

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

S CI 2011

IN THE MATTER OF TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION) (ACN 092 311 469) AND TIMBERCORP LIMITED (IN LIQUIDATION) (ACN 055 185 067)

**TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)
(ACN 092 311 469) IN ITS CAPACITY AS RESPONSIBLE
ENTITY OF THE MANAGED INVESTMENT
SCHEME LISTED IN SCHEDULE 1 AND ORS
ACCORDING TO THE SCHEDULE**

First Plaintiff

CERTIFICATE IDENTIFYING EXHIBIT

Date of document: 17 February 2011
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: 011551197

(Bridget Slocum - bslocum@ab.com.au)

This is the exhibit marked "MAK-3" now produced and shown to **MARK ANTHONY KORDA** at the time of swearing his affidavit on 17 February 2011.

MEAGAN LOUISE GROSE
Arnold Bloch Leibler
Level 21, 333 Collins Street
Melbourne 3000

An Australian Legal Practitioner within the
meaning of the Legal Profession Act 2004

Before me: 

Exhibit "MAK-3"

**Affidavit of Chris Marsden Fenwick dated 23
September 2010 filed in Supreme Court Proceeding
SCI 2009 4280**

Filed on behalf of the Plaintiffs
ARNOLD BLOCH LEIBLER
Lawyers and Advisers
Level 21
333 Collins Street
Melbourne 3000
ABL/1383024v1

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Tel: 9229 9999
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Ref: 011551197
(Bridget Slocum)

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

No. SCI 2010

BETWEEN:

BOSI SECURITY SERVICES LIMITED (A.C.N. 009 413 852) as trustee for
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
(A.C.N. 005 357 522) and BOS INTERNATIONAL (AUSTRALIA) LIMITED (A.C.N.
066 601 250) and WESTPAC BANKING CORPORATION (A.C.N. 007 457 141)

Plaintiff

and

MACQUARIE BANK LIMITED (A.C.N. 008 583 542) & ORS (according to the attached
Schedule)

Defendants

AFFIDAVIT OF CHRIS MARSDEN FENWICK

Date affirmed: 23 September 2010

Filed on behalf of: The Plaintiff

Prepared by:

Blake Dawson

Level 26

181 William Street

MELBOURNE VIC 3000

Solicitor's Code: 53

DX: 187

Tel: (03) 9679 3000

Fax: (03) 9679 3111

Ref: 03-2005-7039

Attention: Mr R McClymont

Email: ross.mcclymont@blakedawson.com


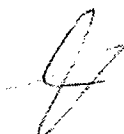
I, **Chris Marsden Fenwick** of 181 William Street, Melbourne, in the State of Victoria,
Lawyer, do solemnly, sincerely and truly declare and affirm that:

1. I am a lawyer in the sole and permanent employ of Blake Dawson. I have the care and conduct of this proceeding on behalf of the Plaintiff, subject to the control and supervision of my principals. I am authorised to make this affidavit on behalf of the Plaintiff.
2. I make this affidavit from my own knowledge save where otherwise stated. Where I depose to matters of information and belief, I believe those matters to be true.

Chris Fenwick

3. I make this affidavit in support of the Plaintiff's summons dated 23 September 2010, seeking, *inter alia*, the following orders:
- (a) A declaration that the Plaintiff is entitled to be paid \$351,368.00 (together with any accrued interest) by the Third Defendant (**Allianz**) in respect of the refund of premiums due to the Second Defendant (**Timbercorp**) under the plantation insurance policy number TIMB 2758-0809 dated 29 September 2008 issued by Allianz to Timbercorp.
 - (b) Alternatively to paragraph (a), a declaration that the Plaintiff is entitled to be paid \$351,368.00 (together with any accrued interest) by Timbercorp in respect of the refund of premiums due to Timbercorp under the plantation insurance policy number TIMB 2758-0809 dated 29 September 2008 issued by Allianz to Timbercorp.
 - (c) A declaration that the Plaintiff is entitled to be paid \$135,542.80 (together with any accrued interest) by Allianz in respect of the proceeds of the claim for fire fighting expenses and the cost of removing debris, made under the plantation insurance policy number TIMB 2758-0809 dated 29 September 2008 issued by Allianz to Timbercorp, in respect of the fire which occurred on 29 January 2009 on Branton Treefarm.
 - (d) Alternatively to paragraph (c), a declaration that the Plaintiff is entitled to be paid \$135,542.80 (together with any accrued interest) by Timbercorp in respect of the proceeds of the claim for fire fighting expenses and the cost of removing debris, made under the plantation insurance policy number TIMB 2758-0809 dated 29 September 2008 issued by Allianz to Timbercorp, in respect of the fire which occurred on 29 January 2009 on Branton Treefarm.

Chin Faruqi

- (e) A declaration that the Plaintiff is entitled to be paid \$34,367.54 (together with any accrued interest) by the First Defendant (**Macquarie**) in respect of the refund of premiums due to Timbercorp under the public liability policy number 10M 1997059 03 dated on or around 1 October 2008 issued by CGU Insurance Limited to Timbercorp.
- (f) Alternatively to paragraph (e), a declaration that the Plaintiff is entitled to be paid \$34,367.54 (together with any accrued interest) by Timbercorp in respect of the refund of premiums due to Timbercorp under the public liability policy number 10M 1997059 03 dated on or around 1 October 2008 issued by CGU to Timbercorp.
- (g) An order that Allianz, alternatively Timbercorp, pay the Plaintiff:
 - (i) \$351,368.00 (together with any accrued interest); and
 - (ii) \$135,542.80 (together with any accrued interest).
- (h) An order that Macquarie, alternatively Timbercorp, pay the Plaintiff \$34,367.54 (together with any accrued interest).

Timbercorp Insolvency

- 4. On 23 April 2009, Mark Anthony Korda and Leanne Kylie Chesser of the firm KordaMentha were appointed as administrators of Timbercorp pursuant to section 436A of the *Corporations Act 2001* (Cth). Now produced and shown to me and marked "CMF-1" is an historical company extract of the records maintained by the Australian Securities and Investments Commission in relation to Timbercorp.

Chin Fennid, L. L.

5. On 29 June 2009, at a meeting of the creditors of Timbercorp, the creditors resolved to wind up Timbercorp. Mr Korda and Ms Chesser thereby became the liquidators of Timbercorp (**the Liquidators**).

The Plaintiff's Fixed and Floating Charge

6. On or about 25 December 2006 Timbercorp granted a fixed and floating charge (**Charge**) to the Plaintiff (which was previously known as BWA Custodians Ltd) (**BOSI**). The Charge was and remains registered as number 1410090. Now produced and shown to me and marked "**CMF-2**" is a true copy of the fixed and floating charge granted by Timbercorp to BOSI.

Plantation Policy Insurance

7. I am informed by Jorja Cleeland of Arnold Bloch Leibler, the solicitors for the Liquidators, and believe, that on or about 1 October 2008 Timbercorp entered into a contract for plantation insurance (policy number TIMB 2655-0809) (**Plantation Policy**) with Allianz through its underwriting agent, Primacy Underwriting Agency Pty Ltd (**Primacy**). Ms Cleeland has provided me with three documents relevant to the Plantation Policy: the policy wording, placement slip and insurance renewal confirmation. Now produced and shown to me and marked "**CMF-3**" is a true copy of the Plantation Policy wording, placement slip and insurance renewal confirmation, as provided to me by Ms Cleeland.
8. I am further informed by Ms Cleeland and believe that Timbercorp obtained finance in respect of the premium due under the Plantation Policy. In this regard, on or about 29 September 2008 Timbercorp entered into a Premium Funding Agreement (**Premium Funding Agreement**) with Macquarie through Macquarie's broker,

Chin Fenwick



Agririsk Services Pty Ltd, under which Timbercorp borrowed funds to pay the premium under the Plantation Policy. Clause 8.1 of the Premium Funding Agreement states that to secure payment of the secured money, Timbercorp assigns to Macquarie, by way of mortgage, all of its right, title and interest in and to each Funded Policy, all Refund Proceeds and all rights, powers and remedies to cancel or enforce any Funded Policy and obtain Refund Proceeds (**Mortgage**). The Mortgage was not registered as a charge under the *Corporations Act 2001* (Cth). Now produced and shown to me and marked "CMF-4" is a true copy of the Premium Funding Agreement.

9. On 6 August 2010, Mr Korda swore an affidavit in Supreme Court of Victoria Proceeding No. SCI 2010 4280. In that affidavit, Mr Korda deposed to the following facts which I believe to be true:

- (a) on 29 January 2009 a fire occurred on Branton Treefarm (**Branton Fire**);
- (b) the Branton Fire was an insured event under the Plantation Policy;
- (c) on or about 7 April 2009, Timbercorp made a claim under the Plantation Policy;
and
- (d) the Plantation Policy was cancelled during about August 2009 by Macquarie.

Now produced and shown to me and marked "CMF-5" is a true copy of Mr Korda's affidavit (excluding exhibits).

10. I am informed by Ms Cleeland and believe that:

Chin Farnid

[Signature]

[Signature]

- (a) Primacy, as agent for Allianz, has determined to provide a refund of premium of \$351,368.00 to Timbercorp in respect of the cancellation of the Plantation Policy; and
- (b) insurance proceeds in the sum of \$135,542.80 are payable to Timbercorp under the Plantation Policy in respect of the expenses incurred in fighting the Branton Fire and the removal of debris associated with that fire (**Fire Insurance Proceeds**).

Now produced and shown to me marked "CMF-6" is a true copy of a draft Deed of Release that was prepared by Arnold Bloch Leibler and sent to me by Ms Cleeland on or around 14 May 2010.

Now produced and shown to me marked "CMF-7" is an email copied to me from Ms Cleeland to Ross McClymont, a Partner of Blake Dawson, dated 5 May 2010.

Public Liability Insurance

- 11. I am informed by Ms Cleeland and believe that on or about 1 October 2008 Timbercorp entered into or renewed a contract for public liability insurance (policy number 10M 1997059 03) (**Public Liability Policy**) with CGU Insurance Limited, through its underwriting agent, Agririsk Services Pty Ltd. Now produced and shown to me and marked "CMF-8" is a true copy of the Public Liability Policy terms and conditions, and renewal invitation and renewal schedule, as provided to me by Ms Cleeland.
- 12. I am informed by Daniel Turk, the solicitor for Macquarie, and believe that Timbercorp also obtained finance in respect of the premium due under the Public Liability Policy, from Macquarie, under the Premium Funding Agreement.

Chris Fennich

[Signature]

13. I am informed by Mr McClymont and believe that on 26 August 2009, Gary Seymour of Macquarie Premium Funding Pty Ltd wrote to Mr McClymont stating that Agririsk Services Pty Ltd cancelled the Public Liability Policy effective at 1 May 2009 and rebated the pro-rata premium refund of \$34,367.54 to Macquarie on 26 August 2009. Now produced and shown to me marked "CMF-9" is a true copy of an email from Gary Seymour to Mr McClymont dated 16 February 2010.

Entitlement to claim under Plantation Policy and refund of premium

14. There are competing claims, as between BOSI and Macquarie, over:
- (a) the refund of premiums paid or to be paid under the Plantation Policy and Public Liability Policy; and
 - (b) the Fire Insurance Proceeds.
15. Macquarie's position is set out in a letter from Minter Ellison (the former solicitors for Macquarie) to Arnold Bloch Leibler dated 20 November 2009:

"Macquarie's security [under the Premium Funding Agreement] operates by way of assignment of Timbercorp's rights, being an assignment to Macquarie.

If and when BOSI's floating charge did crystallise into a fixed charge (which would have been after the grant of Macquarie's mortgage), BOSI's floating charge would only have fixed on Timbercorp's actual remaining rights to Macquarie's mortgaged property at that time. That's BOSI's charge would be over Timbercorp's right to have the mortgaged property re-assigned back to Timbercorp upon Macquarie having been repaid in full.

As BOSI's charge only continues to secure Timbercorp's redemptive rights to have Macquarie's mortgaged property re-assigned, we note that Macquarie will need to be repaid in full before BOSI's charge operates over Macquarie's mortgaged property (that is, once re-assigned to Timbercorp). Accordingly, BOSI's floating charge would not have priority over Macquarie's mortgage."

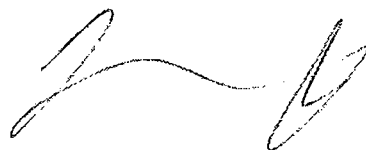
Now produced and shown to me marked "CMF-10" is a true copy of the letter from Minter Ellison to Arnold Bloch Leibler dated 20 November 2009 and the covering email under which it was sent to me dated 9 December 2009.

Chris Fenwick

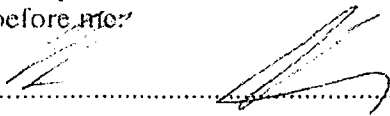
[Signature]

16. It is BOSI's position that the Premium Funding Agreement is void as against the Liquidators of Timbercorp pursuant to section 266(1) of the Act and/or that the Charge has priority over the Premium Funding Agreement pursuant to section 280(1) of the Act. Accordingly, BOSI asserts that it is entitled to be paid the refund amounts owed to Timbercorp under the Plantation Policy and Public Liability Policy together with the Fire Insurance Proceeds. BOSI's position is articulated in a letter from Blake Dawson to Arnold Bloch Leibler dated 1 February 2010. Now produced and shown to me marked "CMF-11" is a true copy of the letter from Blake Dawson to Arnold Bloch Leibler dated 1 February 2010.
17. Further correspondence has been exchanged between Blake Dawson and the solicitors for Macquarie. That correspondence includes:
- (a) a letter from Minter Ellison dated 10 February 2010;
 - (b) a letter in reply from Blake Dawson dated 18 February 2010; and
 - (c) a letter from Turks Legal (the new solicitors for Macquarie) dated 3 June 2010.
- Now produced and shown to me marked "CMF-12", "CMF-13" and "CMF-14" are true copies of Minter Ellison's letter dated 10 February 2010, Blake Dawson's letter in reply dated 18 February 2010 and Turks Legal's letter dated 3 June 2010.
18. By reason of the foregoing matters, BOSI seeks the orders referred to in the Summons dated 23 September 2010.

Chin Fennick



Sworn at Melbourne
 in the State of Victoria this 23rd day
 of September 2010
 before me:



Name:

MEREDITH BENNETT

Blake Dawson

181 William Street, Melbourne Vic 3000

An Australian legal practitioner within the
 meaning of the Legal Profession Act 2004

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SCHEDULE

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
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No. SCI 2010

BETWEEN:

**BOSI SECURITY SERVICES LIMITED (A.C.N. 009 413 852) as trustee for
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED
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(A.C.N. 066 601 250) and WESTPAC BANKING CORPORATION (A.C.N. 007 457 141)**
Plaintiff

and

MACQUARIE BANK LIMITED (A.C.N. 008 583 542)

First Defendant

and

TIMBERCORP LIMITED (IN LIQUIDATION) (A.C.N. 055 185 067)

Second Defendant

and

ALLIANZ AUSTRALIA INSURANCE LIMITED (A.C.N. 000 122 850)

Third Defendant