeds of variation dated 8 December 1999 and 12 February 2004 pursuant to which Timbercorp Forestry Pty Ltd (In liquidation) ACN 070 952 472 (**TFL**) was appointed as forestry contractor of the PLL Land (**PLL Plantation Services Agreement**).

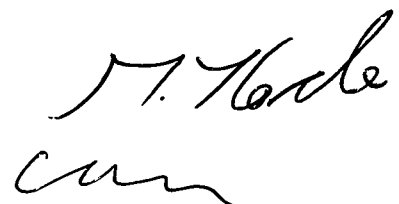
There is no Wood Purchase Agreement in relation to the PLL Land.

PLL Lease

23 Under clause 2 of the PLL Lease, the Defendant leases the PLL Land to TL for the term of the PLL Lease for the purpose of growing, tending and harvesting a plantation or plantations of eucalyptus trees.

24 Clause 4 of the PLL Lease sets out obligations of TL as lessee relating to:

- (a) Permitted use;
- (b) Forestry practice;



- (c) Compliance with laws;
- (d) Repairs;
- (e) Chemicals and dangerous substances;
- (f) Native vegetation;
- (g) Buildings; and
- (h) Permitting Owner to enter.

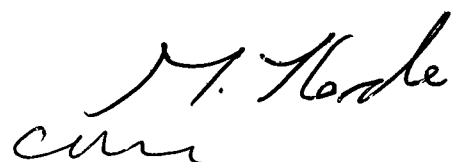
25 Clause 5 sets out the obligations of the defendant in relation to:

- (a) Quiet enjoyment;
- (b) Rates and taxes;
- (c) Compliance with laws;
- (d) Compliances with mortgages;
- (e) Chemicals and dangerous substances;
- (f) Control of fires;
- (g) Lighting of fires; and
- (h) Notification of fires.

26 Clause 6 of the PLL Lease sets out the rights of TL as lessee relating to:

- (a) Harvest;
- (b) Access;
- (c) Construction of roads and tracks;
- (d) Use of sand and gravel;
- (e) Grazing of livestock;
- (f) Security; and
- (g) Signs.

27 Clause 10 of the PLL Lease governs the ownership of the Trees and carbon credits. It provides, in general terms, that while the annual rent is being paid, the Trees and any carbon credits remain the property of TL or any other person deriving title to the Trees through TL. It also contains a grant of additional rights to TL in addition to the other rights granted to TL under the PLL Lease and provides that those rights constitute an independent and severable grant of a proprietary interest in the PLL

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Land by the Defendant to TL. Clause 10 also constitutes a forest property agreement for the purposes of the *Forestry Rights Act 1996* (Vic).

- 28 Clause 11 of the PLL Lease provides that TL may sub-lease or grant a licence to occupy the whole or any part of the PLL Land or deal with the Trees and rights derived from the Trees, without having to obtain the consent of the Defendant.
- 29 The annual rent payable under the PLL Lease is currently approximately \$217,000 based on the records of Timbercorp.

PLL Land Sub-lease

- 30 Under the PLL Land Sub-lease, TL sub-leases to relevant Growers specific Woodlots on the PLL Land for the purpose of growing, tending and harvesting a plantation or plantations of eucalyptus trees.
- 31 Clause 6 sets out the Growers' obligations, which generally reflect TL's obligations under the PLL Lease (save those in relation to native vegetation).
- 32 Clause 7 of the PLL Land Sub-lease sets out TL's obligations, which generally reflect the Defendant's obligations under the PLL Lease (save those in relation to compliance with mortgages and lighting and notification of fires) and include additional obligations relating to compliance with the PLL Lease and a prohibition on creating any encumbrance.
- 33 Clause 8 sets out the Growers' rights, which reflect some, but not all of the rights given to TL under the PLL Lease. Clause 9 of the PLL Land Sub-lease retains a number of those rights for TL and includes additional rights for TL.
- 34 Clause 13 of the PLL Land Sub-lease governs the ownership of the Trees and generally reflects clause 10 of the PLL Lease (save for the constitution of a separate forestry property agreement).
- 35 The Annual Rent payable by Growers under the PLL Land Sub-lease is currently approximately \$320 per Woodlot based on the records of Timbercorp.

Actions by the Administrators and Liquidators

- 36 As at 23 April 2009, being the date of our appointment as administrators, TL had paid, in advance, the rent in respect of the PLL Lease for the period up to 30 June 2009. TL 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. Accordingly, on 15 June 2009, we wrote to the Defendant, requesting a standstill arrangement in relation to the rental obligations under the PLL Lease. The Defendant did not agree to that request. Now produced and shown to me marked **MAK-8** is a copy of that request and their response.

- 37 As at 29 June 2009, being the date of our appointment as liquidators, TL 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.
- 38 Given the lack of available funds, as liquidators of TL, we have not adopted or ratified the PLL Lease or exercised, or directed anyone to exercise on our behalf, any of the rights granted to TL under the PLL Lease. On 2 July 2009, we gave notice in writing to the Defendant that we, as liquidators, were not adopting or ratifying the PLL Lease or using or occupying the PP Land and were not entering onto the PLL Land or performing any of TL's obligations under the PLL Lease. Now produced and shown to me marked **MAK-9** is a copy of that notice.
- 39 As liquidators of TL, we have not adopted or ratified the PLL Land Sub-lease. Since our appointment as liquidators, TL has not exercised any rights or performed any obligations under the PLL Land Sub-lease.
- 40 As liquidators of TSL, we have not adopted or ratified the PLL Management Agreement. Since our appointment as liquidators, TSL has not provided any services, exercised any rights or performed any obligations under the PLL Management Agreement in respect of the PLL Land.
- 41 As liquidators, we have not adopted or ratified the PLL Plantation Services Agreement. We have not authorised TFL to recommence the provision of services under the PLL Plantation Services Agreement and, to the best of our knowledge and belief, since 29 June 2009, TFL has not provided any services under the PLL Plantation Services Agreement in respect of the PLL Land.

Conclusion

- 42 As liquidators neither we nor our servants or agents will enter on the PP Land, or do anything on the PP Land. We will not use or occupy the PP Land. We do not have sufficient available cash or immediately realisable and available unencumbered

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assets of TL and TSL to pay a use and occupancy expense which would otherwise arise if we use and occupy the PP Land. In these circumstances we seek to avoid incurring as an expense of the liquidation a per diem cost for use and occupation of PP Land.

- 43 We have been advised that we can disclaim the PP Lease and thereby avoid any possibility of incurring an expense in the liquidation for use or occupancy of the PP land. However, the difficulty in doing so is that the Defendant may assert that by disclaiming the PP Lease, the Growers may be adversely affected. As liquidators of TSL we are obliged to act in the best interests of Growers and if there is any conflict between Growers interests and TSL's interests we must act in the interests of Growers (s 601FC (1)(c) of the Act).
- 44 We do not believe that it is proper for the liquidators to incur an expense in the liquidation that we cannot meet.
- 45 In the premises, we seek an urgent determination of whether in the circumstances described in this affidavit, we are incurring a use and occupation expense in respect of the PP Land as an expense of the liquidations within the meaning of either s 556(1)(a) or s 556(1)(dd).

SWORN by the abovenamed deponent at)
 Melbourne in the State of Victoria)
 this *3rd* day of July 2009)



Before me:



CATHERINE HELEN MACRAE
 Arnold Bloch Leibler
 Level 21, 333 Collins Street
 Melbourne 3000
 An Australian Legal Practitioner within the
 meaning of the Legal Profession Act 2004

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Plaintiffs

PLANTATION LAND LIMITED
ACN 090 443 333

Defendant

AFFIDAVIT - CERTIFICATE OF COMPLIANCE

(Order 14, rule 5A)

I, **CATHERINE HELEN MACRAE**, certify to the Court that the affidavit of **MARK ANTHONY KORDA** sworn on 3 July 2009 filed on behalf of the Plaintiffs complies with Order 14, rule 2 of the Federal Court Rules.

Date: 3 July 2009



Catherine Helen Macrae
A solicitor of Arnold Bloch Leibler
Solicitor for the Plaintiffs

Filed on behalf of the Plaintiffs
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(Jane Sheridan)