

**Form 5F**

Rule 5.02(3)

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMERCIAL COURT

S ECI 2014 000419

BETWEEN

**Timbercorp Finance Pty Ltd (In Liquidation) (ACN 054 581 190)**

Plaintiff

and

**Peter John White**

First Defendant

and

**Timbercorp Securities Limited (In Liquidation) (ACN 093 311 469)**

Second Defendant

**SECOND FURTHER AMENDED STATEMENT OF CLAIM**

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Date of document: 29/08/2016  
Filed on behalf of: The Plaintiff  
Prepared by:  
**Mills Oakley Lawyers**  
Lawyers  
Level 6  
530 Collins Street  
MELBOURNE VIC 3000

Solicitor's Code: 103868  
DX: 558  
Tel: +61 3 9670 9111  
Fax: +61 3 9605 0933  
Ref: DXJM/SJSM:5360669  
Case Manager: Sam Sheridan  
Case Manager Email:  
ssheridan@millsoakley.com.au

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1. The Plaintiff is and was at all material times:
  - (a) a corporation duly incorporated and registered pursuant to the *Corporations Act* 2001 (Cth) (**the Act**); and
  - (b) a company carrying on the business of providing finance, financial services and financial accommodation.
2. On or about 23 April 2009, the board of directors of the Plaintiff resolved to appoint administrators to the Plaintiff pursuant to s. 436A of the Act and Mark Anthony Korda and Craig Peter Shepard were so appointed.
3. On 29 June 2009, a meeting of creditors of the Plaintiff was convened pursuant to s. 439A of the Act. The creditors voting at the meeting resolved that the Plaintiff be wound up pursuant

to s. 439C(c) of the Act and Mark Anthony Korda and Craig Peter Shepard became the liquidators.

**Claims against the First Defendant**

**2007/08 TIMBERCORP (SINGLE PAYMENT) TIMBERLOT PROJECT (the 2007/08 Single Payment Timberlot Project), 2007 TIMBERCORP ALMOND PROJECT [POST 30 JUNE GROWERS] (the 2007 Almond Project) AND 2008 TIMBERCORP OLIVE EARLY PROJECT (the 2008 Olive Early Project**

**Loan Agreement L0025841**

4. On or about 2 June 2008 the First Defendant applied to the Plaintiff for a loan (**L0025841 Loan Application**) in the amount of \$205,756.00 (**L0025841 Loan Amount**) to fund part of the cost of his initial investment in the 2007/08 Single Payment Timberlot Project, 2007 Almond Project and 2008 Olive Early Project being registered managed investment schemes operated by the Second Defendant, Timbercorp Securities Limited (in Liquidation) (**TSL**).

**PARTICULARS**

The L0025841 Loan Application is in writing and contained in:

- (i) a document titled “2008 Timbercorp Projects Finance Package Loan Application Form”; and
- (ii) a document titled “2007 Timbercorp Projects Finance Package Loan Explanation and Loan Terms” (**L0025841 Loan Explanation and Loan Terms**).

The L0025841 Loan Application was executed by the First Defendant.

Copies of the documents are in the possession of the solicitors for the Plaintiff and can be inspected by prior appointment during ordinary business hours.

5. By executing the L0025841 Loan Application, the First Defendant acknowledged, confirmed and agreed *inter alia* that:

- (a) he had read and understood the L0025841 Loan Explanation and Loan Terms provided with the L0025841 Loan Application;
- (b) the Plaintiff made no recommendation in connection with any investment in the 2007/08 Single Payment Timberlot Project, 2007 Almond Project and 2008 Olive Early Project;
- (c) the Plaintiff recommended to the First Defendant that he:
  - (i) obtain independent professional advice as to whether any investment in the 2007/08 Single Payment Timberlot Project, 2007 Almond Project and 2008 Olive Early Project was an appropriate investment or was fit for any particular purpose that is required or is of a nature or quality to achieve any result that is desired; and
  - (ii) review the potential risks of any investment in the 2007/08 Single Payment Timberlot Project, 2007 Almond Project and 2008 Olive Early Project and of borrowing money to acquire that investment with his own legal and financial advisers;
- (d) his obligation to pay all interest on, and to repay, the L0025841 Loan Amount applied regardless of the success or failure of any investment in the 2007/08 Single Payment Timberlot Project, 2007 Almond Project and 2008 Olive Early Project or of the rate of return of income or capital from that investment or of the consequences of that investment or any act, conduct, dealing, omission, statement, representation or warranty by TSL or any other person; and
- (e) he could not claim or exercise any set-off, counterclaim or any similar right of defence in relation to any amounts that may be due and payable by him in connection with the 2007/08 Single Payment Timberlot Project, 2007 Almond Project and 2008 Olive Early Project loan agreement.

(collectively, **L0025841 Loan Acknowledgments**)

### PARTICULARS

The L0025841 Loan Acknowledgments are contained at page 7 of the L0025841 Loan Application under the heading "IMPORTANT ACKNOWLEDGEMENTS".

6. By completing and submitting the L0025841 Loan Application, the First Defendant offered to borrow the L0025841 Loan Amount from the Plaintiff on the terms specified therein on the basis that the terms contained in the L0025841 Loan Explanation and Loan Terms would regulate the loan agreement between him and the Plaintiff if his L0025841 Loan Application was accepted.
7. In pursuance of the L0025841 Loan Application the Plaintiff accepted the First Defendant's offer to borrow the L0025841 Loan Amount and agreed to lend to him the L0025841 Loan Amount (**Loan Agreement L0025841**).

### PARTICULARS

The Plaintiff's acceptance is partly in writing and partly to be implied.

Insofar as it is in writing, it is contained in the L0025841 Letter of Acceptance, enclosing the L0025841 Loan Details, referred to below in these particulars.

Insofar it is to be implied, it is to be implied from the Plaintiff paying the L0025841 Loan Amount as referred to below in these particulars.

Loan Agreement L0025841 is partly in writing and partly to be implied.

The written part is comprised of:

- (i) L0025841 Loan Application;
- (ii) L0025841 Loan Explanation and Loan Terms; and
- (iii) Letter of acceptance from the Plaintiff to the First Defendant dated 30 June 2008 (**L0025841 Letter of Acceptance**), enclosing a document titled "Loan Terms - Details" signed on behalf of the First Defendant by

his attorney on 30 June 2008 (**L0025841 Loan Details**).

Copies of the documents are in the possession of the Plaintiff's solicitors and can be inspected by prior appointment during ordinary business hours.

Insofar as Loan Agreement L0025841 is to be implied, it is to be implied from the Plaintiff paying the L0025841 Loan Amount to TSL (or as it directed) for the balance of the First Defendant's application money and loan application fee as described in the L0025841 Loan Application.

8. There were terms of Loan Agreement L0025841 as follows:

- (a) *"balance owing on your loan account"* meant, at any time, the difference between all amounts credited and all amounts debited to the First Defendant under Loan Agreement L0025841 at that time and when this amount would be calculated for the end of a day, it would include all debits and credits assigned to that day;
- (b) *"business day"* meant any day (other than a Saturday or a Sunday) banks were open for business in Victoria (**Business Day**);
- (c) *"costs"* included charges and expenses, and costs, charges and expenses in connection with legal and other advisers on a full indemnity basis;
- (d) *"higher interest rate"* meant a per annum interest rate of 13.20% (**L0025841 Higher Interest Rate**);
- (e) *"instalment"* meant a monthly principal and interest instalment of \$3,890.08 (**L0025841 Instalment**);
- (f) *"loan account"* meant an account the Plaintiff would establish in the First Defendant's name for recording all transactions in connection with Loan Agreement L0025841 (**L0025841 Loan Account**);
- (g) *"loan amount"* meant the L0025841 Loan Amount;
- (h) *"loan expiry date"* meant the date ending 72 months from 30 June 2008 (**L0025841 Loan Expiry Date**);

- (i) “*loan term*” meant 72 months from 30 June 2008 (**L0025841 Loan Term**);
- (j) “*lower interest rate*” meant a per annum rate of interest fixed at 10.75% for the L0025841 Loan Term (**L0025841 Lower Interest Rate**);
- (k) “*total amount owing*” (**L0025841 Total Amount Owing**) meant, at any time, the balance owing on the L0025841 Loan Account at that time, plus:
  - (i) all accrued interest charges, default interest charges and other amounts which the First Defendant was obliged to pay under Loan Agreement L0025841 but which had not been debited to the L0025841 Loan Account at that time (including insurance); and
  - (ii) all money which the First Defendant would or may owe the Plaintiff in the future under Loan Agreement L0025841.

#### **PARTICULARS**

- (i) The terms referred to in sub-paragraphs 8(a) to 8(c) are express and contained in cl. 11 of the L0025841 Loan Explanation and Loan Terms.
- (ii) The terms referred to in sub-paragraphs 8(d) and 8(e) are express and contained in cl. 11 of the L0025841 Loan Explanation and Loan Terms and in the L0025841 Loan Details.
- (iii) The term referred to in sub-paragraph 8(f) is express and contained in cl. 11 of the L0025841 Loan Explanation and Loan Terms.
- (iv) The terms referred to in sub-paragraphs 8(g) to 8(j) are express and contained in cl. 11 of the L0025841 Loan Explanation and Loan Terms and in the L0025841 Loan Details.
- (v) The term referred to in sub-paragraph 8(k) is express and contained in cl. 11 of the L0025841 Loan Explanation and Loan Terms.

9. There were further terms of Loan Agreement L0025841 as follows:

- (a) the Plaintiff agreed to lend the First Defendant the L0025841 Loan Amount by paying it to TSL (or as TSL directed) as payment of the balance of the application money for the First Defendant 's lots and his loan application fee as described in the L0025841 Loan Explanation and Loan Terms;
- (b) interest charges for each day would be calculated at the daily percentage rate on the balance owing on the L0025841 Loan Account for the end of that day;
- (c) the daily percentage rate would be the L0025841 Higher Interest Rate for that day divided by 365, but if the First Defendant paid interest on the due date and was not in default at that time, the Plaintiff would accept interest charges calculated at the L0025841 Lower Interest Rate;
- (d) interest charges would accrue daily from and including the date the Plaintiff paid the L0025841 Loan Amount under the term referred to in sub-paragraph 9(a) above;
- (e) the Plaintiff could charge interest at the L0025841 Higher Interest Rate on any other amount which was not paid on time, which charges would accrue daily and the First Defendant would pay them to the Plaintiff when asked;
- (f) the Plaintiff could debit any of these amounts to the L0025841 Loan Account without first notifying the First Defendant;
- (g) the First Defendant 's obligation to pay on time would not be cancelled by the provisions of the terms in sub-paragraphs 9(b) to 9(f) above;
- (h) the First Defendant would repay to the Plaintiff all amounts the First Defendant borrowed from the Plaintiff and the First Defendant would pay the Plaintiff interest charges;
- (i) the First Defendant would pay the L0025841 Instalments of \$3,890.08 over the L0025841 Loan Term;

- (j) each L0025841 Instalment was due and payable on the last Business Day of each month, with the first L0025841 Instalment due on the last Business Day of the month in which the L0025841 Loan Term commenced;
- (k) the First Defendant would pay the Plaintiff the L0025841 Total Amount Owing on the earlier of the date the final L0025841 Instalment was due, the L0025841 Loan Expiry Date or, if the First Defendant was in default, on the date it became due for payment *inter alia* under the terms set out in sub-paragraphs 9(p) to 9(r) below;
- (l) the First Defendant would pay the Plaintiff the Plaintiff's costs in enforcing Loan Agreement L0025841 after the First Defendant was in default;
- (m) the Plaintiff could debit any of these amounts to the L0025841 Loan Account on or after the date the Plaintiff paid them or the date they become due or payable by the First Defendant or the Plaintiff (whichever is earlier) without first notifying the First Defendant;
- (n) the First Defendant would indemnify the Plaintiff against liability, loss or costs the Plaintiff may suffer or incur:
  - (i) if the First Defendant defaulted under Loan Agreement L0025841;
  - (ii) in connection with actions, proceedings, claims and demands in connection with Loan Agreement L0025841;
- (o) any amount the First Defendant was obliged to pay the Plaintiff under Loan Agreement L0025841 in respect of which a time for payment was not stated, would be payable when the Plaintiff asked;
- (p) the First Defendant would be in default if:
  - (i) the First Defendant did not pay on time all amounts due under Loan Agreement L0025841;
  - (ii) the First Defendant did something he agreed not to do, or did not do something he agreed to do under Loan Agreement L0025841;



- (q) if the First Defendant was in default, the L0025841 Total Amount Owing would be payable on demand;
- (r) after a default occurred, the Plaintiff could sue the First Defendant for the L0025841 Total Amount Owing; and
- (s) the agreement was governed by the laws of Victoria and both the First Defendant and the Plaintiff agreed to submit to the non-exclusive jurisdiction of the courts of that State.

### **PARTICULARS**

- (i) The term referred to in sub-paragraph 9(a) is express and contained in cl. 1 of the L0025841 Loan Explanation and Loan Terms.
  - (ii) The terms referred to in sub-paragraphs 9(b) to 9(g) are express and contained in cl. 2 of the L0025841 Loan Explanation and Loan Terms.
  - (iii) The terms referred to in sub-paragraphs 9 (h) to 9 (k) are express and contained in cl. 3 of the L0025841 Loan Explanation and Loan Terms.
  - (iv) The terms referred to in sub-paragraphs 9 (l) to 9 (o) are express and contained in cl. 4 of the L0025841 Loan Explanation and Loan Terms.
  - (v) The terms referred to in sub-paragraphs 9 (p) to 9 (r) are express and contained in cl. 7 of the L0025841 Loan Explanation and Loan Terms.
  - (vi) The term referred to in sub-paragraph 9 (s) is express and contained in cl. 9 of the L0025841 Loan Explanation and Loan Terms.
10. The Plaintiff paid the L0025841 Loan Amount to TSL (or as it directed) as payment of the balance of the application money for the First Defendant's lots and his loan application fee, by:
- (a) the following:
    - (i) a debit entry of \$4,473,412 (which included the L0025841 Loan Amount) on 14 June 2008 to an account in the general ledger of the Plaintiff named "Loan Control Account" and numbered 51-1221, by way of a journal voucher numbered

504786 entered in the Great Plains accounting software maintained by the Plaintiff and TSL;

- (ii) a credit entry of \$4,473,412 (which included the L0025841 Loan Amount) on 14 June 2008 to an account in the general ledger of the Plaintiff named "Loan – Timbercorp Securities Ltd" and numbered 51-1208, by way of the same journal voucher;
- (iii) a debit entry of \$4,473,412 (which included the L0025841 Loan Amount) on 14 June 2008 to an account in the general ledger of TSL named "Loan – Timbercorp Finance Pty Ltd" and numbered 12-1200, by way of the same journal voucher;
- (iv) a credit entry of \$4,473,412 (which included the L0025841 Loan Amount) on 14 June 2008 to an account in the general ledger of TSL named "Suspense New Loans Advanced" and numbered 12-7234, by way of the same journal voucher;
- (v) TSL recording in its "Timbercorp Information Management System", on 13 June 2008, the settlement of the First Defendant's balance liabilities to TSL (following payment of his deposit) recorded in invoices 2256378 and 2261873 issued 13 June 2008,

and thereby loaned it to the First Defendant in accordance with the terms of the Loan Agreement L0025841.

- 11. Between 31 July 2008 and 30 April 2009 the First Defendant paid L0025841 Instalments to the Plaintiff under Loan Agreement L0025841.
- 12. On or about 30 May 2009, the First Defendant defaulted under Loan Agreement L0025841 by failing to pay the L0025841 Instalment when due and payable.

### **PARTICULARS**

The First Defendant failed to pay the L0025841 Instalment due on the last Business Day of the month of May 2009.

- 13. By reason of the foregoing paragraph:

- (a) the First Defendant was at all times from 30 May 2009 in default under Loan Agreement L0025841; and
  - (b) the L0025841 Total Amount Owing under Loan Agreement L0025841 was payable on demand.
14. On 30 October 2009 the Plaintiff made a demand for the L0025841 Total Amount Owing under Loan Agreement L0025841 as at 23 October 2009 to be paid by the First Defendant within 7 days of service of the demand (**L0025841 Demand**).

### PARTICULARS

The L0025841 Demand is in writing, a copy of which is in the possession of the Plaintiff's solicitors and may be inspected by prior appointment.

15. The First Defendant failed and/or neglected and/or refused to pay the amount so demanded within 7 days or at all.
16. By letter dated 2 May 2014 the Plaintiff wrote to the First Defendant, *inter alia*, confirming that he remained in default of his payment obligations under Loan Agreement L0025841, advising the L0025841 Total Amount Owing as at 31 March 2014, and notifying of the Plaintiff's intention to issue proceedings 14 days from the date of the letter (**L0025841 Notice of Intention to Sue**).

### PARTICULARS

The L0025841 Notice of Intention to Sue is in writing, a copy of which is in the possession of the Plaintiff's solicitors and may be inspected by prior appointment.

17. By reason of the matters aforesaid, the First Defendant is and remains indebted to the Plaintiff for the L0025841 Total Amount Owing, as at 30 September 2014 being the sum of \$371,097.58 plus costs and interest calculated at the L0025841 Higher Interest Rate thereupon at 13.20% per annum being \$134.21 per day.

### **Claims against the Second Defendant**

18. TSL:
  - (a) is and was at all material times a corporation duly incorporated and registered pursuant to the Act; and
  - (b) was at all material times a company carrying on the business of a responsible entity of forestry and horticultural managed investment schemes, including the 2007/08 Single Payment Timberlot Project, 2007 Almond Project and 2008 Olive Early Project.
19. On or about 23 April 2009, the board of directors of TSL resolved to appoint administrators to TSL pursuant to s. 436A of the Act and Mark Anthony Korda and Leanne Kylie Chessser were so appointed.
20. On 29 June 2009, a meeting of creditors of TSL was convened pursuant to s. 439A of the Act. The creditors voting at the meeting resolved that TSL be wound up pursuant to s. 439C(c) of the Act and Mark Anthony Korda and Leanne Kylie Chessser became the liquidators.
21. The Amended Defence of the First Defendant to the Plaintiff's claim, dated 29 August 2016 (the **Defence**), pleads, *inter alia*, that by reason of the matters referred to in paragraphs 4 to 12 therein (and the paragraphs to which they refer), the Plaintiff made no loan to the First Defendant (the **no loan defence**).
22. The Plaintiff disputes the no loan defence, and in that regard relies upon the matters herein at paragraphs 1 to 17 and in its Reply to the Defence.
23. In relation to the no loan defence, the First Defendant alleges in paragraph 5A of the Defence that, by reason of the matters referred to in paragraphs 76A to 76C of the Defence, the debit and credit entries by way of journal voucher 504786 and the alleged receipt entry by TSL in TIMS as referred to in paragraph 10(a) above (the **payment**) do not and cannot constitute the payment required by Loan Agreement L0025841.
24. The Plaintiff disputes the allegations in paragraph 5A of the Defence (as read with the paragraphs to which it refers), including by reason of the matters pleaded in its Reply to the

Defence, but, in the event that one or more of the First Defendant's allegations in paragraph 5A of the Defence are established, then (and only then) the Plaintiff says in the alternative against TSL as follows.

25. For the purpose of its contingent claim against TSL and without admission, the Plaintiff refers to and repeats the allegations in the Defence.
26. TSL knew that the Plaintiff offered to lend money to investors in the 2007 Almond Project, the 2008 Olive Early Project and the 2007/08 Single Payment Timberlot Project, on terms that the loan money:
  - (a) be paid to TSL (or as it directs) as payment of the balance of the borrowers' application money for grovelots, almondlots and timberlots; and
  - (b) pay the borrowers' loan application fee.

### **PARTICULARS**

The term referred to is contained in cl 1 of the Provisions of the "2008 Timbercorp Projects Finance Package Loan Application Form".

A copy is in the possession of the solicitors for the Plaintiff and can be inspected by prior appointment during ordinary business hours.

27. It was reasonably foreseeable,
  - (a) in relation to the 2007 Almond Project, that if TSL:
    - (i) did not receive and hold that part of the payment relating to the 2007 Almond Project on behalf of the First Defendant as payment of the balance of his application money to TSL as responsible entity, in accordance with Loan Agreement L0025841;
    - (ii) further or alternatively, did not apply that part of the payment relating to the 2007 Almond Project in discharge of the First Defendant's liability under the Almond Sub-Lease and Almondlot Management Agreement;

- (iii) further or alternatively, did not act in accordance with the scheme constitution and or PDS,

then the First Defendant might deny that the Plaintiff made any loan to him as set out in paragraph 5A of the Defence;

- (b) in relation to the 2008 Olive Early Project, that if TSL:

- (i) did not receive and hold that part of the payment relating to the 2008 Olive Project on behalf of the First Defendant as payment of the balance of his application money to TSL as responsible entity, in accordance with Loan Agreement L0025841;
- (ii) further or alternatively, did not apply that part of the payment relating to the 2007 Almond Project in discharge of the First Defendant's liability under the Grovelot Management Agreement;
- (iii) further or alternatively, did not act in accordance with the scheme constitution and or PDS,

then the First Defendant might deny that the Plaintiff made any loan to him as set out in paragraph 5A of the Defence;

- (c) in relation to the 2007/08 Single Payment Timberlot Project, if TSL:

- (i) did not receive and hold that part of the payment relating to the 2007/08 Single Payment Timberlot Project on behalf of the First Defendant of the loan amount as payment of the balance of his application money to TSL as responsible entity, in accordance with Loan Agreement L0025841;
- (ii) further or alternatively, did not apply that part of the payment relating to the 2007/08 Single Payment Timberlot Project in discharge of the First Defendant's liability under the Timberlot Management Agreement;
- (iii) further or alternatively, did not act in accordance with the scheme constitution and or PDS,

then the First Defendant might deny that the Plaintiff made any loan to him as set out in paragraph 5A of the Defence.

28. The Plaintiff was reliant upon TSL:

- (a) receiving and holding the payment on behalf of the First Defendant as payment of the balance of his application moneys to TSL as responsible entity of each scheme, in accordance with Loan Agreement L0025841;
  - (b) applying the payment in discharge of the First Defendant's liability under the scheme agreements of each scheme;
  - (c) acting in accordance with the scheme constitutions and or PDSs,
- and was vulnerable to the consequences if TSL failed to do so.

29. In the premises, at all material times and in relation to the 2007 Almond Project, the 2008 Olive Early Project, and the 2007/08 Single Payment Timberlot Project, TSL owed to the Plaintiff a duty to take reasonable care by its officers, servants and agents to:

- (a) receive and hold the payment on behalf of the First Defendant as payment of the balance of his application moneys to TSL as responsible entity of each scheme, in accordance with Loan Agreement L0025841;
- (b) apply the payment in discharge of the First Defendant's liability under the scheme agreements of each scheme;
- (c) act in accordance with the scheme constitutions and or PDSs.

30. By reason of the matters referred to in paragraph 5A of the Defence and the fact that TSL accepted the Plaintiff's payment to it (or as it directed) as payment of the balance of Mr White's application money for grovelots, almondlots and timberlots, TSL breached its duty to the plaintiff.

31. If, by reason of the First Defendant's allegations in paragraph 5A of the Defence, the First Defendant is held not liable to the Plaintiff in the sum claimed or any part thereof, the Plaintiff has suffered loss and damage in such amount by reason of TSL's breach of duty.

**AND THE PLAINTIFF CLAIMS AGAINST THE FIRST DEFENDANT:**

- A. \$371,097.58
- B. Interest at the L0025841 Higher Rate of Interest as defined in Loan Agreement  
L0025841 being \$134.21 per day, alternatively pursuant to statute.
- C. Costs of the proceeding on a full indemnity basis pursuant to the terms of each of the  
respective Loan Agreements as defined.
- D. Such further or other orders as this Honourable Court deems fit.



**AND THE PLAINTIFF CLAIMS CONTINGENTLY AGAINST THE SECOND DEFENDANT:**

- A. Damages.
- B. Interest pursuant to statute.
- C. Costs.
- D. Such further or other orders as this Honourable Court deems fit.

**DATED:** 29 August 2016

D.J. Batt

C. O. H. Parkinson

H.A. Tiplady

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**Mills Oakley**

Solicitors for the Plaintiff