

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:
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This is the exhibit marked "MAK-4" now produced and shown to **MARK ANTHONY KORDA** at the time of swearing his affidavit on 17 February 2011.

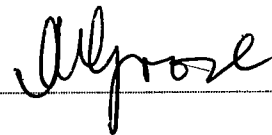
MEAGAN LOUISE GROSE Before me: 
Arnold Bloch Leibler
Level 21, 333 Collins Street
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An Australian Legal Practitioner within the
meaning of the Legal Profession Act 2004

Exhibit "MAK-4"
**Points of Claim dated 7 September 2010 filed in
Supreme Court Proceeding SCI 2009 4280**

Filed on behalf of the Plaintiffs
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IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION

SCI 2010 4280

BETWEEN

TIMBERCORP LIMITED (IN LIQUIDATION)
(ACN 055 185 067) AND ORS ACCORDING TO THE SCHEDULE

Plaintiffs

and

MACQUARIE BANK LIMITED
(ACN 008 583 542) AND ORS ACCORDING TO THE SCHEDULE

Defendants

POINTS OF CLAIM

(filed pursuant to the order of Associate Justice Zammit made 24 August 2010)

Date of document: 7 September 2010
Filed on behalf of: the Plaintiffs

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(Leon Zwier; Bridget Slocum; bslocum@abl.com.au)

- 1 At all material times each of the First Plaintiff (TL), the Second Plaintiff (TSL), the First Defendant (**Macquarie**), the Second Defendant (**BOSI**) and the Third Defendant (**Allianz**), was a company incorporated under the *Corporations Act 2001* (Cth) (**Corporations Act**).
- 2 At all material times the 1999 Timbercorp Eucalypts Project ARSN 085 827 872 (**Scheme**) was a managed investment scheme registered under Chapter 5C of the Corporations Act, for the harvesting of eucalypt trees. The members of the Scheme are described as **Growers**.
- 3 At all material times TSL was the responsible entity of the Scheme.

- 4 The plantation land used for the Scheme included Branton Treefarm situated in the South Grampians Shire (**Branton Treefarm**).
- 5 The Scheme is governed by documents which include a constitution (**Constitution**) and a Grower sub-lease under which, relevantly:
 - (a) each Grower is allocated and sub-leases a parcel of the plantation land known as a Woodlot (clause 7.7 of the Constitution);
 - (b) the Grower owns the crop of trees (Trees) on their Woodlot (clause 13.1 of the Grower sub-lease), and any saleable wood derived from the Trees (Wood) (clause 13.2 of the Grower sub-lease);
 - (c) the Grower is entitled, relevantly, to any moneys payable to the Grower under any policy of insurance in relation to the relevant Woodlots and proceeds from any sale of Wood (Proceeds) (clauses 1.1 and 23.1 of the Constitution, and clause 8.2 of the Grower sub-lease);
 - (d) TSL, as the responsible entity, has irrevocable power as the agent, representative and attorney of each Grower relevantly to exercise all rights and powers of the Grower under any sub-lease (clause 11(f) of the Constitution) and to take proceedings on behalf of the Growers (clause 11(j) of the Constitution); and
 - (e) TSL, as the responsible entity, must keep a separate agency account for the Proceeds, in which moneys are held for the Growers to be dealt with in accordance with the constitution (clauses 12.1, 12.2, 23.4 of the Constitution).
- 6 A number of Growers elected for TSL to take out on their behalf insurance of the trees on their respective Woodlots (**Participating Growers**).
- 7 On or about 25 December 2006 TL granted a fixed and floating charge to BOSI (then known as BWA Custodians Ltd) over all TL's property, registered with ASIC as number 1410090.
- 8 On or about 29 September 2008 TL entered into a premium funding agreement (**Funding Agreement**) with Macquarie, under which, relevantly:
 - (a) Macquarie advanced funds to TL for the purposes of taking out a plantation insurance policy; and

- (b) in order to secure TL's obligations, TL assigned to Macquarie, by way of mortgage, all of TL's right, title and interest in and to the plantation insurance policy, all refund proceeds, and all rights, powers and remedies to cancel or enforce the policy and obtain refund proceeds (**Mortgage**).
- 9 On or about 1 October 2008 TL took out a plantation insurance policy with Allianz (number TIMB 2655-0809) (**Policy**), in which:
 - (a) the insured was described as 'Timbercorp Limited and investors in their various projects plus interested parties to be defined and declared at inception of the policy';
 - (b) the insured property was described by reference to the plantations, including Branton Treefarm; and
 - (c) the risks covered fire.
- 10 The Participating Growers were specified or referred to in the Policy, whether by name or otherwise, as persons to whom the insurance cover provided by the Policy extended, for the purposes of s 48(1) of the *Insurance Contracts Act 1984* (Cth).
- 11 The Participating Growers were invoiced in relation to the relevant proportion of the insurance premium payable under the Policy.
- 12 On 29 January 2009 a fire occurred at Branton Treefarm and the trees on that farm were lost and/or damaged.
- 13 As a result of the loss of and/or damage to the trees in the Branton Treefarm fire, insurance proceeds, in the amount of \$467,434.09 (**Proceeds**) became payable under the Policy, and Allianz has acknowledged that the indemnity under the Policy has been triggered (by letter from Wotton Kearney dated 8 September 2009 and email dated 23 August 2010).
- 14 By reason of the matters set out in paragraphs 2 to 6 and 9 to 13 above, and s 48(1) of the *Insurance Contracts Act 1984* (Cth), the Participating Growers whose Woodlots include trees lost and/or damaged at Branton Treefarm (**Branton Participating Growers**) have a right to recover the amount of their loss from Allianz in accordance with the Policy are entitled to the Proceeds, and TSL is entitled to recover this amount as agent and/or trustee for the Branton Participating Growers.

15 As the Proceeds belong beneficially to the Branton Participating Growers:

- (a) neither the charge of BOSI nor the mortgage of Macquarie attach to the Proceeds because the Proceeds are not property of TL over which it could grant a charge or mortgage; and
- (b) neither BOSI nor Macquarie is entitled to the Proceeds.

AND THE PLAINTIFFS SEEK THE FOLLOWING ORDERS:

- A A declaration that TSL, as agent and/or trustee for the Branton Participating Growers, is entitled to be paid \$467,434.09 by Allianz in respect of the proceeds of the claim made under the plantation insurance policy number TIMB 2758-0809 dated 29 September 2008 issued by Allianz to TL, in respect of the fire which occurred on 29 January 2009 on Branton Treefarm.
- B An order that Allianz pay TSL, as agent and/or trustee for the Branton Participating Growers, \$467,434.09.
- C An order that Macquarie pay the Plaintiffs' costs.
- D Any other order the Court deems fit.

DATE 7 September 2010

O BIGOS

ARNOLD BLOCH LEIBLER

Arnold Bloch Leibler
Solicitors for the Plaintiffs

SCHEDULE OF PARTIES

BETWEEN:

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

First Plaintiff

**TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)
(ACN 092 311 469) IN ITS CAPACITY AS RESPONSIBLE ENTITY
OF THE 1999 TIMBERCORP EUCALYPTS PROJECT (ARSN 085 827 872)**

Second Plaintiff

and

MACQUARIE BANK LIMITED (ACN 008 583 542)

First Defendant

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

Second Defendant

ALLIANZ AUSTRALIA INSURANCE LIMITED (ACN 000 122 850)

Third Defendant