

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

No 8870 of 2009  
and 9519 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

**CERTIFICATE IDENTIFYING EXHIBIT**

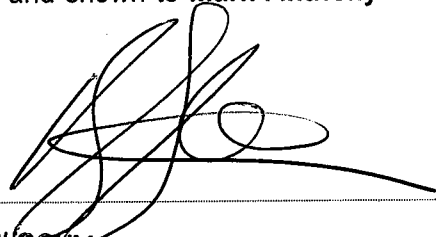
Date of document: 19 October 2009  
Filed on behalf of: the Plaintiffs

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)

This is the exhibit marked "**MAK-13**" now produced and shown to **Mark Anthony Korda** at the time of swearing his affidavit on 19 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

**Exhibit "MAK-13"**  
**Bundle of Correspondence between**  
**Arnold Bloch Leibler and Maddocks**

## **Bridget Slocum**

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**From:** Leon Zwier  
**Sent:** Wednesday, 1 July 2009 6:05 PM  
**To:** 'Philip.Jones@maddocks.com.au'  
**Cc:** Nicole Flint; mkorda@kordamentha.com  
**Subject:** Timbercorp in liquidation and Timbercorp Securities Limited in liquidation

Philip

Can you please call me ASAP to discuss the Timbercorp liquidations

Many thanks.

Regards

**Leon Zwier** | Partner

**Arnold Bloch Leibler** | Level 21, 333 Collins Street, Melbourne Victoria 3000  
T: +61 3 9229 9646 | F: + 61 3 9229 9603  
lzwier@abl.com.au | [www.abl.com.au](http://www.abl.com.au)

Arnold Bloch Leibler acknowledges the traditional owners of country throughout Australia.

## Bridget Slocum

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**From:** Nicole Flint on behalf of Leon Zwier  
**Sent:** Thursday, 2 July 2009 1:33 PM  
**To:** 'philip.jones@maddocks.com.au'  
**Cc:** Bridgette Toy-Cronin  
**Subject:** Outline of Submissions

**Attachments:** Outline of Submissions.PDF



Outline of  
Submissions.PDF (20.

Philip,

Please find attached precedent Outline of Submissions which may be of assistance.

Regards  
LEON

Leon Zwier | Partner

Arnold Bloch Leibler | Level 21, 333 Collins Street, Melbourne Victoria 3000  
T: +61 3 9229 9646 | F: + 61 3 9229 9603  
lzwier@abl.com.au | www.abl.com.au

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**IN THE FEDERAL COURT OF AUSTRALIA  
VICTORIA DISTRICT REGISTRY**

**No. V3107 of 2002**

**BETWEEN**

**ANSETT AUSTRALIA GROUND STAFF SUPERANNUATION PLAN PTY LTD (ACN 065 590 178) (as trustee of the Ansett Australia Ground Staff Superannuation Plan)**

**Applicant**

**and**

**ANSETT AUSTRALIA LIMITED (subject to Deed of Company Arrangement) (ACN 004 209 410)**

**First Respondent**

**and**

**MARK FRANCIS XAVIER MENTHA and MARK ANTHONY KORDA (As Deed Administrators of Ansett Australia Limited) (subject to Deed of Company Arrangement)**

**Second and Third Respondents**

**OUTLINE OF SUBMISSIONS ON ss 556(1)(a) and (dd)**

1. The Ground Staff Plan is a regulated superannuation fund.
2. The Trustee and Ansett are bound by the SIS Act and SIS Regulations: ss 7, 19 SIS Act; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 103 para [19]; *Asgard Capital Management Ltd v Maher* [2003] FCAFC 156 at para [3].
3. Ansett is bound by SIS Reg 9.08 to pay at least the certified minimum contributions in FSC 5, the special FSC and special FSC 2, each of which are funding and solvency certificates issued by the Actuary under Division 9.3 of the SIS Regulations: s 31 of the SIS Act. Ansett's obligations in this regard continue notwithstanding technical insolvency: SIS Reg 9.19. Clauses 1(1)(b), 1(2) and 4(4) of the Trust Deed incorporate by reference all SIS Act standards and the whole of Division 9.3 of the SIS Regulations.
4. Expenses in a winding up that are properly incurred after the relevant date attract priority under s 556(1)(dd). Where the expense has the

additional quality that it was incurred in preserving, realising or getting in property of the company, or in carrying on the company's business, then it attracts priority under s 556(1)(a).

5. The expression "expenses" in ss 556(1)(a) and (d) has a wide meaning: *In re Beni-Felkai Mining Corporation Ltd* [1934] Ch D 406 at 419; *In re Wenborn & Co* [1905] 1 Ch D 414; *Explanatory Memorandum to the Corporate Law Reform Bill 1992*, para [909] and McPherson, *The Law of Company Liquidation* (4<sup>th</sup> ed) 588-589. The expression includes salaries, wages and other entitlements of employees: McPherson, *op sit*, p 589; *Re Matthew Bros Ltd* [1962] VR 262. The expression is designed to ensure that the paragraph extends to expenses incurred by the company through a variety of agents ("relevant authorities").
6. Sections 556(1)(a) and (dd) require that the expense is properly "incurred" by a relevant authority. The word does not connote personal liability of the relevant authority: *Deputy Commissioner of Taxation v Tideturn Pty Ltd* (2001) 37 ACSR 152; *Bell v Amberday Pty Ltd* (2001) 39 ACSR 25 at 37.
7. A broad interpretation of the word "incurred" is appropriate when dealing with a regime which allows a company to trade on under external administration for extended periods, particularly as it is contemplated that liabilities will be incurred by the company under the control of administrators, in circumstances where the administrators are not personally liable. If those liabilities were not to rank for priority in a subsequent winding up, and were not provable at all, ss 556(1)(a) and (dd) would be at variance with the approach in *In re Beni-Felkai* (supra).
8. Ansett's obligations to pay certified minimum contributions under the relevant funding and solvency certificates are expenses for the purposes of either s 556(1)(a) or (d) of the *Corporations Act* for the following reasons:
  - (a) these are post relevant date expenses incurred by way of funding and solvency certificates under SIS Reg 9.08;

- (b) the obligations under the relevant funding and solvency certificates are obligations imposed by statute that were incurred by Ansett after the relevant date. These kinds of obligations have generally been accorded priority under ss 556(1)(a) or (dd), or cognate provisions, depending on whether they count as expenses incurred only, or as expenses incurred in (for example) realising or getting in the assets. It would be anomalous for statutory superannuation obligations not to be treated in the same way as rates, taxes, license fees and the like: *In re Beni-Felkai* (supra); *In re Mesco Properties* [1980] 1 WLR 96; [1980] 1 All ER 117; *In re Toshoku Finance UK plc* [2002] 1 WLR 671; [2002] 3 All ER 961; *In re Blazer Fire Lighter Ltd* [1895] 1 Ch 402; *In re Mineral Resources* [1999] 1 All ER 746; and *Deputy Commissioner of Taxation v Tideturn* (supra); compare *In re Kentish Homes Ltd* [1993] BCLC 1375 (overruled in *In re Toshoku*);
  - (c) the funding and solvency certificate obligations are part of the same statutory system as the superannuation guarantee charge. Pre-relevant date charge comes under s 556(1)(e): see s 52 of the *Superannuation Guarantee (Administration) Act*. Post-relevant date superannuation guarantee charge, if not falling under s 556(1)(e), must come under ss 556(1)(dd) or (a);
  - (d) there is no relevant distinction between the result in *Re Matthew Bros (in liq)* [1962] VR 262 and the result sought by the Trustee.
9. Alternatively, the administrators incurred an expense by choosing to continue the Plan. When the administrators were appointed to Ansett on 12 September 2001, they had the same choices available to them as the board of Ansett previously. These were:
- (i) terminate their obligations to comply with and contribute to the Plan, and pay the charge instead;
  - (ii) terminate their obligations to comply with and contribute to the Plan, make contributions to an accumulation fund (or to a

different defined benefit fund), and in that manner eliminate the charge; or

(iii) continue the Plan and in that manner eliminate the charge.<sup>1</sup>

10. In this case, the administrators chose the third option. The taking of the third option led to the issue by the Actuary of funding and solvency certificates in accordance with the SIS Legislation. Authorities such as *McMahon's (Transport) Pty Ltd v Ebbage* [1999] 1 Qd R 185; *Standard Chartered Bank of Australia Ltd v Antico* (1995) 38 NSWLR 290; and *ASIC v Plymin* [2003] VSC 123 support the submission that the administrators by choosing to continue the Plan, chose to accept the inevitability of further funding and solvency certificates, and, as a matter of substance and commercial reality, incurred the obligations under the funding and solvency certificates within the meaning of s 556(1)(a) or (dd).
11. The administrators were preserving, realising or getting in Ansett's property or carrying on its business within the meaning of s 556(1)(a) as part of their duties, the administrators continued:
  - (a) Ansett's role as principal employer;
  - (b) membership of Ansett employees in the Plan;
  - (c) Ansett's performance of its contractual obligations to its employees to secure membership for them in the Plan;
  - (d) the arrangement between Ansett and the Trustee which is embodied in the Trust Deed;
  - (e) the obligations of the Trustee to the members of the Plan as a continuing plan;
  - (f) the obtaining of entitlements of benefits by members under the Trust Deed;
  - (g) the elimination of the charge by Ansett;

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<sup>1</sup> Ansett, through its administrators, could have terminated the Plan on one month's notice: clause 2(1) and (2), 20 of the Trust Deed.

- (h) the payment by Ansett of 9% of salary contributions;
  - (i) the deduction of members' 5% of salary contributions;
  - (j) the submission of Ansett to further funding and solvency certificates; and
  - (k) Ansett's obligations under the SIS Legislation.
12. Ansett, through its administrators, had the unilateral power to close the Plan by giving notice under the Trust Deed. That power was not a fiduciary power. It could have been exercised at any time, in the company's own interests: *Hillsdown Holdings Pty Ltd v Pensions Ombudsman* [1997] 1 All ER 862 at 890.
13. The continuation of the Ground Staff Plan for the ground staff employees was an integral part of the management of Ansett's business: see *In re Edgar* [1972] ACLC ¶ 40-064. The Ansett Group had some 15,000 employees before September 2001. More than 8, 000 Ansett employees were members of the Ground Staff Plan.
14. If the expense was not incurred for one of the purposes in s 556(1)(a), it falls within s 556(1)(dd) as an "other expense" properly incurred by a relevant authority.



## Bridget Slocum

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**From:** Philip Jones [Philip.Jones@maddocks.com.au]  
**Sent:** Thursday, 2 July 2009 1:48 PM  
**To:** Leon Zwier  
**Cc:** Nicole Flint; Bridgette Toy-Cronin  
**Subject:** RE: Working draft Motion attached

Dear Leon

We have briefed Simon Rubenstein and are meeting with him this afternoon.

Please send through your supporting material as soon as you can even if it is in draft form.

Regards

Philip Jones

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**From:** Leon Zwier [mailto:LZwier@abl.com.au]  
**Sent:** Thursday, 2 July 2009 12:49 PM  
**To:** Philip Jones  
**Cc:** Nicole Flint; Bridgette Toy-Cronin  
**Subject:** Working draft Motion attached

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15/10/2009

## Bridget Slocum

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**From:** Leon Zwier  
**Sent:** Thursday, 2 July 2009 6:17 PM  
**To:** 'Philip Jones'  
**Cc:** Nicole Flint; Bridgette Toy-Cronin; Jane Sheridan  
**Subject:** RE: Plantation Land and Timbercorp

Philip - will do.

---

**From:** Philip Jones [mailto:Philip.Jones@maddocks.com.au]  
**Sent:** Thursday, 2 July 2009 6:11 PM  
**To:** Leon Zwier  
**Subject:** Plantation Land and Timbercorp

Dear Leon  
We have met with counsel and are preparing a draft affidavit.  
We need your supporting material.  
Please send through as soon as you can.  
Regards  
Philip Jones

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### Maddocks

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## Bridget Slocum

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**From:** Leon Zwier  
**Sent:** Thursday, 2 July 2009 7:19 PM  
**To:** 'Philip Jones'; Andrew Tregear (andrew.tregear@asic.gov.au); Mark Bland  
**Cc:** Nicole Flint; pdcrutchfield@vicbar.com.au; mkorda@kordamentha.com; Bryan Webster (bwebster@kordamentha.com)  
**Subject:** Timbercorp Securities Limited and Timbercorp - s 511 Application  
**Attachments:** Draft s 511 Originating Process.pdf

Dear All,

Attached for your information is a draft of the Originating Process which will be issued tomorrow after Mark Korda has sworn his affidavit.

I am providing working draft documents in the interests of expedition.

Yours sincerely,  
Leon Zwier | Partner

Arnold Bloch Leibler | Level 21, 333 Collins Street, Melbourne Victoria 3000  
T: +61 3 9229 9646 | F: + 61 3 9229 9603  
lzwier@abl.com.au | [www.abl.com.au](http://www.abl.com.au)



Draft s 511  
Originating Proces...

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

ORIGINATING PROCESS

A. DETAILS OF APPLICATION

This application is made under section 511 of the *Corporations Act 2001*.

The plaintiffs seek a declaration regarding a question that has arisen in the winding up of the First and Second Plaintiffs.

On the facts stated in the supporting affidavit, the Plaintiffs seek:

- 1 A declaration that there is no obligation on the liquidators of the First and Second Plaintiffs pursuant to s 556(1)(a) or (dd) of the *Corporations Act 2001* (Cth) to pay the Defendant for the use or occupancy of the leased land as defined in the annexed affidavit of Mark Anthony Korda (**Affidavit**) for the period commencing 30 June 2009 in the circumstances described in the Affidavit.

---

Filed on behalf of the Plaintiffs

**ARNOLD BLOCH LEIBLER**  
Lawyers and Advisers  
Level 21  
333 Collins Street  
Melbourne 3000

DX 38455 Melbourne  
Tel: 9229 9999  
Fax: 9229 9900  
Ref: 01-1499489  
(Leon Zwier/Bridgette Toy-Cronin)

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

DATE:

.....  
Leon Zwier  
**ARNOLD BLOCH LEIBLER**  
Solicitors for the Plaintiffs

This application will be heard by the Federal Court of Australia, 305 William Street, Melbourne at 12pm on Monday 6 July 2009.

**B. NOTICE TO DEFENDANT**

TO: Plantation Land Limited by its solicitors Maddocks Lawyers, Level 6, 140 William Street, Melbourne (Philip Jones and David Newman)

If you or your legal practitioner do not appear before the Court at the time shown above, the application may be dealt with, and an order made, in your absence. As soon after that time as the business of the Court will allow, any of the following may happen:

- (a) the application may be heard and final relief given;
- (b) directions may be given for the future conduct of the proceeding;
- (c) any interlocutory application may be heard.

Before appearing before the Court, you must file a notice of appearance, in the prescribed form, in the Registry and serve a copy of it on the plaintiffs.

|  |
|--|
| <p><i>Note:</i> Unless the Court otherwise orders, a defendant that is a corporation must be represented at a hearing by a legal practitioner. It may be represented at a hearing by a director of the corporation only if the Court grants leave.</p> |
|--|

**C. APPLICATION FOR WINDING UP ON GROUND OF INSOLVENCY**

Not applicable.

**D. FILING**

Date of filing:

.....  
An officer acting with the authority of the  
**DISTRICT REGISTRAR**

This originating process is filed by Arnold Bloch Leibler of Level 21, 333 Collins Street, Melbourne, VIC, 3000, the solicitors for the plaintiffs.

**E. SERVICE**

The plaintiffs' address for service is C/- Arnold Bloch Leibler, Level 21, 333 Collins Street, Melbourne, VIC, 3000.

It is intended to serve a copy of this originating process on each defendant and on any person listed below:

Plantation Land Limited by its solicitors Maddocks Lawyers, Level 6, 140 William Street Melbourne

## **SCHEDULE OF PARTIES**

**TIMBERCORP SECURITIES LIMITED  
(IN LIQUIDATION) ACN 092 311 469**

First Plaintiff

**TIMBERCORP LIMITED (IN LIQUIDATION)  
ACN 055 185 067**

Second Plaintiff

**MARK ANTHONY KORDA**

Third Plaintiff

**LEANNE CHESSER**

Fourth Plaintiff

**PLANTATION LAND LIMITED  
ACN 090 443 333**

Defendant