

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT

No S ECI 2014 000425

B E T W E E N:

TIMBERCORP FINANCE PTY LTD (In Liquidation)
(ACN 054 581 190)

Plaintiff

- and -

MORAG LOWE

Defendant

SECOND FURTHER AMENDED DEFENCE
[Pursuant to Leave Granted on ~~16~~30 August 2016 by Justice Judd]

Date of Document:	16 30 August 2016
Filed on behalf of:	The Defendant
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To the plaintiff's amended statement of claim dated 3 August 2016, the defendant ("Ms Lowe") says as follows:

1. She admits paragraph 1.
2. She does not admit paragraph 2.
3. She does not admit paragraph 3.

2008 Single Payment Timberlot Project

Loan Agreement L0026664

4. She does not admit paragraph 4.
5. She denies paragraph 5.
6. She denies paragraph 6.
7. She denies paragraph 7.

8. Subject to the plaintiff adducing at trial the Loan Agreement L0026664, she admits paragraph 8.
9. Subject to the plaintiff adducing at trial the Loan Agreement L0026664, she admits paragraph 9.
10. She denies paragraph 10.
11. She admits paragraph 11 and says further that Ms Lowe paid the following amounts to the plaintiff by way of repayment of the L0026664 Loan Amount: \$59,106.19.
12. She denies paragraph 12.
13. She denies paragraph 13.
14. She does not admit paragraph 14.
15. She denies paragraph 15.
16. She does not admit paragraph 16.
17. She denies paragraph 17 and says that by reason of the matters set out below, Ms Lowe is not indebted to the plaintiff, alternatively is entitled to the set-off set out herein.

2008 Olive Early Project

Loan Agreement L0026036

18. She does not admit paragraph 18.
19. She denies paragraph 19.
20. She denies paragraph 20.
21. She denies paragraph 21.
22. Subject to the plaintiff adducing at trial the Loan Agreement L0026036, she admits paragraph 22.
23. Subject to the plaintiff adducing at trial the Loan Agreement L0026036, she admits paragraph 23.

- 24. She denies paragraph 24.
- 25. She admits paragraph 25 and says further that the defendant paid the following amounts to the plaintiff by way of repayment of the L0026036 Loan Amount: \$13,143.46.
- 26. She denies paragraph 26.
- 27. She denies paragraph 27.
- 28. She does not admit paragraph 28.
- 29. She denies paragraph 29.
- 30. She does not admit paragraph 30.
- 31. She denies paragraph 31 and says that by reason of the matters set out below, Ms Lowe is not indebted to the plaintiff, alternatively is entitled to the set-off set out herein

Loan Agreement L0027409

- 32. She does not admit paragraph 32.
- 33. She denies paragraph 33.
- 34. She denies paragraph 34.
- 35. She denies paragraph 35.
- 36. Subject to the plaintiff adducing at trial the Loan Agreement L0027409, she admits paragraph 36.
- 37. Subject to the plaintiff adducing at trial the Loan Agreement L0027409, she admits paragraph 37.
- 38. She denies paragraph 38.
- 39. She admits paragraph 39 and says further that the defendant paid the following amounts to the plaintiff by way of repayment of the L0027409 Loan Amount: \$2,421.16.
- 40. She denies paragraph 40.
- 41. She denies paragraph 41.

- 42. She does not admit paragraph 42.
- 43. She denies paragraph 43.
- 44. She does not admit paragraph 44.
- 45. She denies paragraph 45 and says that by reason of the matters set out below, Ms Lowe is not indebted to the plaintiff, alternatively is entitled to the set-off set out herein.

Mutual Credit and/or Set-Off

- 46. Further, or alternatively:
 - (a) the matters set out in this defence which comprise allegations against Timbercorp Finance constitute “mutual credits, mutual debts or other mutual dealings” under section 533C of the *Corporations Act* between an insolvent company that is being wound up (Timbercorp Finance Pty Ltd) and a person (Ms Lowe) who wants to have a debt or claim admitted against the defendant (Ms Lowe);
 - (b) immediately prior to the appointment of a liquidator of Timbercorp Finance Pty Ltd, Ms Lowe was a creditor, alternatively contingent creditor, of Timbercorp Finance Pty Ltd, by reason of the matters set out in this defence;
 - (c) pursuant to s 553C of the *Corporations Act*:
 - (i) an account is to be taken of what is due from the one party to the other in respect of those mutual dealings as at the relevant date (being the date of winding up of Timbercorp Finance Pty Ltd); and
 - (ii) the sum due from the one party is to be set off against any sum due from the other party; and
 - (iii) only the balance of the account is admissible to proof against Timbercorp Finance Pty Ltd, or is payable to Timbercorp Finance Pty Ltd, as the case may be.

TIMBERCORP GROUP

Members of the Timbercorp Group

48. At all material times, the Timbercorp Group of companies included Timbercorp Ltd, Timbercorp Securities Ltd (AFSL no. 235653) and Timbercorp Finance Pty Ltd.
49. At all material times, Timbercorp Ltd (“Timbercorp”), Timbercorp Securities Ltd (“Timbercorp Securities”), and Timbercorp Finance Pty Ltd (“Timbercorp Finance”) were incorporated under the *Corporations Act 2001* (Cth) (“the *Corporations Act*”).
50. At all material times, the Timbercorp Group of companies operated commercial activities in timber and other horticultural sectors.
51. At all material times after 2001, the business model of the Timbercorp Group was to sell interests in timber and other horticultural projects to members of the public and other investors.
52. Under the business model, the Timbercorp Group would derive fees and commercial gain from selling and operating the projects, and participants in the projects would become lot owners, leasing land from the Timbercorp Group, and deriving returns as lot owners over time.
53. At all material times since 23 April 2009, Timbercorp, Timbercorp Securities and Timbercorp Finance have been in liquidation.

Common Officers Across Timbercorp and Common Knowledge

54. At all material times between 1 January 2006 and 31 October 2008:
 - (a) Timbercorp Securities and Timbercorp Finance were related corporations and had the same parent, Timbercorp;
 - (b) Timbercorp Securities and Timbercorp Finance had common directors and a common company secretary; and
 - (c) each of the common directors and company secretary of Timbercorp Securities and Timbercorp Finance were officers of Timbercorp.

PARTICULARS

The common directors (and their roles at Timbercorp) were:

- (i) Robert Hance (CEO of Timbercorp);
- (ii) Gary Liddell (non-executive director of Timbercorp);
- (iii) Sol Rabinowicz (Timbercorp Legal & Corporate Counsel);
- (iv) John Vaughan (executive director of Timbercorp).

The common company secretary was Mark Pryn (Timbercorp General Manager, Operations and General Manager, Accounts and Administration).

55. In the premises, at all material times between 1 January 2006 and 31 October 2008, Timbercorp Securities, Timbercorp Finance and Timbercorp each had the knowledge of the other (“Common Knowledge”).

Respective Roles of Timbercorp companies

56. At all material times, Timbercorp Securities was the head lessor of Timbercorp projects and invited the public to invest in Timbercorp projects through the issue of product disclosure statements.
57. At all material times, Timbercorp Finance’s function within the Timbercorp Group was to provide finance to persons who wished to invest in relevant Timbercorp projects promoted by Timbercorp Securities from time to time.

Financing Arrangements to Fund Projects

58. At all material times between 2006 until the Timbercorp Group of companies fell into liquidation in April 2009, the ANZ Banking Group had been providing finance to the Timbercorp Group and/or Timbercorp Finance to enable Timbercorp Finance to provide loans to persons who wished to participate in Timbercorp group projects, including the defendant’s initial investment and continuing participation in the 2008 Single Payment Timberlot Project and in the 2008 Olive Early Project referred to below.

2008 SINGLE PAYMENT TIMBERLOT PROJECT

Launch of 2008 Single Payment Timberlot Project by Timbercorp Securities with Investor funds from Timbercorp Finance

59. On or about late 2006, Timbercorp Securities issued a product disclosure statement relating to an offer, inter alia, to invest in a long-term Timberlot project (the “2008

Single Payment Timberlot Project” and the “2006 Timberlot PDS” respectively), being a registered managed investment scheme to be operated by Timbercorp Securities (a first supplementary PDS, secondary supplementary PDS and third supplementary PDS were issued on 23 April 2007, 12 December 2007 and 29 February 2008, respectively).

60. In or about June 2008, Ms Lowe received from Timbercorp Finance an invitation to offer to take up a loan in order to enable her to invest in the 2008 Single Payment Timberlot Project.
61. On or about June 2008, Timbercorp Finance accepted an offer Ms Lowe had made for Timbercorp Finance to lend Ms Lowe money to take up an investment in the 2008 Single Payment Timberlot Project, and on or about the above date, Ms Lowe became an investor in lots in the 2008 Single Payment Timberlot Project and Loan L0026664 came into effect.
62. In or about June 2008, as a consequence of Ms Lowe’s investment in the 2008 Single Payment Timberlot Project, Timbercorp Securities and Ms Lowe became a party to an agreement styled as a Constitution (the “2006 Timberlot Constitution”) which dealt with the relationship between them (and other investor growers) in relation to the 2008 Single Payment Timberlot Project.

PARTICULARS

The terms and conditions of the 2006 Timberlot Constitution are summarised in part 12 of the 2006 Timberlot PDS. A copy of the 2006 Timberlot PDS and the 2006 Timberlot Constitution are available for inspection at the request of the defendant.

63. It was a term of the 2006 Timberlot Constitution that Timbercorp Securities as responsible entity would hold all Application Money (as defined in the 2006 Timberlot PDS) as bare trustee for the Applicants until Minimum Subscription (if any) was reached or waived by Timbercorp Securities as responsible entity and that monies would be held in a special Trust Account solely for the purpose and may be pooled with moneys of other Applicants.

PARTICULARS

Clauses 4.1, 4.2, and 4.3 of the 2006 Timberlot Constitution.

64. It was a further term of the 2006 Timberlot Constitution that if Timbercorp Securities as

responsible entity was satisfied of certain matters identified in the 2006 Timberlot Constitution, it was authorised to release the Application Money of an Applicant, and within 2 Business Days of being so satisfied, it was required to release the Application Money and apply those monies in payment of the fees payable under the Grower Agreements.

PARTICULARS

Clauses 8.2 and 8.3(a) of the 2006 Timberlot Constitution. The Grower Agreements were the Sub-leases and the Timberlot Management Agreements as identified in the Glossary of the 2006 Timberlot PDS.

65. It was a further term of the 2006 Timberlot Constitution that Timbercorp Securities had power to do certain things in relation to the 2008 Single Payment Timberlot Project, including using the Application Moneys of Applicants (including Ms Lowe) as Participant Growers (as defined in the 2006 Timberlot Constitution) (including Ms Lowe) in discharging the Participant Grower's obligations under the Grower Agreements or under the 2006 Timberlot Constitution.

PARTICULARS

Clause 11 of the 2006 Timberlot Constitution.

66. The terms of the 2006 Timberlot Constitution referred to in the preceding paragraphs authorised Timbercorp Securities:
- (a) to pool Application Moneys of Applicants; and
 - (b) to apply such moneys to Participant Grower obligations,
- but did not otherwise authorise Timbercorp Securities to apply the Application Moneys (including those of Ms Lowe) to or for any purpose other than in respect of the 2008 Single Payment Timberlot Project.
67. Further, there were terms of the 2006 Timberlot Constitution that moneys to which Participant Growers (including Ms Lowe) were entitled derived from the proceeds of crops or product or insurance policies or other amounts would be paid by Timbercorp Securities into an Agency Account (as defined in the 2006 Timberlot Constitution) and from which Timbercorp Securities would be entitled to deduct amounts comprising fees and other amounts owing by the Participant Growers (including Ms Lowe) in respect of

the 2008 Single Payment Timberlot Project, and in respect of Other Timbercorp Projects (and loan agreements relating thereto).

PARTICULARS

Clauses 12.1 and 14.1 of the 2006 Timberlot Constitution.

68. None of the provisions of the 2006 Timberlot Constitution referred to in the particulars sub-joined to the preceding paragraph dealt with Application Moneys (as defined in the 2006 Timberlot PDS).
69. In the premises, none of the provisions of the 2006 Timberlot Constitution authorised Timbercorp Securities (whether expressly or impliedly) to apply Application Moneys to the Other Timbercorp Projects or to the expenses and/or liabilities of or within the Timbercorp Group generally or specifically.
70. In the premises, other than the express authorisations referred to in the preceding paragraphs, on the proper construction of the 2006 Timberlot Constitution, Timbercorp Securities as responsible entity of the registered managed investment scheme in respect of the 2008 Single Payment Timberlot Project was not authorised by the 2006 Timberlot Constitution to apply Ms Lowe's Application Money (as defined in the 2006 Timberlot PDS) in any way other than for the establishment and operation of the 2008 Single Payment Timberlot Project.

Terms of Management Agreement in respect of the 2008 Single Payment Timberlot Project

71. Further, in or about June 2008, Timbercorp Securities and Ms Lowe entered into an agreement styled a management agreement (the "2006 Timberlot Management Agreement") in respect of the 2008 Single Payment Timberlot Project.

PARTICULARS

A copy of the 2006 Timberlot Management Agreement is available for inspection at the offices of the solicitors for the defendant.

72. There were terms of the 2006 Timberlot Management Agreement that:
 - (a) Timbercorp Securities would complete services in the 12 months following the day when the first seasonally dependent agronomic activity for the planting of trees (or 30 June 2009, if earlier) (the "establishment period"), including preparing

lots for planting, procuring seedlings, pest eradication, spraying and planting (“establishment services”);

PARTICULARS

Clause 6 of the 2006 Timberlot Management Agreement.

- (b) Timbercorp Securities would, on and from the completion of establishment services in the establishment period, perform services including the cultivation and tending of trees, repairing, managing infrastructure and keeping insurance policies (“plantation services”);

PARTICULARS

Clause 6A of the 2006 Timberlot Management Agreement.

- (c) Timbercorp Securities would be entitled to fees, payable in respect of Ms Lowe’s lot, in consideration for the services performed by Timbercorp Securities as set out in clauses 6 and 6A (being the services referred to in (a) and (b)), including:
 - (i) a fixed amount of \$2,800.00 per lot payable in respect of the establishment services performed or to be performed during the establishment period (the “establishment fee”); and
 - (ii) an amount equal to 3% of net proceeds in consideration for the plantation services performed after the establishment period.

PARTICULARS

Clause 5.1 and Schedule Part 1 of the 2006 Timberlot Management Agreement.

- 73. At all material times, Timbercorp Finance was aware of the terms of the 2006 Timberlot Constitution and the terms of the 2006 Timberlot Management Agreement.

PARTICULARS

In respect of the 2006 Timberlot Constitution and the 2006 Timberlot Management Agreement, the knowledge was Common Knowledge.

74. The tax treatment of an investment in the 2008 Single Payment Timberlot Project was the subject of a ruling by the Australian Tax Office being Product Ruling 2006/143.

PARTICULARS

A copy of the Ruling is available for inspection at the offices of the solicitors for the defendant.

75. The Ruling:
- (a) was to have no binding effect on the Commissioner of Taxation if the 2008 Single Payment Timberlot Project was carried out in a way that was materially different to the description of the Project in the Ruling;

PARTICULARS

Paragraph 10 of the Ruling.

- (b) would not apply to an investment if the finance arrangement entered into by the investor had the feature that the funds borrowed, or any part of them, would not be available for the conduct of the Project but rather would be transferred (by any mechanism, directly or indirectly) back to Timbercorp Finance or any associate of Timbercorp Finance;

PARTICULARS

Paragraph 68 of the Ruling.

- (c) provided that the fee for establishment services payable under the Management Agreement would be deductible in full in the year that it was incurred on the basis that the fee:
 - (i) constituted expenditure during the establishment period for 'seasonally dependent agronomic activities', being activities in the planting and tending of trees for felling;
 - (ii) accordingly, had a sufficient connection to the operations by which income was to be gained from the business; and

- (iii) had no identifiable “non-income producing” purpose;

PARTICULARS

- (i) Paragraphs 96, 108 and 109 of the Ruling.
 - (ii) Taxation Determination TD 2003/12 (Income tax: what activities are ‘seasonally dependent agronomic activities’ for the purposes of section 82KZMG of the Income Tax Assessment Act 1936?), a copy of which is available for inspection at the offices of the solicitors for the defendant.
- (d) provided that interest costs incurred by Ms Lowe under loans granted by Timbercorp Finance would be deductible on the basis that the loans were to finance the operations by which income was to be gained from the Project, being the cultivation and growing of trees, and were directly connected to those operations.

PARTICULARS

Paragraph 98 of the Ruling.

Terms of Loan Agreement in respect of the 2008 Single Payment Timberlot Project

76. Further, in or about June 2008, Ms Lowe entered into a loan agreement with Timbercorp Finance for the provision of monies for the purpose of investing in certain lots in the 2008 Single Payment Timberlot Project.

PARTICULARS

The loan terms and conditions included those recorded in a document styled ‘Loan Explanation and Loan Terms’ and a loan application form, copies of which are available for inspection at the offices of the solicitors for the defendant. The loan was referenced by Timbercorp Finance with the number L0026664 (“Loan L0026664”).

77. In the loan application form Ms Lowe acknowledged and confirmed that she had read and understood the 2006 Timberlot PDS, the Tax Ruling and the Loan Explanation and Loan Terms.

PARTICULARS

Clause 14 of the loan application form.

78. It was a term of the Loan L0026664 that Timbercorp Finance agreed to lend Ms Lowe the loan amount by paying it to Timbercorp Securities as payment of the balance of Ms Lowe's invoice for her lots in the 2008 Single Payment Timberlot Project together with the loan application fee as described in the loan application form.

PARTICULARS

Clause 1 of the Loan L0026664 loan terms and conditions.

79. It was a further term of the Loan L0026664 that Ms Lowe must not at any time be in default under the loan agreement or under the project agreements in respect of the 2008 Single Payment Timberlot Project.

PARTICULARS

Clause 6 of the Loan L0026664 loan terms and conditions.

80. It was a further term of the Loan L0026664 that Ms Lowe must not at any time without the written consent of Timbercorp Finance:
- (a) sell or part with possession of the lots of the 2008 Single Payment Timberlot Project or the secured property in relation to the loan being all of Ms Lowe's right to title and interest in any debt or other monetary obligation (actual or contingent) owed to Ms Lowe by Timbercorp Securities under or in relation to Ms Lowe's investments in the 2008 Single Payment Timberlot Project, accruing after the date of the Loan L0026664;
 - (b) create another security interest over the lots of the 2008 Single Payment Timberlot Project or the secured property or allow one to arise;
 - (c) deal in any other way with the lots of the 2008 Single Payment Timberlot Project, the secured property, the Loan L0026664, or any interest in them.

PARTICULARS

Clause 6 of the Loan L0026664 loan terms and conditions.

Timbercorp Securities As Trustee

81. In the premises, Timbercorp Securities was the trustee of Ms Lowe's Application Money and was as trustee required to release and apply her Application Money solely towards the establishment and/or operation of the 2008 Single Payment Timberlot Project by paying a management fee in consideration for the management services under the 2006 Timberlot Management Agreement and in default of such application, to hold it for Ms Lowe.

PARTICULARS

The trust is identified in the following.

- (i) The terms of the 2006 Timberlot Constitution set out earlier.
 - (ii) The terms of the 2006 Timberlot Management Agreement set out earlier.
 - (iii) The terms of the Loan L0026664 as set out earlier as known to Timbercorp Securities having regard to the Common Knowledge.
 - (iv) The purpose for which the Application Money had been provided by Ms Lowe to Timbercorp Securities namely the purpose of investment by Ms Lowe in the 2008 Single Payment Timberlot Project.
 - (v) The terms of the Tax Ruling.
 - (vi) The fact that the 2006 Timberlot PDS promoted the investment Ms Lowe would make not as one in which she would invest in the Timbercorp Group generally by, for example, subscribing for or purchasing shares in Timbercorp, but rather one in which Ms Lowe's Application Money would be invested specifically in the 2008 Single Payment Timberlot Project as sponsored by Timbercorp Securities and financed by Timbercorp Finance.
 - (vii) The operation of section 601FC(2) and/or section 601FC(1)(c) of the *Corporations Act*.
82. Under the trust referred to in the preceding paragraph, Timbercorp Securities was under a duty not to apply Ms Lowe's Application Money otherwise than in fulfilment of the stated purpose as aforesaid.

PARTICULARS

The duty was imposed by law.

Breach of Trust by Timbercorp Securities

83. In or around June 2008, Timbercorp Securities released the Application Moneys of Ms Lowe together with the Application Moneys of other applicants for investments in the 2008 Single Payment Timberlot Project and applied those monies by paying itself management fees ("Timberlot Management Fees") purportedly due to it under the 2006 Management Agreement.

PARTICULARS

The Timberlot Management Fees were to be payable for work properly undertaken by Timbercorp Securities as manager in respect of the 2008 Single Payment Timberlot Project.

84. The Timberlot Management Fees paid were in whole, alternatively, substantially:
- (a) not referable to the management obligations of Timbercorp Securities under the 2006 Management Agreement, alternatively
 - (b) excessive
- (collectively "the Timberlot Non-Commercial Management Fees").

PARTICULARS

- (i) Timbercorp Securities charged millions of dollars in fees for management services.
 - (ii) The Timberlot Management Fees were paid for the purposes or substantially for the purposes of providing the Timbercorp Group with funds and/or capital to pay down debt owed to third parties and/or for other internal Timbercorp Group purposes.
85. The payment of the Timberlot Non-Commercial Management Fees was a breach of the trust in paragraph 81.
86. Further, despite the matters giving rise to the trust as aforesaid, Timbercorp Securities failed to reveal to Ms Lowe the matters referred to in paragraph 84.
87. In the premises, the failure of Timbercorp Securities to reveal to Ms Lowe that her Application Money had been applied as aforesaid to the Timberlot Non-Commercial Management Fees as distinct from the payment of management fees properly payable under the 2006 Management Agreement for the purposes of the 2008 Single Payment Timberlot Project, was also a breach of the trust.

88. In the premises, Timbercorp Securities' breach of trust was dishonest.

PARTICULARS

Timbercorp Securities' breach of trust was dishonest, in an objective sense, as judged by standards of ordinary, decent people because:

- (i) Timbercorp Securities knew that Ms Lowe paid her Application Money on terms that it be held on trust and released in payment of a management fee payable for the management services under the 2006 Management Agreement.
- (ii) Timbercorp Securities intended to and did in fact apply Ms Lowe's Application Money towards the Timberlot Non-Commercial Management Fees in accordance with paragraph 84 above.
- (iii) Timbercorp failed to reveal to Ms Lowe the matters referred to in paragraph 84 above.

87. —

Knowing Assistance and/or Participation by Timbercorp Finance in Timbercorp Securities' Dishonest Breach of Trust

88-89. By reason of the Common Knowledge, Timbercorp Finance knew or ought to have known that Timbercorp Securities was the trustee of Ms Lowe's Application Money to be applied towards the Timberlot Management Fees properly payable in respect of the scheme the subject of the 2008 Single Payment Timberlot Project and not otherwise.

89-90. At all relevant times, Timbercorp Finance with Common Knowledge assisted and/or participated in the conduct of Timbercorp Securities as aforesaid constituting the dishonest breaches of trust, in that Timbercorp Finance:

- (a) knew or ought to have known of the conduct of Timbercorp Securities in relation to the Application Money; and/or
- (b) wilfully shut its eyes to Timbercorp Securities' conduct; and/or
- (c) wilfully and recklessly failed to make such enquiries of Timbercorp Securities' conduct as an honest and reasonable person would have made; and/or
- (d) had knowledge of circumstances which would indicate to an honest and reasonable person that Timbercorp Securities would engage in the conduct; and/or
- (e) had knowledge of circumstances which would put an honest and reasonable

person on inquiry as to Timbercorp Securities' conduct.

~~90-91.~~ In the premises, Ms Lowe seeks an order from this Honourable Court that Timbercorp Finance pay equitable compensation to Ms Lowe assessed as the wrongly dissipated Application Money together with interest, alternatively an order that Timbercorp Finance must indemnify Ms Lowe for any liability to Timbercorp Finance under Loan L0026664 for that excess with interest, alternatively an order that Ms Lowe be relieved from any liability to Timbercorp Finance under Loan L0026664 to the extent of that excess with interest.

Liability of Timbercorp Finance for Statutory Contraventions by Timbercorp Securities

~~94-92.~~ Further or alternatively, at all relevant times Timbercorp Securities was required:

- (a) by section 601FC(1)(c) of the *Corporations Act* to act in the best interests of Ms Lowe as a member of the scheme comprising the 2008 Single Payment Timberlot Project, and, if there was a conflict between her interests and the interests of Timbercorp Securities, to give priority to Ms Lowe's interests;
- (b) by section 601FC(1)(i) of the *Corporations Act* to ensure that scheme property of the 2008 Single Payment Timberlot Project was held separately from property of the responsible entity, Timbercorp Securities, and property of any other scheme operated by Timbercorp Securities;
- (c) by section 601FC(1)(k) of the *Corporations Act* to ensure that all payments out of the scheme property of the 2008 Single Payment Timberlot Project were made in accordance with that Project's Constitution and the *Corporations Act*;
- (d) by section 601FC(2) of the *Corporations Act* to hold the scheme property of the Projects on trust for the members of the 2008 Single Payment Timberlot Project (which included Ms Lowe).

~~92-93.~~ Timbercorp Securities did not:

- (a) act in the best interests of Ms Lowe as a member of the scheme comprising the 2008 Single Payment Timberlot Project and permitted there to exist a conflict between Ms Lowe's interests and the interests of Timbercorp Securities and failed to give priority to Ms Lowe's interests;

- (b) ensure that scheme property of the 2008 Single Payment Timberlot Project was held separately from property of Timbercorp Securities as the responsible entity of the Project, and property of any other scheme operated by Timbercorp Securities;
- (c) ensure that all payments out of the scheme property of the 2008 Single Payment Timberlot Project were made in accordance with that Project's Constitution and the *Corporations Act*;
- (d) hold the scheme property of the 2008 Single Payment Timberlot Project on trust for the members of the 2008 Single Payment Timberlot Project including Ms Lowe.

PARTICULARS

Paragraphs 81 to 87 above and the particulars thereto are referred to and repeated.

93.94. In the premises, Timbercorp Securities contravened section 601FC(1)(c) and/or section 601FC(1)(i) and/or 601FC(1)(k) and/or 601FC(2) and/or section 601FC(5) of the *Corporations Act*.

94.95. Further:

- (a) Timbercorp Finance was at all material times a related party of Timbercorp Securities;
- (b) Timbercorp Finance provided or applied, or permitted the provision or application, of Ms Lowe's Application Money and other monies contributed to the 2008 Single Payment Timberlot Project, in a manner which was not consistent with the statutory obligations of Timbercorp Securities as aforesaid of the *Corporations Act*;
- (c) the loan agreements entered into between Timbercorp Finance and Ms Lowe were an integral part of the 2008 Single Payment Timberlot Project;
- (d) Timbercorp Finance provided loans for scheme members, including Ms Lowe, to enable them to participate in the managed investment scheme being the 2008 Single Payment Timberlot Project for which Timbercorp Securities was the responsible entity;

- (e) by reason of the Common Knowledge, Timbercorp Finance knew that or that it was likely that Timbercorp Securities would not apply Ms Lowe's Application Money as required by the 2006 Timberlot Constitution.

~~95-96.~~ In the premises, Timbercorp Finance was involved in Timbercorp Securities' contravention of section 601FC(1)(c) and/or section 601FC(1)(i) and/or 601FC(1)(k) and/or 601FC(2) within the meaning of section 601FC(5) and section 79 and accordingly Timbercorp Finance itself contravened section 601FC(5).

~~96-97.~~ The defendant seeks an order for compensation under section 1325 of the *Corporations Act* by way of set-off against the Loans as aforesaid.

~~97-98.~~ Further, or alternatively, by reason of the contraventions of the *Corporations Act* by Timbercorp Finance as aforesaid, the Loans in respect of the 2008 Single Payment Timberlot Project are unlawful and therefore unenforceable.

Unjust Enrichment - Recovery of Loan Instalments Paid to Timbercorp Finance

~~98-99.~~ In respect of Loan L0026664, between 29 August 2008 and 29 May 2009, Ms Lowe paid loan repayments totalling \$59,106.19.

~~99-100.~~ The loan repayments and interest were paid under the mistake that the loan had been provided or applied towards Timberlot Management Fees payable in consideration for the management services under the 2006 Timberlot Management Agreement when in fact they had been applied towards fees that were in whole, alternatively, substantially:

- (a) not referable to the management obligations of Timbercorp Securities under the 2006 Management Agreement, alternatively
- (b) excessive.

~~100-101.~~ In the premises, Timbercorp Finance would be unjustly enriched if it were to keep the repayments by Ms Lowe in respect of Loan L0026664 and require repayment of Loan L0026664.

~~101-102.~~ Timbercorp Finance accordingly holds the present and future benefits of those repayments on resulting or constructive trust for Ms Lowe.

~~102-103.~~ The defendant seeks an order from this Honourable Court that Ms Lowe is

entitled to set-off the loan instalments paid by Ms Lowe together with interest and that this Honourable Court set aside Loan L0026664 to the extent to which Ms Lowe is required to repay any balance otherwise owing.

Unconscionable Conduct by Timbercorp Finance

~~103.~~104. Further or alternatively, the loan agreement being Loan L0026664 was a thing done by Timbercorp Finance in the provision of financial services within the meaning of section 12BAB of the Australian Securities and Investments Commission Act 2001 (Cth) (“the *ASIC Act*”).

~~104.~~105. At the time of granting Loan L0026664, by reason of the Common Knowledge, Timbercorp Finance knew or ought to have known that Timbercorp Securities intended to release the Application Money of Ms Lowe together with the Application Money of other applicants for investments in the 2008 Single Payment Timberlot Project and apply those monies by paying itself Timberlot Management Fees that were in whole, alternatively, substantially:

- (a) not referable to the management obligations of Timbercorp Securities under the 2006 Management Agreement, alternatively
 - (b) excessive
- (paragraphs 83 and 84 above).

~~105.~~106. The matters referred to in the preceding paragraph were matters which might affect Ms Lowe’s interest in the 2008 Single Payment Timberlot Project.

~~106.~~107. At the time of granting Loan L0026664, Timbercorp Finance unreasonably failed to disclose to Ms Lowe the matters referred to in paragraph ~~105~~104.

~~107.~~108. In the premises, the conduct of Timbercorp Finance was unconscionable conduct in contravention of section 12CB of the *ASIC Act* and/or in contravention of the unwritten law.

~~108.~~109. In the premises, this Honourable Court should order under section 12GM of the *ASIC Act* alternatively under its equitable jurisdiction that:

- (a) Ms Lowe is entitled to set-off all loan repayments;

- (b) Ms Lowe is relieved from any liability under Loan L0026664; and/or
- (c) Loan L0026664 is void ab initio.

2008 OLIVE EARLY PROJECT

Launch of the 2008 Olive Early Project by Timbercorp Securities with Investor funds coming from Timbercorp Finance (Loan L0026036)

~~409~~.110. On or about 26 February 2008, Timbercorp Securities issued a product disclosure statement relating to an offer to invest in a long-term olive orchard project (the “2008 Olive Early Project” and the “2008 Olive PDS” respectively), being a registered managed investment scheme to be operated by Timbercorp Securities.

~~440~~.111. In or about June 2008, Ms Lowe received from Timbercorp Finance an invitation to offer to take up a loan in order to enable her to invest in the 2008 Olive Early Project.

~~444~~.112. In or about June 2008, Timbercorp Finance accepted an offer Ms Lowe had made for Timbercorp Finance to lend Ms Lowe money to take up an investment in the 2008 Olive Early Project, and on or about the above date, Ms Lowe became an investor in lots in the 2008 Olive Early Project and Loan L0026036 came into effect.

~~442~~.113. In or about June 2008, Timbercorp Securities and Ms Lowe became a party to an agreement styled as a Constitution (the “2008 Olive Constitution”) which dealt with the relationship between them (and other investor growers) in relation to the 2008 Olive Early Project.

PARTICULARS

The terms and conditions of the 2008 Olive Constitution are summarised in part 13 of the 2008 Olive PDS. A copy of the 2008 Olive PDS and the 2008 Olive Constitution are available for inspection at the request of the defendant.

~~443~~.114. It was a term of the 2008 Olive Constitution that Timbercorp Securities as responsible entity would hold all Application Money (as defined in the 2008 Olive PDS) as bare trustee for the Applicants (as defined in the 2008 Olive PDS) until Minimum Subscription (if any) (as defined in the 2008 Olive PDS) was reached or waived by Timbercorp Securities as responsible entity and that monies would be held in a special Trust Account (as defined in the 2008 Olive PDS) solely for the purpose and may be pooled with moneys of other Applicants (as defined in the 2008 Olive PDS).

PARTICULARS

Clauses 4.1, 4.2, and 4.3 of the 2008 Olive Constitution.

~~44-115.~~ It was a further term of the 2008 Olive Constitution that if Timbercorp Securities as responsible entity was satisfied of certain matters identified in the 2008 Olive Constitution, it was authorised to release the Application Moneys of an Applicant, and within 2 Business Days of being so satisfied, it was required to release the Application Moneys and apply them in payment of the fees payable under the Grower Agreements (as defined in the 2008 Olive PDS).

PARTICULARS

Clauses 9.2 and 9.3(a) of the 2008 Olive Constitution. The Licence Agreements were the Sub-leases and the Grovelot Management Agreements as identified in the Glossary of the 2008 Olive PDS.

~~44-116.~~ It was a further term of the 2008 Olive Constitution that Timbercorp Securities had power to do certain things in relation to the 2008 Olive Early Project, including using the Application Moneys of Applicants (including Ms Lowe) as Participant Growers (as defined in the 2008 Olive Constitution) in discharging the Participant Grower's obligations under the Licence Agreements or under the 2008 Olive Constitution.

PARTICULARS

Clause 11 of the 2008 Olive Constitution.

~~44-117.~~ The terms of the 2008 Olive Constitution referred to in the preceding paragraphs authorised Timbercorp Securities:

- (a) to pool Application Moneys of the Applicants; and
- (b) to apply such moneys to Participant Grower obligations,

but did not authorise Timbercorp Securities to apply the Application Moneys including those of Ms Lowe to any purpose other than the 2008 Olive Early Project.

~~44-118.~~ Further, there were terms of the 2008 Olive Constitution that moneys to which Participant Growers, including Ms Lowe, were entitled from the proceeds of crops or product or insurance policies or other amounts would be paid by Timbercorp Securities into an Agency Account (as defined in the 2008 Olive Constitution) and from which

Timbercorp Securities was entitled to deduct amounts comprising fees and other amounts owing by the Participant Growers (including Ms Lowe) in respect of the 2008 Olive Early Project, and in respect of Other Timbercorp Projects (and loan agreements relating thereto).

PARTICULARS

Clauses 13.6, 13.7, and 15.1 of the 2008 Olive Constitution.

~~118.~~119. None of the provisions of the 2008 Olive Constitution referred to in the particulars sub-joined to the preceding paragraph dealt with Application Moneys (as defined in the 2008 Olive PDS).

~~119.~~120. In the premises, none of the provisions of the 2008 Olive Constitution authorised Timbercorp Securities (whether expressly or impliedly) to apply Application Moneys to the Other Timbercorp Projects or to the expenses and/or liabilities of or within the Timbercorp Group generally or specifically.

~~120.~~121. In the premises, other than the express authorisations referred to in the preceding paragraphs, on the proper construction of the 2008 Olive Constitution, Timbercorp Securities as responsible entity of the registered managed investment scheme in respect of the 2008 Olive Early Project was not authorised by the 2008 Olive Constitution to apply Ms Lowe's Application Money (as defined in the 2008 Olive PDS) in any way other than for the establishment and operation of the 2008 Olive Early Project.

Terms of Management Agreement in respect of the 2008 Olive Early Project

~~121.~~122. Further, in or about June 2008, Timbercorp Securities and Ms Lowe entered into an agreement styled a management agreement (the "2008 Olive Management Agreement") in respect of the 2008 Olive Early Project.

PARTICULARS

A copy of the 2008 Olive Management Agreement is available for inspection at the offices of the solicitors for the plaintiff by counterclaim.

~~122.~~123. There were terms of the 2008 Olive Management Agreement that:

- (a) Timbercorp Securities was engaged to manage and administer the 2008 Olive

Early Project, manage, direct and conduct the operations of the Project on behalf of Mr Lowe and to perform services;

PARTICULARS

Clause 4.1 of the 2008 Olive Management Agreement.

- (b) Timbercorp Securities would conduct the 2008 Olive Early Project in the best interest of all Participant Growers and not in the interests of Timbercorp Securities if those interests were not the same as those of the Participant Growers, including Ms Lowe.

PARTICULARS

Clause 4.4 of the 2008 Olive Management Agreement.

- (c) Timbercorp Securities would complete the following services between the commencement date (being early January 2008) and 30 June 2008, provided that the services were required to be completed by 30 June 2008:
 - (i) infrastructure management services, being services such as keeping access roads, fences and equipment in good repair and condition, controlling vermin and soil management services;
 - (ii) administrative and other management services, being services such as preparing reports and statements, procuring insurance and marketing; and
 - (iii) olive tree management services, being services such as auditing infrastructure quality, cultivating and tending to trees, pest control, irrigating, fertilising and inspecting equipment;

PARTICULARS

Clause 5.2 of the 2008 Olive Management Agreement.

- (d) Timbercorp Securities would complete the services after 1 July 2008 and during each subsequent financial year during the term of the 2008 Olive Early Project including auditing infrastructure quality, cultivating and tending to trees, pest control, irrigating, fertilising, inspecting equipment and preparing reports;

PARTICULARS

Clause 5.2A of the 2008 Olive Management Agreement.

- (e) Timbercorp Securities would be entitled to management fees, payable in respect of Ms Lowe's lot, in consideration for the services performed by Timbercorp Securities as set out in clauses 5.2 and 5.2A (being the services referred to in (c) and (d) above), including:
 - (i) a fixed amount of \$5,181.81 per lot payable on the commencement date in consideration for the services described in clause 5.2 and provided or to be provided in the period commencing on the commencement date and ending on 30 June 2008;

PARTICULARS

Clause 11.1(a) of the 2008 Olive Management Agreement.

- (ii) a fixed amount of \$1,000.00 per lot payable on 31 October 2008, and an amount equal to 1.5% of net proceeds of the sale of crop and product in each financial year, in consideration for the services described in clause 5.2A and services in respect of the harvesting of the olives;

PARTICULARS

Clause 11.1(b) of the 2008 Olive Management Agreement.

- (iii) an amount for Timbercorp Securities' estimated costs of operating each lot (by reference to the preceding financial year) payable on 31 October in each financial year after 30 June 2010, to be adjusted by the difference between the actual costs incurred and the costs estimated.

PARTICULARS

Clause 11.3 of the 2008 Olive Management Agreement.

~~123.124.~~ At all material times, Timbercorp Finance was aware of the terms of the 2008 Olive Constitution and the terms of the 2008 Olive Management Agreement.

PARTICULARS

In respect of these agreements, the knowledge was Common Knowledge.

~~124.125.~~ The tax treatment of an investment in the 2008 Olive Early Project was the subject of a ruling by the Australian Tax Office being Product Ruling 2007/105.

PARTICULARS

A copy of the Ruling is available for inspection at the offices of the solicitors for the defendant.

~~125.126.~~ The Ruling:

- (a) was to have no binding effect on the Commissioner of Taxation if the 2008 Olive Early Project was carried out in a way that was materially different to the description of the Project in the Ruling;

PARTICULARS

Paragraph 6 of the Ruling.

- (b) would not apply to prepayment of management fees for a period that extended beyond the income year in which the management expenditure is incurred;

PARTICULARS

Paragraph 24 note (iii) of the Ruling.

- (c) would not apply to an investment if the finance arrangement entered into by the investor had the feature that the funds borrowed, or any part of them, would not be available for the conduct of the Project but rather would be transferred (by any mechanism, directly or indirectly) back to Timbercorp Finance or any associate of Timbercorp Finance;

PARTICULARS

Paragraph 92 of the Ruling.

- (d) provided that the management fees payable under the Management Agreement would be deductible in full in the year that it was incurred on the basis that the management fees:
 - (i) had a sufficient connection to, and was an inherent part of, the operations

by which income was to be gained from the Project, being the cultivation and growing of trees;

- (ii) had no identifiable 'non-income producing' purpose;
- (iii) had no capital component; and
- (iv) were not a prepayment for expenditure incurred in a later financial year.

PARTICULARS

Paragraphs 100 and 105 of the Ruling.

- (e) provided that interest costs incurred by Ms Lowe under loans granted by Timbercorp Finance would be deductible on the basis that the loans were to finance the operations by which income was to be gained from the Project, being the cultivation and growing of trees, and were directly connected to those operations.

PARTICULARS

Paragraph 102 of the Ruling.

Loan Agreement in relation to the 2008 Olive Early Project – Loan L0026036

~~126-127.~~ On or about 11 June 2008, Ms Lowe entered into a loan agreement with Timbercorp Finance for the provision of Application Moneys for the purpose of investing in certain lots in the 2008 Olive Early Project.

PARTICULARS

The loan terms and conditions included those recorded in a document styled 'Loan Explanation and Loan Terms' and a loan application form, copies of which are available for inspection at the offices of the solicitors for the defendant. The loan was referenced by Timbercorp Finance with the number L0026036 ("Loan L0026036").

~~127-128.~~ In the loan application form Ms Lowe acknowledged and confirmed that she had read and understood the 2008 PDS, the Tax Ruling and the Loan Explanation and Loan Terms.

PARTICULARS

Clause 14 of the loan application form.

~~128.~~129. It was a term of the Loan L0026036 that Timbercorp Finance agreed to lend Ms Lowe the loan amount by paying it to Timbercorp Securities as payment of the balance of Ms Lowe's invoice for her lots in the 2008 Olive Early Project together with the loan application fee as described in the loan application form.

PARTICULARS

Clause 1 of the Loan L0026036 loan terms and conditions.

~~129.~~130. It was a further term of the Loan L0026036 that Ms Lowe would not at any time be in default under the loan agreement or under the project agreements in respect of the 2008 Olive Early Project.

PARTICULARS

Clause 6 of the Loan L0026036 loan terms and conditions.

~~130.~~131. It was a further term of the Loan L0026036 that Ms Lowe would not at any time without the written consent of Timbercorp Finance:

- (a) sell or part with possession of the lots of the 2008 Olive Early Project or the secured property in relation to the loan being all Ms Lowe's right title and interest in any debt or other monetary obligation (actual or contingent) owed to Ms Lowe by Timbercorp Securities under or in relation to Ms Lowe's investments in the Project, accruing after the date of the Loan L0026036;
- (b) create another security interest over the lots of the 2008 Olive Early Project or the secured property or allow one to arise;
- (c) deal in any other way with the lots of the 2008 Olive Early Project, the secured property, the Loan L0026036, or any interest in them.

PARTICULARS

Clause 6 of the Loan L0026036 loan terms and conditions.

Breach of Trust by Timbercorp Securities

~~131-132.~~ In the premises, Timbercorp Securities was the trustee of Ms Lowe's Application Money and was as trustee required to release and apply her Application Money solely towards the establishment and/or operation of the 2008 Olive Early Project by paying a management fee in consideration for the management services under the 2008 Olive Management Agreement and in default of such application, to hold it for Ms Lowe.

PARTICULARS

The trust is identified in the following.

- (i) The terms of the 2008 Olive Constitution.
- (ii) The terms of the 2008 Olive Management Agreement set out earlier.
- (iii) The terms of the Loan L0026036 as set out earlier and having regard to the Common Knowledge.
- (iv) The Tax Ruling.
- (v) The purpose for which the Application Money had been provided by Ms Lowe to Timbercorp Securities, namely the purpose of investment by Ms Lowe in the 2008 Olive Early Project.
- (vi) The fact that the 2008 Olive PDS promoted the investment Ms Lowe would make not as one in which she would invest in the Timbercorp Group generally by purchasing shares in Timbercorp but rather one in which Ms Lowe's Application Money would be invested specifically in the 2008 Olive Early Project as sponsored by Timbercorp Securities and financed by Timbercorp Finance.
- (vii) The trust also arose by operation of section 601FC(2) and/or section 601FC(1)(c) of the *Corporations Act*.

~~132-133.~~ Under the trust referred to in the preceding paragraph, Timbercorp Securities was under a duty not to apply Ms Lowe's Application Money otherwise than in fulfilment of the stated purpose as aforesaid.

PARTICULARS

The duty was imposed by law.

~~133-134.~~ In or around June 2008, Timbercorp Securities released the Application Moneys of Ms Lowe together with the Application Moneys of other applicants for

investments in the 2008 Olive Early Project and applied those monies by paying itself management fees ("Olive Management Fees") purportedly due to it under the 2008 Olive Management Agreement.

PARTICULARS

The Olive Management Fees were to be payable for work properly undertaken by Timbercorp Securities as manager in respect of the 2008 Olive Early Project.

~~134-135.~~ The Olive Management Fees paid were in whole, alternatively, substantially:

(a) not referable to the management obligations of Timbercorp Securities under the 2008 Olive Management Agreement, alternatively

(b) excessive

(collectively "the Olive Non-Commercial Management Fees").

PARTICULARS

(i) Timbercorp Securities charged \$36,417,818 in fees for management services.

(ii) The Olive Management Fees were paid for the purposes or substantially for the purposes of providing the Timbercorp Group with funds and/or capital to pay down debt owed to third parties and/or for other internal Timbercorp Group purposes.

~~135-136.~~ The payment of the Olive Non-Commercial Management Fees was a breach of the trust in paragraph ~~132~~¹³⁴.

~~136-137.~~ Further, despite the matters giving rise to the trust as aforesaid, Timbercorp Securities failed to reveal to Ms Lowe the matters referred to in paragraph ~~135~~¹³⁴.

138. In the premises, the failure of Timbercorp Securities to reveal to Ms Lowe that her Application Money had been applied as aforesaid to the Olive Non-Commercial Management Fees as distinct from the payment of management fees properly payable under the 2008 Olive Management Agreement for the purposes of the 2008 Olive Early Project, was also a breach of the trust.

139. In the premises, Timbercorp Securities' breach of trust was dishonest.

PARTICULARS

Timbercorp Securities' breach of trust was dishonest, in an objective sense, as judged by standards of ordinary, decent people because:

- (i) Timbercorp Securities knew that Ms Lowe paid her Application Money on terms that it be held on trust and released in payment of a management fee payable for the management services under the 2008 Olive Management Agreement.
- (ii) Timbercorp Securities intended to and did in fact apply Ms Lowe's Application Money towards the Olive Non-Commercial Management Fees in accordance with paragraph 135 above.
- (iii) Timbercorp failed to reveal to Ms Lowe the matters referred to in paragraph 135 above.

437.—

Loan L0027409 (Further Loan)

~~438.~~140. Further, on or about 29 October 2008, Timbercorp Finance provided Ms Lowe with a further loan (Loan L0027409) which loan was expressly provided by Timbercorp Finance for the purposes of the payment of loan fees, management costs, rent and other amounts owing in relation to the so-called Stage 2 investment in the 2008 Olive Early Project, being a registered managed investment scheme operated by Timbercorp Securities.

~~439.~~141. On or about 29 October 2008, Ms Lowe committed to providing the moneys referred to in the preceding paragraph to Timbercorp Securities and directed Timbercorp Finance to remit the monies to Timbercorp Securities.

~~440.~~142. Had Timbercorp Securities not breached its duties as trustee in respect of the Application Money, the loan fees, management costs, rent and other amounts would not have been payable and/or Loan L0027409 would not have been made.

Knowing Assistance and/or Participation by Timbercorp Finance in Timbercorp Securities' Dishonest Breach of Trust

~~141~~143. By reason of the Common Knowledge, Timbercorp Finance knew or ought to have known that Timbercorp Securities was the trustee of Ms Lowe's Application Money to be applied towards the Olive Management Fees properly payable in respect of the scheme the subject of the 2008 Olive Early Project.

~~142~~144. At all relevant times, Timbercorp Finance with Common Knowledge assisted and/or participated in the conduct of Timbercorp Securities as aforesaid constituting the dishonest breaches of trust, in that Timbercorp Finance:

- (a) knew or ought to have known of the conduct of Timbercorp Securities in relation to the further monies; and/or
- (b) wilfully shut its eyes to Timbercorp Securities' conduct; and/or
- (c) wilfully and recklessly failed to make such enquiries of Timbercorp Securities' conduct as an honest and reasonable person would have made; and/or
- (d) had knowledge of circumstances which would indicate to an honest and reasonable person that Timbercorp Securities would engage in the conduct; and/or
- (e) had knowledge of circumstances which would put an honest and reasonable person on inquiry as to Timbercorp Securities' conduct.

~~143~~145. In the premises, Ms Lowe seeks an order from this Honourable Court that Timbercorp Finance pay equitable compensation to Ms Lowe assessed as the full amount of Ms Lowe's Application Money and the wrongly dissipated Loan Moneys under Loan L0027409 together with interest, alternatively an order that Timbercorp Finance must indemnify Ms Lowe for any liability to Timbercorp Finance under Loans L0026036 and L0027409, alternatively an order that Ms Lowe be relieved from any liability to Timbercorp Finance under Loans L0026036 and L0027409.

Liability of Timbercorp Finance for Statutory Contraventions by Timbercorp Securities

~~144~~146. Further or alternatively, at all relevant times Timbercorp Securities was required:

- (a) by section 601FC(1)(c) of the *Corporations Act* to act in the best interests of Ms

Lowe as a member of the scheme comprising the 2008 Olive Early Project, and, if there was a conflict between her interests and the interests of Timbercorp Securities, to give priority to Ms Lowe's interests;

- (b) by section 601FC(1)(i) of the *Corporations Act* to ensure that scheme property of the 2008 Olive Early Project was held separately from property of the responsible entity, Timbercorp Securities, and property of any other scheme operated by Timbercorp Securities;
- (c) by section 601FC(1)(k) of the *Corporations Act* to ensure that all payments out of the scheme property of the 2008 Olive Early Project were made in accordance with that Project's Constitution and the *Corporations Act*;
- (d) by section 601FC(2) of the *Corporations Act* to hold the scheme property of the Projects on trust for the members of the 2008 Olive Early Project (which included Ms Lowe).

145-147. Timbercorp Securities did not:

- (a) act in the best interests of Ms Lowe as a member of the scheme comprising the 2008 Olive Early Project and permitted there to exist a conflict between Ms Lowe's interests and the interests of Timbercorp Securities and failed to give priority to Ms Lowe's interests;
- (b) ensure that scheme property of the 2008 Olive Early Project was held separately from property of Timbercorp Securities as the responsible entity of the Project, and property of any other scheme operated by Timbercorp Securities;
- (c) ensure that all payments out of the scheme property of the 2008 Olive Early Project were made in accordance with that Project's Constitution and the *Corporations Act*;
- (d) hold the scheme property of the 2008 Olive Early Project on trust for the members of the 2008 Olive Early Project including Ms Lowe.

PARTICULARS

Paragraphs ~~132-134~~ to ~~138-137~~ above and the particulars thereto are referred to and repeated.

~~146.~~148. In the premises, Timbercorp Securities contravened section 601FC(1)(c) and/or section 601FC(1)(i) and/or 601FC(1)(k) and/or 601FC(2) and/or section 601FC(5) of the *Corporations Act*.

~~147.~~149. Further:

- (a) Timbercorp Finance was at all material times a related party of Timbercorp Securities;
- (b) Timbercorp Finance provided or applied, or permitted the provision or application, of Ms Lowe's Application Money and other monies contributed to the 2008 Olive Early Project, in a manner which was not consistent with the statutory obligations of Timbercorp Securities as aforesaid of the *Corporations Act*;
- (c) the loan agreements entered into between Timbercorp Finance and Ms Lowe were an integral part of the 2008 Olive Early Project;
- (d) Timbercorp Finance provided loans for scheme members, including Ms Lowe, to enable them to participate in the managed investment scheme being the 2008 Olive Early Project for which Timbercorp Securities was the responsible entity;
- (e) by reason of the Common Knowledge, Timbercorp Finance knew that or that it was likely that Timbercorp Securities would not apply Ms Lowe's Application Money as required by the 2008 Constitution.

~~148.~~150. In the premises, Timbercorp Finance was involved in Timbercorp Securities' contravention of section 601FC(1)(c) and/or section 601FC(1)(i) and/or 601FC(1)(k) and/or 601FC(2) within the meaning of section 601FC(5) and section 79 and accordingly Timbercorp Finance itself contravened section 601FC(5).

~~149.~~151. The defendant seeks an order for compensation under section 1325 of the *Corporations Act* by way of set-off against the Loans as aforesaid.

~~150.~~152. Further, or alternatively, by reason of the contraventions of the *Corporations Act* by Timbercorp Finance as aforesaid, the Loans in respect of the 2008 Olive Early Project are unlawful and therefore unenforceable.

Unjust Enrichment - Recovery of Loan Instalments Paid to Timbercorp Finance

~~151.~~153. In respect of Loan L0026036, between 29 August 2008 and 29 May 2009, Ms Lowe paid loan repayments totalling \$13,143.46.

~~152.~~154. The loan repayments and interest were paid under the mistake that the loan had been provided or applied towards Olive Management Fees payable in consideration for the management services under the 2008 Olive Management Agreement when in fact they had been applied towards fees that were in whole, alternatively, substantially:

- (a) not referable to the management obligations of Timbercorp Securities under the 2008 Olive Management Agreement, alternatively
- (b) excessive.

~~153.~~155. In the premises, Timbercorp Finance would be unjustly enriched if it were to keep the repayments by Ms Lowe in respect of Loan L0026036 and require repayment of Loan L0026036.

~~154.~~156. Timbercorp Finance accordingly holds the present and future benefits of those repayments on resulting or constructive trust for Ms Lowe.

~~155.~~157. The defendant seeks an order from this Honourable Court that Ms Lowe is entitled to set-off the loan instalments paid by Ms Lowe together with interest and that this Honourable Court set aside Loan L0026036 to the extent to which it requires Ms Lowe to pay any balance otherwise owing.

Unconscionable Conduct by Timbercorp Finance

~~156.~~158. Further or alternatively, the loan agreements being Loan L0026036 and Loan L0027409 were things done by Timbercorp Securities and Timbercorp Finance in the provision of financial services within the meaning of section 12BAB of the *ASIC Act*.

~~157.~~159. At the time of granting Loan L0026036 and Loan L0027409, by reason of the Common Knowledge, Timbercorp Finance knew or ought to have known that Timbercorp Securities intended to release the Application Money of Ms Lowe together with the Application Money of other applicants for investments in the 2008 Olive Early Project and apply those monies by paying itself Olive Management Fees that were in whole, alternatively, substantially:

- (a) not referable to the management obligations of Timbercorp Securities under the

2008 Olive Management Agreement, alternatively

(b) excessive

(paragraphs ~~134~~¹³³ and ~~135~~¹³⁴ above).

~~158~~¹⁶⁰. The matters referred to in the preceding paragraph were matters which might affect Ms Lowe's interest in the 2008 Olive Early Project.

~~159~~¹⁶¹. At the time of granting Loan L0026036 and Loan L0027409, Timbercorp Finance unreasonably failed to disclose to Ms Lowe the matters referred to in paragraph ~~159~~¹⁵⁷.

~~160~~¹⁶². In the premises, the conduct of Timbercorp Finance was unconscionable conduct in contravention of section 12CB of the *ASIC Act* and/or in contravention of the unwritten law.

~~161~~¹⁶³. In the premises, this Honourable Court should order under section 12GM of the *ASIC Act* alternatively under its equitable jurisdiction that:

- (a) Ms Lowe is entitled to set-off all loan repayments;
- (b) Ms Lowe is relieved from any liability under Loan L0026036 and Loan L0027409; and/or
- (c) Loans L0026036 and L0027409 are void ab initio.

Misleading or Deceptive Conduct

~~162~~¹⁶⁴. Further, at all material times, Spencer Broad ("Broad") was a representative and agent of Timbercorp Finance.

~~163~~¹⁶⁵. The investments by Ms Lowe in the 2008 Single Payment Timberlot Project and/or in the 2008 Olive Early Project were financial products within the meaning and application of section 12BAA of the *ASIC Act*.

~~164~~¹⁶⁶. In or about June 2008, prior to Ms Lowe's investment in the 2008 Single Payment Timberlot Project and in the 2008 Olive Early Project, Broad as representative and agent of Timbercorp Finance, represented to Ms Lowe:

- (a) that if Ms Lowe defaulted on any of the loans in respect of the Projects, Timbercorp Securities would sell the lots Ms Lowe owned, which would have increased in value, and Timbercorp Finance would not seek recovery of the loans beyond the value of the owned lots as the lots would have a greater value than the loan balances;
- (b) that the Application Moneys for the Projects would be applied only to the management and servicing of the lots the subject of the schemes established within the Projects including Ms Lowe's lots, over the life of the schemes she had invested in, making her investments safer because they were standalone schemes with adequate funding to see them through to maturity

("the representations").

PARTICULARS

The representations were oral made by Broad to Ms Lowe in early June 2008. The material substance was to the effect alleged.

~~165~~.167. The representations constituted financial product advice within the meaning and application of the Corporations Act 2001 and section 12BAB of the *ASIC Act*.

~~166~~.168. In making the representations, Broad on behalf of Timbercorp Finance provided a financial service within the meaning and application of the *Corporations Act* and section 12BAB of the *ASIC Act*.

~~167~~.169. In reliance on the representations, Ms Lowe invested in 2008 Single Payment Timberlot Project and in the 2008 Olive Early Project and entered into Loans L0026664, L0026036, and L0027409.

~~168~~.170. The representations were made in trade or commerce.

~~169~~.171. In contravention of section 12DA of the *ASIC Act* the representations were false, misleading or deceptive or likely to mislead or deceive.

PARTICULARS

- (i) Timbercorp Finance is seeking recovery of the loan funds.
- (ii) The Application Moneys for the Projects were applied other than for the Project.

~~170.~~172. Further, insofar as the representations pertain to future matters, Ms Lowe relies on section 12BB(1) of the *ASIC Act*.

~~171.~~173. Had the representations not been made, Ms Lowe would not have invested in the 2008 Single Payment Timberlot Project or in the 2008 Olive Early Project.

~~172.~~174. By reason of the matters aforesaid, the defendant has suffered and will suffer loss and damage.

PARTICULARS

The defendant would not have sought to make the investments in the 2008 Single Payment Timberlot Project or in the 2008 Olive Early Project and would not have entered into the Loans.

If the defendant is liable to repayment of the Loans (with interest), that is the measure of her loss together with moneys she contributed as investment moneys, together loan repayments wasted.

~~173.~~175. Further or alternatively, if Broad was the representative or agent of Timbercorp Securities, then the representations as aforesaid were made by Timbercorp Securities in contravention of section 12DA of the *ASIC Act*, to which Timbercorp Finance was involved, and accordingly the defendant is entitled to compensation under section 12GM of the *ASIC Act*.

~~174.~~176. The defendant seeks a set-off of the loss and damage suffered against her indebtedness (if any) to the plaintiff.

AND THE DEFENDANT CLAIMS AGAINST TIMBERCORP FINANCE:

- A Equitable compensation.
- B That the defendant is entitled under section 533C of the Corporations Act and otherwise by law to set-off against her obligations under the loans referred to herein the rights and entitlements against Timbercorp Finance alleged herein.

- C Such further or other relief as the Court may consider appropriate.
- D Interest.
- E Costs

Dated: ~~16~~30 August 2016

D J FARRANDS

Amended by: D J FARRANDS

R KRUSE

Slater + Gordon

Slater + Gordon
Solicitors for the defendant