

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

LIST B

SCI 2009
No 9365 of 2009

BETWEEN

SJ OSTWALD CONSULTING PTY LTD
ACN 083 505 524

Plaintiff

and

PLANTATION LAND LIMITED
ACN 090 443 333

Defendant

AMENDED STATEMENT OF CLAIM

Date of document:	6 October 2009
Filed on behalf of the:	Plaintiff
Prepared by	
Clarendon Lawyers	Tel: 03 8681 4400
Level 17, Rialto North Tower	Fax: 03 8681 4499
525 Collins Street	Solicitors Code: 101294
MELBOURNE VIC 3000	Ref: MJF:0900410

1. The plaintiff is and was at all material times:
 - (a) a corporation registered under the *Corporations Act 2001* (Cth); and
 - (b) a member of a managed investment scheme registered under Part 5C of the *Corporations Act 2001* (Cth) for the cultivation of eucalyptus trees as the 2000 Timbercorp Eucalypts Project (ARSN 091172093) ("**Forestry Scheme**").
2. Timbercorp Securities Ltd (In Liquidation) (ACN 092 311 469) is the responsible entity for the Forestry Schemes ("**TSL/RE**").
3. The defendant is and was at all material times a corporation registered under the *Corporations Act 2001* (Cth).

Head Lease

4. By lease dated 31 May 2000, the defendant let to Timbercorp Limited (In Liquidation) (ACN 055 185 067) ("**Tenant**") the land described as Laurie 272 in the Forestry Scheme, being the land described in certificate of title volume 8498 folio 184, being crown

allotment 66, volume 4848 folio 520, being crown allotment 59A, and crown grant volume 8217 folio 206, being crown allotments 51, 54, part 59A and 66, Parish of Mageppa (“Leased Land”) for a term (“Term”) commencing on 14 March 2000 (“the Commencement Date”) and expiring on the earliest of the date 12 years after the Commencement Date and the date harvesting of the Plantation Crop is completed for the first time (“Head Lease”).

Particulars

The Head Lease is in writing and dated 31 May 2000. A copy of the Head Lease is available for inspection at the office of the plaintiff’s solicitors on reasonable notice. The full term and effect of the Head Lease will be relied on at the hearing of the matter. At the time of preparing this statement of claim the plaintiff has not been provided with a copy of the Head Lease. Further particulars will be provided after inspection of the Head Lease.

5. There were covenants in the Head Lease that (among others):

- (a) the defendant grants to the Tenant the Leased Land for the Term for the purpose of growing, tending and harvesting a plantation or plantations of eucalyptus trees (clause 2);
- (a)(b) the Tenant will pay to the defendant the annual rent in advance in equal successive quarterly instalments on or before 30 June, 30 September, 31 December and 31 March (clause 3.1);
- (c) the defendant grants to the Tenant the rights set out in Part 6 of the Head Lease (clause 6.1);
- (d) the Tenant will be entitled to harvest the Plantation Crop and to remove and sell or otherwise deal in the products and any rights, benefits and credits derived from the Plantation Crop (clause 6.2);
- (e) the Tenant may by giving notice to the defendant not less than three (3) months prior to the expiration of the Term, elect to extend the term for the purpose of growing, tending and harvesting a further rotation of the Plantation Crop (whether by way of coppice or replant) in respect of the whole or any part of the Leased Land (as nominated by the Tenant in such notice) for the period commencing immediately upon expiry of the Term and expiring on the earliest of:

- i. 12 years after the commencement of the Further Term; and
- ii. the date harvesting of the Plantation Crop is completed for the second time;

(clause 7.1);

~~[#query 6.1, 6.2, 7.1 and 7.2]~~

- ~~(b)~~(f) the defendant may terminate the Head Lease with immediate effect if the Tenant is in arrears in respect of one quarterly instalment of annual rent and such arrears are not paid in full within one month after the defendant has served a written notice on the Tenant requesting payment (clause 8.1);
- ~~(e)~~(g) the Tenant may sublease or grant a licence to occupy the whole or any part of the demised premises Leased Land (clause 11.2(a)(i));
- ~~(d)~~(h) “Plantation Crop” means the crop or crops of eucalyptus trees planted and tended or to be planted or and tended on the demised premises Leased Land by the Tenant (clause 1.1);
- ~~(e)~~(i) subject to Part 11 of the Lease (f) to (i) below, any part of the Plantation Crop not harvested by the Tenant during the term will be the property of the defendant (clause 9.3);
- ~~(f)~~(j) for so long as the Head Lease has not been terminated for non-payment of annual rent under clause 8.1, and the Tenant continues to pay the instalments of annual rent, the Plantation Crop and any eCarbon eCredits (as defined in the Head Lease) will be and will remain the property of the Tenant (or any other entity deriving title to the Plantation Crop through the Tenant) for the period referred to in clause 10.3 (clause 10.1)(i) below;
- ~~(g)~~(k) the defendant transfers and grants to the Tenant the following rights in addition to the other rights granted to the Tenant under the Head Lease:
 - (i) to establish, tend and manage the Plantation Crop;
 - (ii) to enter upon the demised Leased Land with or without vehicles and, to the exclusion of the defendant and all other persons, to harvest the

Plantation Crop and remove and sell the products and any rights, benefits and credits derived from the Plantation Crop; and

- (iii) to exercise and enjoy such of the rights and powers granted to the Tenant under ~~this lease~~ the Head Lease as may be necessary to enable the Tenant to exercise the rights referred to in paragraphs (i) and (ii) above;

(clause 10.2);

- ~~(h)(l)~~ the rights and interests granted to the Tenant under clauses 10.1 and 10.2 referred to in (f) and (g) above constitute an independent and severable grant of a proprietary interest in the demised premises Leased Land by the defendant to the Tenant (clause 10.3(a));

- ~~(i)(m)~~ in the event that the lease term or the leasehold interest of the Tenant under the Head Lease (among other things):

- (i) ends; or
- (ii) is terminated (other than by effluxion of time or other than by operation of Parts 7 or 8), ~~among other things, for non-payment of rent~~;

the rights and interests granted to the Tenant under (f) and (g) above clauses 10.1 and 10.2, unless expressly surrendered by the Tenant, continue in full force and effect and may be exercised and enjoyed by the Tenant until the date on which the Term (as extended) would have ended by effluxion of time (clause 10.3(b));- and

- ~~(n)~~ the for the purposes of the *Forestry Rights Act 1996* (Vic), each clause of the Head Lease is deemed to be repeated and separately constitutes a forest property agreement in addition to a lease in respect of the Leased Land (clause 10.4);

- ~~(o)~~ The Tenant may:

- (i) sub-lease or grant a licence to occupy the whole or any part of the Leased Land; or
- (ii) assign, transfer or deal with all or part of the Plantation Crop and all of the products, rights, benefits and credits derived from the Plantation Crop or its rights under the Forest Property Agreement constituted under clause 10.4 of the Head Lease;

on such terms and conditions as the Tenant deems fit without having first to obtain the consent of the defendant (clause 11.2(a)).

Particulars

Each of the above covenants is in writing and contained in the Head Lease ~~sample head lease from the defendant to the Tenant that is contained in schedule 3 to the writ filed in proceeding 8870 of 2009 in this Court (“Sample Head Lease”). To the best of the plaintiff’s knowledge, the terms of the Head Lease are materially the same as the terms in the Sample Head Lease. Further particulars of the Head Lease will be provided when available.~~

Sublease

6. By sub-lease dated 31 May 2000 the Tenant sub-let seven lots within the Leased Land described as lots LAU 341 to LAU 347 (**“Sub-Leased Land”**) to the plaintiff for a term (**“Term”**) commencing the date on which an application for Woodlots (as defined in the Sub-Lease) under the 2000 Timbercorp Eucalypts Project Prospectus issued by the Tenant is accepted by the Tenant and ending on the earliest of 30 June 2014, the date of harvesting of the Wood (as defined in the Sub-Lease) is completed and a day immediately preceding termination of the Head Lease on or after 14 March 2000 or alternatively 31 May 2000 (“Sub-Lease”).

Particulars

The Sub-Lease is in writing. A copy of the Sub-Lease may be inspected at the office of the plaintiff’s solicitors on reasonable notice. The full terms and effect of the Sub-Lease will be referred to at the hearing of the matter. Further particulars of the Commencement Date will be provided when available. ~~At the time of preparing this statement of claim the plaintiff has not been provided with a copy of the Sub-Lease. Further particulars will be provided after inspection of the Sub-Lease.~~

7. There are covenants in the Sub-Lease that (among others):
 - (a) the “Trees” means the crop of eucalyptus trees the subject of the Management Plan (as defined in the Lease) planted and tended or to be planted or tended on the Sub-Let premises Leased Land or the relevant Plantation (as defined in the Sub-Lease) (clause 1);

- (b) the Tenant grants to the plaintiff the rights set out in Part 8 of the Sub-Lease to be exercised by the plaintiff during the Term (clause 8.1);
- ~~(b)~~(c) the plaintiff shall be entitled to harvest the Trees and remove and sell the products derived from the Trees and to retain all income from such sale (clause 8.2);
- ~~(e)~~(d) the Trees are and will remain the property of the plaintiff until the end of the term of the Sub-Lease (clause 8.3);
- ~~(d)~~(e) for so long as the Sub-Lease has not been terminated for non-payment of rent Annual Rent (as defined in the Sub-Lease) under clause 11.1(b) and the plaintiff continues to pay the Annual Rent the Trees will be and shall remain the property of the plaintiff for the period referred to in (g) below paragraph 13.3(b) of the Sub-Lease (clause 13.1);
- ~~(e)~~(f) the Tenant transfers and grants to the plaintiff the following rights in addition to the other rights granted to the plaintiff under the Sub-Lease:
- (i) to establish, tend and manage the Trees and to cultivate and plant seedling trees as part of the Trees;
 - (ii) to enter upon the Sub-Leased Land sub-let premises with or without vehicles and, to the exclusion of the Tenant and all other persons, to harvest the Trees and remove and sell the products derived from the Trees; and
 - (iii) to exercise and enjoy such of the rights and powers granted to the plaintiff under the Sub-Lease as may be necessary to enable the plaintiff to exercise the rights referred to in (i) and (ii) above (clause 13.2);
- ~~(f)~~(g) the rights and interests granted to the plaintiff under clauses 13.1(d) and 13.2(e) constitute an independent and severable grant of a property proprietary interest in the sub-let premises Sub-Leased Land from the Tenant to the plaintiff (clause 13.3(a));
- ~~(g)~~(h) in the event that the term on the leasehold interest of the Tenant plaintiff under the Sub-Lease:
- (i) ends; or

(iii) is terminated (other than for, among other things, non-payment of rent by effluxion of time or by the operation of Parts 4 or 11);

the rights and interests granted to the ~~Tenant~~ plaintiff under clauses 13.1(d) and 13.2(e), unless expressly surrendered by the ~~plaintiff~~ Tenant, continue in full force and effect and may be exercised and enjoyed by the ~~Tenant~~ plaintiff until the date on which the Term (~~as extended~~) would have ended by effluxion of time.

Particulars

Each of the above covenants is in writing and contained in the Sub-Lease, a copy of which is available for inspection at the office of the plaintiff's solicitors by appointment, a sample sub-lease from the Tenant to participants in the Forestry Scheme that is contained in schedule 4 to the writ filed in proceeding 8870 of 2009 in this Court ("Sample Sub-Lease"). To the best of the plaintiff's knowledge, the terms of the Sub-Lease are materially the same as the terms in the Sample Sub-Lease. Further particulars of the Sub-Lease will be provided when available.

Surrender and Regrant

8. By a variation of lease dated 10 March 2008 ("Deed of Variation") between the defendant and the Tenant:

- (a) the area of the Leased Land was reduced (recital D);
- (b) the Leased Land had been subdivided and settlement of the sale of the subdivided land occurred on 30 September 2000 (clauses 3.1 and 1.1);
- (c) except as otherwise provided in the Deed of Variation, the Head Lease remains in full force and effect (clause 2.1);
- (d) the details of the Leased Land in the Head Lease were replaced with the land described in certificate of title volume 8498 folio 184 being crown allotment 66, and volume 4848 folio 520 being crown allotment 59A and crown grant volume 8217 folio 206 being crown allotment 64 in the Parish of Mageppa (clause 4.1);
- (e) the Annual Rent was reduced from \$97,440.41 to \$93,562.06 for the period 30 September 2000 to 30 June 2008 and reviewed thereafter (clause 4.2); and

(f) the provisions of the Head Lease are confirmed and ratified and will continue in full force and effect save to the extent only that the provisions of the Head Lease are necessarily inconsistent with the provisions of the Deed of Variation (clause 5.1).

9. Accordingly, there was a surrender and re-grant of the Head Lease.

Purported Termination of Head Lease

8.10. By letter dated 21 July 2009, the defendant purported to serve on the Tenant a letter demanding payment of rental arrears under clause 8.1 of the Head Lease ("Demand"). On or about 21 July 2009 the defendant purported to serve on the Tenant notices demanding payment of rent under the Head Lease.

9. On or about 24 August 2009, the defendant purported to terminate the Head Lease by notice in writing to the Tenant.

Particulars

The Demand is in writing. A copy of the Demand is available for inspection at the offices of the plaintiff's solicitors by appointment.

11. By letter dated 24 August 2009, the defendant purported to serve on the Tenant notice terminating the Head Lease ("Purported Termination Notice").

Particulars

The Purported Termination Notice is in writing. A copy of the Purported Termination Notice is available for inspection at the offices of the plaintiff's solicitors by appointment.

12. Both the Demand and the Purported Termination Notice refer to the Head Lease as being dated 31 May 2000. As the Head Lease had been surrendered in the Deed of Variation, those notice are ineffective.

Sub-Lease elevated to Lease

13. Further or alternatively, by operation of s139 of the *Property Law Act 1958* (Vic), the Sub-Lease is deemed to be a lease from the defendant to the plaintiff, preserving the

same incidents and obligations as would have affected the Head Lease had there been no surrender.

Relief from forfeiture

~~10.14.~~ Alternatively, the plaintiff is ready, willing and able to:

- (a) pay the rental under the Sub-Lease to the plaintiff; and
- (b) otherwise comply with its obligations under the Sub-Lease.

~~11.15.~~ Accordingly, if relief against forfeiture of the Sub-Lease is not granted If the termination of the Head Lease is valid and the plaintiff loses its rights under the Sub-Lease:

- (a) the plaintiff will lose its interest in the Trees;
 - (b) the plaintiff will lose its profit a prendre granted under the Sub-Lease;
 - (c) the plaintiff will lose its investment in the Forestry Scheme;
 - (d) the plaintiff will lose the benefit of rent paid to the Tenant under the Sub-Lease;
 - (e) the Trees will transfer to the defendant, giving it a windfall gain;
 - (f) the Carbon Credits will revert to the defendant, giving it a windfall gain;
 - (g) the defendant will not receive its share of the price payable by the purchaser under the agreement dated on or about 30 September 2009 whereby TSL/RE has agreed to terminate or surrender the Sub-Lease; and
 - (h) the above will occur through the default of the Head Tenant and through no fault of the plaintiff.;
- ~~(h) accordingly, it is unfair, unreasonable and unconscionable for relief against forfeiture not be granted.~~

16. Further, the Tenant is and was at all material times a company related to or associated with the defendant.

17. Accordingly, the plaintiff seeks relief against forfeiture under s 146(4) of the *Property Law Act 1958* (Vic).

Profit a prendre

12.18. Further or alternatively, the rights transferred and granted in clause 10 of the Head Lease and clause 13 of the Sub-Lease 5(g) and 7(c) above constitute a profit a prendre that survives the termination of the Lease.

Licence coupled with an equity

19. Further or alternatively, the rights transferred and granted in clause 10 of the Head Lease and clause 13 of the Sub-Lease constitute a licence granted to the plaintiff.

20. The grant of the Head Lease and the consent to sub-lease or licence contained in clause 11.2(a)(i) of the Head Lease constitute a representation that the plaintiff would be entitled to use that licence for the balance of the term of the Sub-Lease.

21. In reliance on that representation, the plaintiff contributed money to the Forestry Scheme, which was used to improve the Sub-Leased Land.

22. Accordingly, the plaintiff has a licence over the Sub-Leased Land coupled with an equity preserving its right to exercise that right for the balance of the term of the Sub-Lease.

23. By consenting to the Sub-Lease and the grant of a licence over the Sub-Leased Land, the defendant had actual or constructive notice of the plaintiff's licence coupled with an equity and is bound by it.

Estoppel

22.24. Further or alternatively, the defendant is estopped from denying that the plaintiff's rights under clause 10 of the Head Lease and clause 13 of the Sub-Lease binding on it.

AND THE PLAINTIFF CLAIMS:

A. A declaration that the Demand and the Purported Termination Notice are of no effect. An order reinstating the Sub-Lease as a lease between the plaintiff and the defendant.

B. Further or alternatively, a declaration that the Sub-Lease is deemed to be a lease from the defendant to the plaintiff, preserving the same incidents and obligations as would have affected the Sub-Lease had there been no surrender of the Head Lease.

B.C. Alternatively, an order for relief against forfeiture under s146(4) of the *Property Law Act* on such conditions as the Court determines. ~~granting a new lease from the defendant to~~

~~the plaintiff on the same or substantially similar terms to the Sub-Lease or alternatively the Head Lease.~~

~~C.D.~~ Further or alternatively, a declaration that the plaintiff's profit a prendre survives the termination of the Head Lease.

E. Further or alternatively, a declaration that the licence granted or transferred by clause 10 of the Head Lease and clause 13 of the Sub-Lease binds the plaintiff and an injunction restraining the plaintiff from interfering with the use and enjoyment of that right.

F. Such costs orders as are appropriate.

G. Such further or other orders as the Court deems fit.

DATED: 6~~1~~ October 2009

Garry Bigmore

Sam Hopper

Clarendon Lawyers

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Clarendon Lawyers