

Service and Execution of Process Act 1992

NOTICE TO DEFENDANT

**PLEASE READ THIS NOTICE AND
THE ATTACHED DOCUMENT VERY CAREFULLY**

**IF YOU HAVE ANY TROUBLE
UNDERSTANDING THEM YOU SHOULD GET
LEGAL ADVICE AS SOON AS POSSIBLE**

Attached to this notice is a writ and statement of claim ("the attached process") issued out of the Supreme Court of Victoria.

Service of the attached process outside Victoria is authorised by the *Service and Execution of Process Act 1992*.

YOUR RIGHTS

If a court of a State or Territory other than Victoria is the appropriate court to determine the claim against you set out in the attached process, you may be able to apply to the Supreme Court in Victoria to have the proceeding transferred to another Supreme Court, or another superior court.

If you think the proceeding should be stayed or transferred, you should get legal advice as soon as possible.

CONTESTING THIS CLAIM

If you want to contest this claim, you must take any action set out in the attached process as being necessary to contest the claim.

If you want to contest this claim, you must also file a notice of appearance in the Supreme Court of Victoria. You have only 21 days after receiving the attached process to do so.

The notice of appearance must contain an address in Australia where documents can be left for you or sent to you.

r 5.02(1)

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

LIST B

BETWEEN

TIMBERCORP LIMITED (IN LIQUIDATION)
ACN 055 185 067

and

CADOGAN ESTATES (AUSTRALIA) PTY LTD
ACN 008 715 053

No ~~_____~~ of 2009
S C 1 2009 10091

Plaintiff

Defendant

WRIT

Date of document: 13 November 2009

Filed on behalf of: the Plaintiffs

Prepared by:

ARNOLD BLOCH LEIBLER

Lawyers and Advisers

Level 21

333 Collins Street

MELBOURNE 3000

Solicitor's Code: 54

DX 38455 Melbourne

Tel: 9229 9999

Fax: 9229 9900

Ref: 01-1499489

(Leon Zwier - lzwier@abl.com.au)

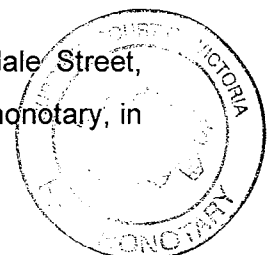
TO THE DEFENDANT

TAKE NOTICE that this proceeding has been brought against you by the plaintiff for the claim set out in this writ.

IF YOU INTEND TO DEFEND the proceeding or if you have a claim against the plaintiff which you wish to have taken into account at the trial, YOU MUST GIVE NOTICE of your intention by filing an appearance within the proper time for appearance stated below.

YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by:

- (a) filing a "Notice of Appearance" in the Prothonotary's office, 436 Lonsdale Street, Melbourne, or, where the writ has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and



- (b) on the day you file the Notice, serving a copy, sealed by the Court, at the plaintiff's address for service, which is set out at the end of this writ.

IF YOU FAIL to file an appearance within the proper time, the plaintiff may OBTAIN JUDGMENT AGAINST YOU on the claim without further notice.

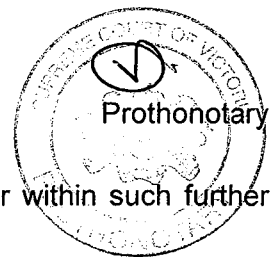
1 An order has not been made fixing time for appearance THE PROPER TIME TO FILE AN APPEARANCE is as follows:

- (a) where you are served with the writ in Victoria, within 10 days after service;
- (b) where you are served with the writ out of Victoria and in another part of Australia, within 21 days after service;
- (c) where you are served with the writ in New Zealand or in Papua New Guinea, within 28 days after service;
- (d) where you are served with the writ in any other place, within 42 days after service.]

~~IF the plaintiff claims a debt only and you pay that debt, namely, \$ ——— and \$ ——— for legal costs to the plaintiff or its solicitor within the proper time for appearance, this proceeding will come to an end. Notwithstanding the payment you may have the costs taxed by the Court.~~

FILED

13 NOV 2009



THIS WRIT is to be served within one year from the date it is filed or within such further period as the Court orders.

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

LIST

No of 2009

BETWEEN

TIMBERCORP LIMITED (IN LIQUIDATION)
ACN 055 185 067

Plaintiff

and

CADOGAN ESTATES (AUSTRALIA) PTY LTD
ACN 008 715 053

Defendant

STATEMENT OF CLAIM

Date of document: 13 November 2009

Filed on behalf of: the Plaintiffs

Prepared by:

ARNOLD BLOCH LEIBLER

Lawyers and Advisers

Level 21

333 Collins Street

MELBOURNE 3000

Solicitor's Code: 54

DX 38455 Melbourne

Tel: 9229 9999

Fax: 9229 9900

Ref: 01-1499489

(Leon Zwier - lzwier@abl.com.au)

-
- 1 The plaintiff (**Timbercorp**) is and was at all material times a company duly incorporated in accordance with the laws of Victoria.
 - 2 Timbercorp is in liquidation and the liquidators are Mark Anthony Korda and Leanne Kylie Chesser of KordaMentha Pty Ltd ACN 100 169 391 (**Liquidators**).
 - 3 The Defendant (**Cadogan**) is and was at all material times a company duly incorporated according to law and a trading corporation within the meaning of the *Trade Practices Act 1974* (Cth).

The Leases

- 4 Cadogan is the lessee of the land described in Schedule 1 (**Premises**).
- 5 On or about 15 March 2000, Cadogan sub-leased the Premises to Timbercorp, for a term of twelve years commencing on 15 March 2000 (**Lease**).

PARTICULARS

A copy of the Lease may be inspected by appointment of the offices of the Plaintiff's solicitors.

- 6 The Premises are located in the State of Western Australia.
- 7 The Premises are leased for the purpose of growing, tending and harvesting a plantation or plantations of eucalyptus trees (**Plantations**).
- 8 The Plantations formed part of a Managed Investment Scheme registered pursuant to Part 5C of the *Corporations Act 2001* (Cth) for the cultivation of eucalyptus trees (**1999 Forestry Scheme**).
- 9 The Lease includes the following covenants on the part of Timbercorp, regarding payment of rent, termination and assignment, relevant to these proceedings:
 - (a) Timbercorp will pay Cadogan the annual rent in advance in equal successive quarterly instalments on or before 15 June, 15 September, 15 December and 15 March (**Annual Rental Instalments**) (Clause 4.1).
 - (b) Cadogan may terminate the Lease with immediate effect if Timbercorp is in arrears in respect of one quarterly instalment of annual rent and such arrears are not paid in full within three months after Cadogan has served a written notice on Timbercorp requesting payment (Clause 9.1).
 - (c) Except as expressly provided in clause 9 of the Lease, neither Timbercorp or Cadogan are entitled to terminate or rescind the Lease and Cadogan will not be entitled to re-enter the Premises or forfeit the Lease at any time prior to the expiration of the term (as extended or renewed) (Clause 9.7).
 - (d) Termination of the whole or any part of the Lease in accordance with clause 9 will be without prejudice to any rights or obligations which may have accrued prior to the date of termination (Clause 9.6).
 - (e) Timbercorp may, with Cadogan's consent (which must not be unreasonably withheld) assign or transfer the Lease upon Timbercorp arranging (at its own cost) for the assignee to enter into a Deed of Covenant with Cadogan under which the assignee agrees to comply with and be bound by the provisions of

the Lease as if they were the named Lessee under the Lease (clause 12.2(b)).

- 10 On or about 20 August 2001, the Lease was varied at law, such that the Annual Rental Instalments payable under Clause 4.1 of the Lease would fall due and be paid on 30 June, 30 September, 31 December and 31 March of each year.

PARTICULARS

The variation was in writing and comprised a letter from Cadogan to Timbercorp dated 20 August 2001 and signed by David Nuttal, who was at the time a Director and the Company Secretary of Cadogan.

A copy of the letter dated 20 August 2001 may be inspected by appointment at the offices of the Plaintiff's solicitors.

- 11 Further or alternatively, the terms of the Warren Hill Lease were varied by way of an equitable variation such that the Annual Rental Instalments payable under Clause 4.1 of the Lease would fall due and be paid on 30 June, 30 September, 31 December and 31 March of each year.

PARTICULARS

The variation was both oral and in writing and comprised a conversation, or series of conversations, between Gideon Meltzer of Timbercorp and David Nuttal of Cadogan and a letter from Cadogan to Timbercorp dated 20 August 2001 and signed by David Nuttal, who was at the time a Director and the Company Secretary of Cadogan.

A copy of the letter dated 20 August 2001 may be inspected by appointment at the offices of the Plaintiff's solicitors.

- 12 Timbercorp performed its obligation to pay rent consistently with the parties' agreement to vary the Lease in that it paid the Annual Rental Instalments on 30 June, 30 September, 31 December and 31 March of each year.

PARTICULARS

The plaintiff refers to and repeats the particulars to paragraph 18 below.

- 13 Cadogan accepted Timbercorp's payment of rent on 30 June, 30 September, 31 December and 31 March of each year.
- 14 Further or alternatively, Cadogan represented to Timbercorp that it would not require payment of the Annual Rental Instalments until 30 June, 30 September, 31 December and 31 March of each year (**Representation**).
- 15 The Representation was a continuing representation and continued from 20 August 2001 until 22 June 2009 when the Purported Default Notice (as described in paragraph 21 below) was served (**Continuing Representation**).
- 16 Relying on the Representation and Continuing Representation, Timbercorp assumed that Cadogan would not require payment of the Annual Rental Instalments until 30 June, 30 September, 31 December or 31 March of each year and would not rely on the non-payment of rent on 15 June, 15 September, 15 December and 15 March of each year as a breach permitting termination of the Lease.
- 17 Cadogan knew or intended that Timbercorp would rely on the Representation and the Continuing Representation.
- 18 Timbercorp paid the Annual Rental Instalments on 30 September, 31 December, 31 March and 30 June commencing on 30 September 2000 with the final payment on 31 March 2009 for the period to 30 June 2009.

PARTICULARS

- (a) the Annual Rental Instalments were paid by way of cheque on 30 September 2000, 31 December 2000 and 31 March 2001; and,
- (b) the Annual Rental Instalments were paid by electronic funds transfer on 30 June 2001, 30 September 2001, 31 December 2001, 31 March 2002, 30 June 2002, 30 September 2002, 31 December 2002, 31 March 2003, 30 June 2003, 30 September 2003, 31 December 2003, 31 March 2004, 30 June 2004, 30 September 2004, 31 December 2004, 31 March 2005, 30 June 2005, 30 September 2005, 31 December 2005, 31 March 2006, 30 June 2006, 30 September 2006, 31 December 2006, 31 March 2007, 30 June 2007, 30 September 2007, 31 December 2007, 31 March 2008, 30 June 2008, 30 September 2008, 31 December 2008, and 31 March 2009.

- 19 At no time in the period between 15 September 2000 and 31 March 2009 did Cadogan ever serve a written notice on Timbercorp requesting payment of an Annual Rental Instalment on 31 March, 30 June, 30 September or 31 December of each year.
- 20 On or about 23 April 2009, the Liquidators were appointed as voluntary administrators of Timbercorp and TSL.
- 21 On or about 25 June 2009, Cadogan purported to issue a notice of default to Timbercorp alleging Timbercorp was in breach of the Lease for non-payment of the Annual Rental Instalment due on 15 June 2009 and requiring payment of the outstanding rent within three months from service of the notice (**Purported Default Notice**).

PARTICULARS

The Purported Default Notice was in writing and dated 22 June 2009. The Purported Default Notice was received by Timbercorp on 25 June 2009.

- 22 The Purported Default Notice was invalid in that it alleged a breach of the Lease that had not been committed, in that Timbercorp was not required to pay the Annual Rental Instalment until 30 June 2009.
- 23 On or about 29 June 2009 the creditors of Timbercorp resolved to liquidate Timbercorp.
- 24 On 30 June 2009, Timbercorp failed to pay the Annual Rental Instalment of \$25,117.66 due on that date, in accordance with the terms of the Lease (**July Quarter Instalment**).
- 25 Cadogan has not issued a Purported Default Notice in respect of the non-payment of the July Quarter Instalment.
- 26 On or about 31 July 2009 the Liquidators sought expressions of interest in the sale or recapitalisation of the 1999 Forestry Scheme's assets and the assets of other Timbercorp forestry schemes, including the Lease (**Timbercorp Sale Process**).
- 27 Final bids for the Timbercorp Sale Process closed on 18 September 2009.

- 28 On 30 September 2009 a confidential contract was entered into with the preferred bidder, Australian Bluegum Plantations Pty Ltd (**Purchaser**) (**Sale Contract**) and settlement of the Sale Contract took place on 2 November 2009.
- 29 The assets the subject of the Sale Contract include the Lease.
- 30 Pursuant to the terms of the Sale Contract, the Purchaser agreed to enter into a Deed of Assignment in respect of the Lease and to comply with, and be bound by, the terms of the Lease.
- 31 Also on 30 September 2009 Cadogan purported to terminate the Lease.

PARTICULARS

The purported termination was by way of letter dated 30 September 2009. A copy of the letter may be inspected by appointment at the offices of the Plaintiff's solicitors (**Purported Termination Notice**)

- 32 The Purported Termination Notice was invalid and of no effect.

PARTICULARS

- (a) The Purported Termination Notice relied on the Purported Default Notice which was, in itself, invalid and of no effect;
- (b) The Plaintiff refers to and repeats paragraph 22.
- 33 By the matters set out in paragraphs 11 to 19 above and 40 and 41 below, Cadogan is estopped from:
- (a) relying on the Purported Default Notice or the Purported Termination Notice to terminate the Lease;
- (b) contending that the Purported Default Notice and Purported Termination Notice operate so as to terminate the Lease;
- (c) denying that the Lease exists;
- (d) denying that the Lease remains on foot; and/or

- (e) seeking to terminate the Lease based on Timbercorp's non-compliance with the Purported Default Notice.
- 34 Further or alternatively, by issuing the Purported Default Notice and the Purported Termination Notice Cadogan sought to unconscionably depart from the Representation and the Continuing Representation.
- 35 Further, insofar as the Representation and the Continuing Representation related to future matters, Timbercorp relies on s 51A of the *Trade Practices Act 1974* (Cth) and/or s 4 of the *Fair Trading Act 1999* (Vic).
- 36 Insofar as each of the Representation and the Continuing Representation was as to matters of existing fact it was false from the time when Cadogan decided to serve, or alternatively served, the Purported Default Notice.
- 37 By reason of the matters referred to in paragraphs 11 to 19 above Cadogan engaged, in trade or commerce, in conduct which was misleading or deceptive or was likely to mislead or deceive, in contravention of s 52 of the *Trade Practices Act 1974* (Cth) and/or s 9 of the *Fair Trading Act 1999* (Vic).
- 38 By reason of the matters set out in paragraph 37 above Timbercorp:
- (a) has suffered, alternatively is likely to suffer, loss and damage;
 - (b) seeks and is entitled to an order pursuant to s 87 of the *Trade Practices Act 1974* (Cth) and/or s 158 of the *Fair Trading Act 1999* (Vic) that the Purported Termination Notice be set aside and is of no effect.

PARTICULARS

If the Lease is terminated (which is denied) and not transferred under the Sale Contract, the purchase price payable under the Sale Contract will be reduced.

- 39 Timbercorp tendered payment of the July Quarter Instalment and part of the Annual Rental Instalment due on 30 September 2009 (**October Quarter Instalment**) on 2 October 2009 and caused the remaining part of the October Quarter Instalment to be paid on or about 12 November 2009.

PARTICULARS

- (a) On 2 October 2009, Timbercorp paid Cadogan by way of electronic funds transfer:
 - (i) \$25,117.66 for the July Quarter Instalment; and
 - (ii) \$9,009.60 for part of the October Quarter Instalment for the period being 1 October 2009 to 2 November 2009; and
 - (b) On 12 November 2009, Timbercorp caused an electronic funds transfer of \$16,108.06 to be made to Cadogan for the period being 3 November 2009 - 31 December 2009.
- 40 Cadogan accepted the payments described in paragraph 39 and has not returned them to Timbercorp.

PARTICULARS

Copies of the records of the payments described in paragraph 39 are available for inspection by appointment at the offices of the Plaintiff's solicitors.

- 41 The payments of rent described in paragraph 39 above cured all and any defaults alleged in the Purported Default Notice (which default is denied).
- 42 Pursuant to the terms of the Sale Contract, the Purchaser will pay that portion of the October Quarter Instalment from 2 November to 31 December 2009, upon assignment of the Lease.
- 43 The Purchaser has agreed to meet all rental and other obligations under the Lease following assignment of the Lease.
- 44 On or about 14 October 2009, Timbercorp sought Cadogan's consent to the assignment of the Lease to the Purchaser.

PARTICULARS

The request was by way of letter from the Timbercorp's solicitors, Arnold Bloch Leibler, to Cadogan's solicitors Warren Syminton Ralph dated 14 October 2009.

A copy of the letter may be inspected by appointment at the offices of the Plaintiff's solicitors.

- 45 On or about 20 October 2009, Cadogan informed Timbercorp that it considered it owned the Plantations.

PARTICULARS

The statement was made in a letter dated 20 October 2009 from Cadogan's lawyers, Warren Syminton Ralph, to Timbercorp's lawyers, Arnold Bloch Leibler.

A copy of this letter may be inspected by appointment at the offices of the Plaintiff's solicitors.

- 46 The failure of Timbercorp to pay the July Quarter Instalment on time was due to the insolvency of Timbercorp and Timbercorp subsequently paid, and Cadogan have accepted, the July Quarter Instalment and part of the October Quarter Instalment as alleged in paragraphs 39 and 40 above.
- 47 Alternatively, if the Purported Termination Notices operated so as to forfeit the Lease, Timbercorp seeks relief from forfeiture of the Lease and it is just and equitable to grant such relief in the circumstances.

PARTICULARS

Timbercorp relies on, inter alia, the matters referred to in paragraphs 11 to 19 above; the terms of the Lease; the fact that the forfeiture in respect of which relief is sought is a forfeiture for non-payment of rent; the limited right of termination expressly provided for in clause 9.7 of the Lease; the entitlement of Timbercorp under clause 12 of the Lease to assign or transfer the Lease with the consent of Cadogan which must not be unreasonably withheld; the terms of the Sale Contract and, in particular, those parts that relate to transfer of the Lease; the consequences under the Sale Contract if relief is not

granted; Cadogan's contention that it will be entitled to the Plantations if the Lease have been validly terminated and Timbercorp is not entitled to relief from forfeiture; the fact that following the settlement of the Sale Contract and assignment of the Lease, a new tenant will be responsible for paying the remainder of the October Quarter Instalment and the ongoing rent and performing the other covenants under the Lease.

AND THE PLAINTIFF CLAIMS:

A Declarations:

(a) that the:

(i) Purported Default Notice; and

(ii) Purported Termination Notice;

are invalid and of no effect;

(b) that the defendant is estopped from relying on the defendant's Purported Default Notice or Purported Termination Notice or contending that the Purported Termination Notice operates so as to terminate the Lease; and

(c) that the Lease remains extant.

B An order pursuant to s 87 of the *Trade Practices Act 1974* (Cth) and/or s 158 of the *Fair Trading Act 1999* (Vic) that the Purported Termination Notice be set aside and is of no effect.

C An injunction restraining the defendant from taking any steps to terminate the Lease on the grounds that the plaintiff failed to comply with the Purported Default Notice or to take possession of the Premises or otherwise from interfering with the plaintiffs' quiet enjoyment thereof.

D Alternatively, relief from forfeiture of the Lease on such conditions as the Court determines.

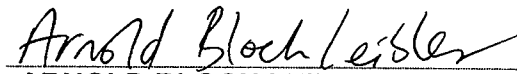
E An injunction requiring the defendant to execute the assignment of the Lease to the Purchaser.

F Further or alternatively, damages.

G Such costs orders as are appropriate.

H Such further or other orders as the Court considers appropriate.

DATED: 13 November 2009

A handwritten signature in black ink, reading "Arnold Bloch Leibler", is written over a horizontal line.

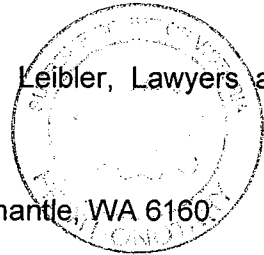
ARNOLD BLOCH LEIBLER

Solicitors for the plaintiff

SCHEDULE 1

- (i) The premises more particularly described in the Lease being part of Volume 269 Folio 124A as shown on the plans annexed to the Lease.
- (ii) The premises more particularly described in the Lease being part of Volume 1083 Folio 63 as shown on the plans annexed to the Lease.
- (iii) The premises more particularly described in the Lease being part of Volume 1402 Folio 166 as shown on the plans annexed to the Lease.
- (iv) The premises more particularly described in the Lease being part of Volume 1245 Folio 54 as shown on the plans annexed to the Lease.
- (v) The premises more particularly described in the Lease being part of Volume 1229 Folio 711 as shown on the plans annexed to the Lease.
- (vi) The premises more particularly described in the Lease being part of Volume 1323 Folio 685 as shown on the plans annexed to the Lease.

- 1 Place of trial: Melbourne.
- 2 Mode of trial: Judge of the Court sitting alone.
- 3 This writ was filed for the plaintiff by Arnold Bloch Leibler, Lawyers and Advisers of Level 21, 333 Collins Street, Melbourne 3000.
- 4 The address of the plaintiff is C/- KordaMentha, Level 24, 333 Collins Street, Melbourne, 3000.
- 5 The address for service of the plaintiff is C/- Arnold Bloch Leibler, Lawyers and Advisers of Level 21, 333 Collins Street, Melbourne 3000.
- 6 The address of the defendant is Level 2, 3 Norfolk Street, Fremantle, WA 6160.



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

LIST B

BETWEEN

TIMBERCORP LIMITED (IN LIQUIDATION)
ACN 055 185 067

Plaintiff

and

CADOGAN ESTATES (AUSTRALIA) PTY LTD
ACN 008 715 053

Defendant

SUMMONS FOR DIRECTIONS

Date of document: 13 November 2009

Filed on behalf of: the Plaintiffs

Prepared by:

ARNOLD BLOCH LEIBLER

Lawyers and Advisers

Level 21

333 Collins Street

MELBOURNE 3000

Solicitor's Code: 54

DX 38455 Melbourne

Tel: 9229 9999

Fax: 9229 9900

Ref: 01-1499489

(Leon Zwier - lzwier@abl.com.au)

TO: the defendant

You are summoned to attend before the Court on the hearing of an application by the plaintiff for directions pursuant to Rule 2.04 of Chapter II of the Rules of the Supreme Court.

The application will be heard before the Judge in the Commercial Court, Supreme Court, 450 Little Bourke Street, Melbourne on 27 November 2009 at 1000am or so soon afterwards as the business of the Court allows.

FILED

13 NOV 2009

This summons was filed by Arnold Bloch Leibler of Level 21, 333 Collins Street, Melbourne, solicitors for the plaintiff.