

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

LIST B
No. of 2009

BETWEEN

TIMBERCORP LIMITED (IN LIQUIDATION)
ACN 055 185 067

First Plaintiff

and

TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION)
ACN 092 311 469

Second Plaintiff

and

PLANTATION LAND LIMITED ACN 090 443 333

Defendant

DEFENCE TO AMENDED STATEMENT OF CLAIM

Date of document:
Filed on behalf of:

12 October 2009
the defendant

Prepared by:
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Attention: Marelda Hibberd
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To the amended statement of claim dated 5 October 2009, the defendant says as follows:

1. It admits the allegations in paragraph 1.
2. It admits the allegations in paragraph 2.
3. It admits the allegations in paragraph 3.
4. Subject to the production of the Leases, it admits the allegations in paragraph 4.
5. It admits the allegations in paragraph 5.

6. Subject to the production of the Leases, it admits the allegations in paragraph 6.
7. It admits that clause 2 of the Lease attached as schedule 2 to the amended statement of claim states that the defendant leased the premises for the term of the lease for the purpose of growing, tending and harvesting a plantation or plantations of eucalyptus trees, and otherwise does not admit the allegations in paragraph 7.
8. Save that it admits that covenants regarding ownership and use of the plantations are contained in clauses 1 (definitions), 2, 4.1, 5.2, 10.3, 11 and 12 of the Lease attached as schedule 2 to the amended statement of claim, it does not admit the allegations in paragraph 8. Further, it will rely on the full terms and effect of the Lease attached as schedule 2 to the amended statement of claim at trial and in particular:
 - (a) the definition of "Term" in clause 1;
 - (b) the right of termination for non-payment of rent in clause 9.1; and thereupon
 - (c) its right of ownership of plantation crop not harvested during the term of the lease as provided by clause 10.3 and as recognised in clause 11.
9. Save that it admits that clause 4.1 and clause 9.1 of the Lease attached as schedule 2 to the amended statement of claim contain covenants on the part of the first plaintiff (**Timbercorp**) or the second plaintiff (**TSL**) regarding payment of rent, the defendant does not admit the allegations in paragraph 9. Further, the defendant will rely on the full terms and effect of the Lease attached as schedule 2 to the amended statement of claim at trial including those matters referred to at paragraph 8(a) to (c) above.
10. It admits the allegations in paragraph 10.
11. It admits the allegations in paragraph 11.

12. It admits the allegations in paragraph 12 and says further that:

- (a) on 15 June 2009, prior to the due date for payment of the July Quarter Instalment, the plaintiffs sought a 'standstill agreement' from the defendant with regards to rental obligations under the Leases;

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*By letter dated 15 June 2009, Mark Korda of Korda Mentha wrote to Maddocks, the lawyers for the defendant, seeking a 'standstill agreement' with regard to among other things rental obligations under the leases. A copy of the letter is in the possession of Maddocks and may be inspected by appointment. The defendant also relies upon paragraph 36 of and exhibit MAK 8 to the affidavit of Mark Korda sworn 3 July 2009 (the **July Korda affidavit**) in support of an application made to the Federal Court of Australia in proceeding number VID 497 of 2009 for a declaration that the plaintiffs had no obligation to pay the defendant as a priority under section 556(1) of the Corporations Act 2001 for the use or occupancy of the leased land for the period from 30 June 2009 (the **Federal Court proceeding**).*

- (b) on 24 June 2009, the defendant notified the plaintiffs that it did not agree to the proposed 'standstill agreement' and that it intended to serve notices to terminate the Leases if the rent was not paid (the **first statement about the defendant's intention to terminate the Leases**);

PARTICULARS

By letter dated 24 June 2009, Maddocks so informed Mark Korda of same. A copy of the letter is in the possession of the Maddocks and may be inspected by

appointment. The defendant also relies upon paragraph 36 of and exhibit MAK 8 to the July Korda affidavit.

- (c) on 2 July 2009, the liquidators of the plaintiffs notified the defendant that they would not perform any of the plaintiffs' obligations under the Leases (the **first 'renunciation of obligations' statement**);

PARTICULARS

The first 'renunciation of obligations' statement was contained in a letter from Korda Mentha to Maddocks dated 2 July 2009. A copy of the letter is in the possession of the Maddocks and may be inspected by appointment. The defendant also relies upon paragraph 38 of and exhibit MAK 9 to the July Korda affidavit.

- (d) on 3 July 2009, the defendant informed the plaintiffs that it was in the process of issuing notices under the Leases notifying of the failure of the plaintiffs to pay rent; that one month after those notices had been sent, formal notices of termination of the Leases would be sent to the plaintiffs; that it was expected that the Leases would be formally terminated in early August 2009 (the **second statement about the defendant's intention to terminate the Leases**); that steps had been taken by the defendant in contemplation of the termination of the Leases, including its proposed valuation and sale in order to repay the noteholders and to hopefully return money to members of the defendant (the **first statement about the defendant's intention to sell its land**);

PARTICULARS

The second statement about the defendant's intention to terminate the Leases and the first statement about the defendant's intention to sell its land were

contained in an affidavit of Alan Fisher, a director of the defendant, sworn 3 July 2009 and filed, served and read in the Federal Court proceedings (particularly paragraphs 7 and 12 of that affidavit).

- (e) on 6 July 2009, in the Federal Court proceeding, plaintiffs made further statements that they did not intend to perform any of their obligations under the Leases (the subsequent '**renunciation of obligations**' statements).

PARTICULARS

The subsequent 'renunciation of obligations' statements were made by Philip Crutchfield, barrister, for and on behalf of the plaintiffs during the hearing of the Federal Court proceedings.

- 13. It admits the allegations in paragraph 13 and says that its conduct in issuing the notices was in furtherance of the first and second statements about the defendant's intention to terminate the Leases.
- 14. To paragraph 14:
 - (a) Save that it admits that on or about 31 July 2009, the liquidators commenced a formal process for expressions of interests in the sale or recapitalisation of the Forestry Schemes' assets, including the Leases, it otherwise denies the allegations in paragraph 14.
 - (b) Further, it says that:
 - (i) Korda Mentha received expressions of interest and took steps with respect to the possible sale of the Forestry Schemes' assets (including the Leases) including entering into negotiations with potential purchasers following the appointment of

Mark Korda and Leanne Chesser as voluntary administrators of the plaintiffs on about 23 April 2009 (the **initial steps and negotiations for sale**);

- (ii) The liquidators had entered into the initial steps and negotiations for sale and had contemplated and determined to commence the formal Timbercorp Sale Process prior to making the first 'renunciation of obligations' statement and prior to being notified of second statement about the defendant's intention to terminate the Leases and the first statement about the defendant's intention to sell its land.

PARTICULARS

The defendants refer to the evidence of Mark Korda in the Federal Court proceedings.

- (iii) In the premises, the liquidators were well aware that the defendant intended to terminate the Leases by reason of the non payment of rent and to sell the land, and they conducted the Timbercorp Sale Process and entered into the subsequent Sale Contract while aware of same.

15. It does not admit the allegations in paragraph 15.

16. It admits that a Sale Contract dated 30 September 2009 has been executed with respect to the Timbercorp Sale Process, but otherwise it does not admit the allegations in paragraph 16.

17. To paragraph 17:

- (a) Save that it admits that the Sale Contract contemplates that the Leases may be sold to the purchaser under the Sale Contract, it does not admit the allegations therein.
- (b) Further it says that:

- (i) The Leases were validly terminated by the defendant on or about 24 August 2009;
- (ii) If the Leases had not been validly terminated, pursuant to clause 12.2(b) thereof the Leases could only have been assigned by the plaintiffs with the consent of the defendant (which consent was not to be unreasonably withheld);
- (iii) The plaintiffs and the purchaser have not sought the consent of the defendant for the assignment of the Leases, and neither is obliged under the Sale Contract to do so;
- (iv) The form of assignment of the Leases to which the plaintiffs and the purchaser have agreed includes releases of the plaintiffs in respect of the Leases which the defendant is not obliged to give;
- (v) According to a search of the database maintained by the Australian Securities and Investments Commission, the purchaser:
 - A. was registered on 11 September 2009;
 - B. has paid up capital of \$100;
 - C. has a principle place of business at 'First Cybercentre' Level Serro, 12 Albany Street, Fyshwick, Australian Capital Territory;
 - D. has two of its three directors residing overseas; and
 - E. has one shareholder whose address is George Town in the Grand Cayman.
- (vi) There is no, alternatively no sufficient, assurance to the defendant of the due performance of the tenant's obligations under the Leases including the

obligations to make timely payment of rent and to meet the other obligations under the Leases including the obligation in clause 5.2 of the Leases to comply with sound silvicultural and environmental practices adopted within the forestry industry and in clause 5.3 of the Lease to comply with all laws, by-laws and regulations relating to the use and occupancy of the Leased Area.

18. Save that it admits that the liquidators or their servant or agents on behalf the plaintiffs had communications with officers and the lawyers for the defendant including in respect of the Leases, the termination of the Leases and the refusal of the liquidators to perform the obligations under the Leases, it otherwise denies the allegations in paragraph 18.

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The communications included:

- a) *the letter referred to at paragraph 12(a) above and the particulars subjoined thereto;*
- b) *the first statement about the defendant's intention to terminate the Leases;*
- c) *first 'renunciation of obligations' statement;*
- d) *second statement about the defendant's intention to terminate the Leases;*
- e) *first statement about the defendant's intention to sell its land;*
- f) *the subsequent 'renunciation of obligations' statements;*
- g) *the notices referred to at paragraph 13 of the amended statement of claim; and*
- h) *the Termination Notices.*

19. To paragraph 19:

- (a) It denies the allegations in paragraph 19.
- (b) Further, it says that:
 - (i) The first statement about the defendant's intention to terminate the Leases, the second statement about the defendant's intention to terminate the Leases and the first statement about the defendant's intention to sell its land constituted clear notice to the plaintiffs that it was the defendant's intention to terminate the Leases as soon as it was able to under the terms of the Leases.
 - (ii) The notices referred to at paragraph 13 of the amended statement of claim constituted clear notice to the plaintiffs that it was the defendant's intention to terminate the Leases as soon as it was able to under the terms of the Leases; and
 - (iii) Following the issuing of the notices referred to at paragraph 13 of the amended statement of claim, the plaintiffs requested that the defendant either cancel or extend the time under the notices from 30 to 90 days (the **request**), which request the defendant rejected.

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The request was made in an e-mail from Bryan Webster of Korda Mentha to Mark Pryn of the defendant transmitted on 29 July 2009, and was discussed in a telephone conversation on 30 July 2009 between Alan Fisher on behalf of the defendant and Bryan Webster on behalf of Korda Mentha during which Alan Fisher told Bryan Webster that the defendant would not withdraw or extend the period of notice.

(iv) The rejection of the request provided notice and confirmation to the plaintiffs that the defendant intended to act in accordance with its previous statements regarding its intention to terminate the Leases, and that it would do so at the first opportunity after expiration of the timeframe set out in the notices referred to at paragraph 13 of the amended statement of claim.

(c) It otherwise refers to and repeats the matters at paragraphs 12, 13 and 14(b)(iii) above.

20. It denies the allegations in paragraph 20.

21. It denies the allegations in paragraph 21 and refers to and repeats the matters at paragraph 19(b) (iii) and (iv) above.

22. To paragraph 22:

(a) It denies the allegations in paragraph 22.

(b) It says that at all material times the plaintiffs knew as was the fact that the defendant intended to terminate the Leases as soon as possible under the terms of the Leases.

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The knowledge arose from the matters pleaded at paragraphs 12, 13, 14(b)(iii) and 19 (b) above.

(c) It says further that notwithstanding that the plaintiffs knew as was the fact that the defendant intended to terminate the Leases, the plaintiffs at all relevant times acted, in relation to the Timbercorp Sale Process, without regard to the defendant, including without informing the defendant that the plaintiffs would deal with the Leases without seeking the consent of the defendant to the manner of dealing provided in the Sale Contract.

- (d) In the premises, the plaintiffs did not rely on any conduct or statement of the defendant, or acted in any way differently than it otherwise would have acted.
- (e) Further or alternatively, if the defendant made the Representations or the Continuing Representations (which is not admitted and is denied), the plaintiffs did not rely on the Representations or the Continuing Representations, and alternatively suffer no prejudice thereby, by reason of the fact that the Sale Contract contemplates that the Leases may not be sold to the purchaser.

23. To paragraph 23:

- (a) Save that it admits that on or about 24 August 2009, it served notices terminating the Leases (the **Termination Notices**), it otherwise denies the allegations in paragraph 23;
- (b) Further, it says that the Leases were validly terminated on or about 24 August 2009.

24. It admits the allegations in paragraph 25 and says further that at the time of the tender it had terminated the Leases for reason of the failure of Timbercorp and TSL to pay annual rental under the terms of the Leases.

25. To paragraph 25:

- (a) It denies the allegations in paragraph 25.
- (b) Further it refers to and repeats the matters pleaded at paragraphs 12, 13, 14(b)(iii), 19 (b) and 22 above.

26. To paragraph 26:

- (a) It denies the allegations in paragraph 26.

- (b) Further it refers to and repeats the matters pleaded at paragraphs 12, 13, 14(b)(iii), 19 (b) and 22 above.

27. To paragraph 27:

- (a) It denies the allegations in paragraph 27.
- (b) Further it refers to and repeats the matters pleaded at paragraphs 12, 13, 14(b)(iii), 19 (b) and 22 above.

28. To paragraph 28:

- (a) It denies the allegations in paragraph 28.
- (b) Further it refers to and repeats the matters pleaded at paragraphs 12, 13, 14(b)(iii), 19 (b) and 22 above.

29. To paragraph 29:

- (a) It denies the allegations in paragraph 29.
- (b) Further it refers to and repeats the matters pleaded at paragraphs 12, 13, 14(b)(iii), 19 (b) and 22 above.

30. To paragraph 30:

- (a) It denies the allegations contained in paragraph 30.
- (b) Further it refers to and repeats the matters pleaded at paragraphs 12, 13, 14(b)(iii), 19 (b) and 22 above.

31. It denies the allegations in paragraph 31.

32. It does not admit the allegations in paragraph 32.

33. To paragraph 33:

- (a) Save to say that the plaintiffs are hopelessly insolvent, and that the non-payments of rent and renunciations of the lessee's obligations under the Leases were known and intended breaches of the Leases, it otherwise does not admit the allegations in paragraph 33.

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The defendant refers to and relies on the admissions of Mark Korda with respect to insolvency and the inability to pay rent or occupancy expense including:

- a) the statement that "as at 29 June 2009, being the date of our appointment as liquidators, TL remained hopelessly insolvent and did not have funds available to it from which it could pay the quarterly advance instalment of rent which became due under the PLL Lease on 30 June 2009" – paragraph 37 of the July Korda affidavit;*
- b) the statement that "we do not have sufficient available cash or immediately realisable and available unencumbered assets of TL and TSL to pay a use and occupancy expense which would otherwise arise if we use and occupy the PP Land" – paragraph 42 of the July Korda affidavit; and*
- c) the statements that "on 1 July 2009, approximately \$7.2 million of rental payments became due and payable by TSL for three months' rent to 30 September 2009 in relation to properties relevant to the Forestry Schemes (the Forestry Properties). The total annual rent liability for the Forestry Properties is approximately \$27 million" and "TSL is hopelessly insolvent and is unable to make these rental payments" – paragraphs 44 and 45 of the affidavit of Mark Korda sworn 29 September 2009 in Supreme Court*

*proceedings 9299 of 2009 (the **September Korda affidavit**) and exhibited as "LZ 2" to the affidavit of Leon Zwier sworn 1 October 2009.*

34. To paragraph 34:

- (a) It denies the allegations in paragraph 34.
- (b) Further, it says that:
 - (i) the plaintiffs are not able to pay to the defendant:
 - A. outstanding rent instalments;
 - B. future rental; and
 - C. other amounts properly due and payable under the Leases;
 - (ii) the plaintiffs are unable to make timely payment of future rent; and
 - (iii) the plaintiffs are unable and unwilling to perform the other obligations under the Leases including the obligation in clause 5.2 of the Leases to comply with sound silvicultural and environmental practices adopted within the forestry industry and in clause 5.3 of the Lease to comply with all laws, by-laws and regulations relating to the use and occupancy of the Leased Area.

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The defendant refers to the admissions referred to in the particulars subjoined to paragraph 33 above; the letter referred to at paragraph 12(a) above and the particulars subjoined thereto; the first 'renunciation of obligations' statement; and the subsequent 'renunciation of obligations' statements.

35. To paragraph 35:

- (a) It denies the allegations therein.
- (b) Further, it says that the plaintiffs are not entitled to relief from forfeiture of the Leases for reasons including that:
 - (i) the plaintiffs have breached their obligations under the Leases by the non-payment of rent;
 - (ii) in addition to non-payment of rent, the plaintiffs have breached other obligations under the Leases including the obligation in clause 5.2 of the Leases to comply with sound silvicultural and environmental practices adopted within the forestry industry;

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The defendant refers to and relies on the first 'renunciation of obligations' statement and the subsequent 'renunciation of obligations' statements.

- (iii) the breaches referred to in sub-paragraph (i) and (ii) were calculated, deliberate, intentional and wilful;

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The defendant refers to the 'standstill agreement' proposed in the letter referred to at paragraph 12(a) above and the particulars subjoined thereto, the first 'renunciation of obligations' statement and the subsequent 'renunciation of obligations' statements.

- (iv) the plaintiffs are not ready, willing and able to perform their rental obligations under the Leases;

- (v) the plaintiffs are hopelessly insolvent;
- (vi) the plaintiffs are unable to make timely payment of future rent;
- (vii) the plaintiffs are unable and unwilling to perform the other obligations under the Leases including the obligation in clause 5.2 of the Leases to comply with sound silvicultural and environmental practices adopted within the forestry industry and in clause 5.3 of the Lease to comply with all laws, by-laws and regulations relating to the use and occupancy of the Leased Area;
- (viii) insofar as the plaintiffs seek relief from forfeiture of the Leases in order that the Leases might be assigned to the purchaser under the Sale Contract:
 - A. the Leases can only be assigned by the plaintiffs with the consent of the defendant;
 - B. the plaintiffs and the purchaser have not sought the consent of the defendant for the assignment of the Leases and neither is obliged to do so;
 - C. there is no, alternatively no sufficient, assurance to the defendant of the due performance of the tenant's obligations under the Leases including the obligations to make timely payment of rent and to meet the other obligations under the Leases including the obligation in clause 5.2 of the Leases to comply with sound silvicultural and environmental practices adopted within the forestry industry and in clause 5.3 of the Lease to comply with all laws, by-laws and regulations relating to the use and occupancy of the Leased Area; and
 - D. the defendant is entitled to refuse an assignment proffered in the terms contemplated by the Sale Contract.

- (ix) the plaintiffs have not acted with clean hands.

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The liquidators have sought to use money paid by growers for the purposes of maintaining trees as a source for payment of outstanding rental to the defendant – refer to e-mail from the lawyers for the liquidators dated 8 October 2009 in which it is stated that “we are instructed that the source of the rent moneys tendered to [the defendant] was maintenance fees paid by Growers and which were collected in arrears”.

Mark Korda had previously deposed in affidavits filed in this Court and the Federal Court that the plaintiffs did not have sufficient funds to pay quarterly instalments in circumstances where the liquidators have subsequently tendered outstanding rental to the defendant from money paid by growers for maintenance fees. Refer to the particulars subjoined to paragraph 33 above.

36. To paragraph 36:

- (a) It says that the Leases were validly terminated by the defendant for non payment of annual rental, and therefore by reason of clauses 9.1, 10.3 and 11.1 of the Leases, the plaintiffs have no independent and severable proprietary interest in the Premises that survives the termination of the Leases; and
- (b) It otherwise denies the allegations in paragraph 36.

37. To paragraph 37:

- (a) It says that the Leases were validly terminated by the defendant for non payment of annual rental, and therefore by reason of clauses 9.1 and 10.3 of the Leases, the

plaintiffs have no rights and interests, including any right to remove the Plantations, that survive the termination of the Leases.

(b) It otherwise denies the allegations in paragraph 37.

38. To paragraph 38:

(a) It says that the Leases were validly terminated by the defendant for non-payment of annual rental, and therefore by reason of clauses 9.1 and 10.3 of the Leases, the plaintiffs have no rights and interests, including by contractual licence, that survive the termination of the Leases.

(b) It otherwise denies the allegations in paragraph 38.

Dated: 12 October 2009

Rodney Garratt

Simon Rubenstein



Maddocks
Solicitors for the defendant