

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

No. S CI-02972 of 2014

BETWEEN

TIMBERCORP FINANCE PTY LTD (IN LIQUIDATION) (ACN 054 581 190)

Plaintiff

and

DOUGLAS JAMES COLLINS

First Defendant

JANET ANN COLLINS

Second Defendant

TIMBERCORP SECURITIES LIMITED (IN LIQUIDATION) (ACN 092 311 469)

Third Defendant

SECOND FURTHER AMENDED STATEMENT OF CLAIM
Amended pursuant to the leave granted by the orders of the Honourable Justice
Judd made on 2 September 2016

Date of document: 8 September 2016
Filed on behalf of: The Plaintiff
Prepared by:
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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) (**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.

Claim Against the First and Second Defendants

2008 TIMBERCORP OLIVE EARLY PROJECT (the 2008 Olive Early Project)

Loan Agreement L0026087

4. On or about 12 June 2008 the First and Second Defendants applied to the Plaintiff for a loan (**L0026087 Loan Application**) in the amount of \$51,300.00 (**L0026087 Loan Amount**) to fund part of the cost of their Initial Stage investment in the 2008 Olive Early Project being a registered managed investment scheme operated by the Third Defendant, Timbercorp Securities Limited (In Liquidation) (**TSL**).

PARTICULARS

The L0026087 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” (**L0026087 Loan Explanation and Loan Terms**).

The L0026087 Loan Application was completed and executed by the Defendants.

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 L0026087 Loan Application, the First and Second Defendants acknowledged, confirmed and agreed *inter alia* that:

- (a) they had read and understood the L0026087 Loan Explanation and Loan Terms provided with the L0026087 Loan Application;
- (b) the Plaintiff made no recommendation in connection with any investment in the 2008 Olive Early Project;
- (c) the Plaintiff recommended to the First and Second Defendants that they:
 - (i) obtain independent professional advice as to whether any investment in the 2008 Olive Early Project was an appropriate investment or was fit for any particular purpose that is required or is of a nature of quality to achieve any result that is desired; and
 - (ii) review the potential risks of any investment in the 2008 Olive Early Project and of borrowing money to acquire that investment with their own legal and financial advisers;
- (d) their obligation to pay all interest on, and to repay, the L0026087 Loan Amount applied regardless of the success or failure of any investment in the 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;
- (e) they 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 them in connection with the 2008 Olive Early Project loan agreement.

(collectively, **L0026087 Loan Acknowledgments**)

PARTICULARS

The L0026087 Loan Acknowledgments are contained at page 7 of the L0026087 Loan Application under the heading “IMPORTANT ACKNOWLEDGEMENTS”.

6. By completing and submitting the L0026087 Loan Application, the First and Second Defendants offered to borrow the L0026087 Loan Amount from the Plaintiff on the terms specified therein on the basis that the terms contained in the L0026087 Loan Explanation and Loan Terms would regulate the loan agreement between them and the Plaintiff if their L0026087 Loan Application was accepted.
7. In pursuance of the L0026087 Loan Application the Plaintiff accepted the First and Second Defendants' offer to borrow the L0026087 Loan Amount and agreed to lend to them the L0026087 Loan Amount (**Loan Agreement L0026087**).

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 L0026087 Letter of Acceptance, enclosing the L0026087 Loan Details, referred to below in these particulars.

Insofar it is to be implied, it is to be implied from the Plaintiff paying the L0026087 Loan Amount as referred to below in these particulars.

Loan Agreement L0026087 is partly in writing and partly to be implied.

The written part is comprised of:

- (i) L0026087 Loan Application;
- (ii) L0026087 Loan Explanation and Loan Terms; and
- (iii) Letter of acceptance from the Plaintiff to the First and Second Defendants dated 15 June 2008 (**L0026087 Letter of Acceptance**), enclosing a document titled "Loan Terms - Details" signed on behalf of the First and Second Defendants by their attorney on 15 June 2008 (**L0026087 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 L0026087 is to be implied, it is to be implied from the Plaintiff paying the L0026087 Loan Amount to TSL (or as it directed) for the balance of the First and Second Defendants' application money and loan application fee as described in the L0026087 Loan Application.

8. There were terms of Loan Agreement L0026087 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 and Second Defendants under Loan Agreement L0026087 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 13.2% (**L0026087 Higher Interest Rate**);
 - (e) *"instalment"* meant a monthly principal and interest instalment of \$692.22 (**L0026087 Instalment**);
 - (f) *"loan account"* meant an account the Plaintiff would establish in the First and Second Defendants' names for recording all transactions in connection with Loan Agreement L0026087 (**L0026087 Loan Account**);
 - (g) *"loan amount"* meant the L0026087 Loan Amount;

- (h) “*loan expiry date*” meant the date ending 120 months from 30 June 2008
(**L0026087 Loan Expiry Date**);
- (i) “*loan term*” meant 120 months from 30 June 2008 (**L0026087 Loan Term**);
- (j) “*lower interest rate*” meant a per annum rate of interest fixed at 10.5% for the
L0026087 Loan Term (**L0026087 Lower Interest Rate**);
- (k) “*total amount owing*” (**L0026087 Total Amount Owing**) meant, at any time,
the balance owing on the L0026087 Loan Account at that time, plus:
 - (i) all accrued interest charges, default interest charges and other amounts
which the First and Second Defendants were obliged to pay under Loan
Agreement L0026087 but which had not been debited to the L0026087
Loan Account at that time (including insurance); and
 - (ii) all money which the First and Second Defendants would or may owe the
Plaintiff in the future under Loan Agreement L0026087.

PARTICULARS

- (i) The terms referred to in sub-paragraphs 8(a) to 8(c) are express and
contained in cl. 11 of the L0026087 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 L0026087 Loan Explanation and Loan Terms
and in the L0026087 Loan Details.
- (iii) The term referred to in sub-paragraph 8(f) is express and contained in cl.
11 of the L0026087 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 L0026087 Loan Explanation and Loan Terms
and in the L0026087 Loan Details.
- (v) The term referred to in sub-paragraph 8(k) is express and contained in
cl. 11 of the L0026087 Loan Explanation and Loan Terms.

9. There were further terms of Loan Agreement L0026087 as follows:
- (a) the Plaintiff agreed to lend the First and Second Defendants the L0026087 Loan Amount by paying it to TSL (or as TSL directed) as payment of the balance of the application money for the First and Second Defendants' lots and their loan application fee as described in the L0026087 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 L0026087 Loan Account for the end of that day;
 - (c) the daily percentage rate would be the L0026087 Higher Interest Rate for that day divided by 365, but if the First and Second Defendants paid interest on the due date and was not in default at that time, the Plaintiff would accept interest charges calculated at the L0026087 Lower Interest Rate;
 - (d) interest charges would accrue daily from and including the date the Plaintiff paid the L0026087 Loan Amount under the term referred to in sub-paragraph 9(a) above;
 - (e) the Plaintiff could charge interest at the L0026087 Higher Interest Rate on any other amount which was not paid on time, which charges would accrue daily and the First and Second Defendants would pay them to the Plaintiff when asked;
 - (f) the Plaintiff could debit any of these amounts to the L0026087 Loan Account without first notifying the First and Second Defendants;
 - (g) the First and Second Defendants' 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 and Second Defendants would repay to the Plaintiff all amounts the First and Second Defendants borrowed from the Plaintiff and the First and Second Defendants would pay the Plaintiff interest charges;

- (i) the First and Second Defendants would pay the L0026087 Instalments of \$692.22 over the L0026087 Loan Term;
- (j) each L0026087 Instalment was due and payable on the last Business Day of each month, with the first L0026087 Instalment due on the last Business Day of the month in which the L0026087 Loan Term commenced;
- (k) the First and Second Defendants would pay the Plaintiff the L0026087 Total Amount Owing on the earlier of the date the final L0026087 Instalment was due, the L0026087 Loan Expiry Date or, if the First and Second Defendants were 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 and Second Defendants would pay the Plaintiff the Plaintiff's costs in enforcing Loan Agreement L0026087 after the First and Second Defendants were in default;
- (m) the Plaintiff could debit any of these amounts to the L0026087 Loan Account on or after the date the Plaintiff paid them or the date they become due or payable by the First and Second Defendants or the Plaintiff (whichever is earlier) without first notifying the First and Second Defendants;
- (n) the First and Second Defendants would indemnify the Plaintiff against liability, loss or costs the Plaintiff may suffer or incur:
 - (i) if the First and Second Defendants defaulted under Loan Agreement L0026087;
 - (ii) in connection with actions, proceedings, claims and demands in connection with Loan Agreement L0026087;
- (o) any amount the First and Second Defendants were obliged to pay the Plaintiff under Loan Agreement L0026087 in respect of which a time for payment was not stated, would be payable when the Plaintiff asked;
- (p) the First and Second Defendants would be in default if:

- (i) the First and Second Defendants did not pay on time all amounts due under Loan Agreement L0026087;
- (ii) the First and Second Defendants did something they agreed not to do, or did not do something they agreed to do under Loan Agreement L0026087;
- (q) if the First and Second Defendants were in default, the L0026087 Total Amount Owing would be payable on demand;
- (r) after a default occurred, the Plaintiff could sue the First and Second Defendants for the L0026087 Total Amount Owing.

PARTICULARS

- (i) The term referred to in sub-paragraph 9(a) is express and contained in cl. 1 of the L0026087 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 L0026087 Loan Explanation and Loan Terms L0026087.
 - (iii) The terms referred to in sub-paragraphs 9(h) to 9(k) are express and contained in cl. 3 of the L0026087 Loan Explanation and Loan Terms in Loan Agreement L0026087.
 - (iv) The terms referred to in sub-paragraphs 9(l) to 9(o) are express and contained in cl. 4 of the L0026087 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 L0026087 Loan Explanation and Loan Terms.
10. The Plaintiff paid the L0026087 Loan Amount to TSL (or as it directed) as payment of the balance of the application money for the First and Second Defendants' lots and their loan application fee, by:
- (a) the following:

- (i) a debit entry of \$1,118,840 (which included the L0026087 Loan Amount) on 18 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 505731 entered in the Great Plains accounting software maintained by the Plaintiff and TSL;
- (ii) a credit entry of \$1,118,840 (which included the L0026087 Loan Amount) on 18 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 \$1,118,840 (which included the L0026087 Loan Amount) on 18 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 \$1,118,840 (which included the L0026087 Loan Amount) on 18 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 15 June 2008, the settlement of the First and Second Defendants’ balance liability to TSL (following payment of his deposit) recorded in invoice 2267151 issued 15 June 2008,

and thereby loaned it to the First and Second Defendants in accordance with the terms of the Loan Agreement L0026087.

- 11. Between 31 July 2008 and 29 May 2009 the First and Second Defendants paid L0026087 Instalments to the Plaintiff under Loan Agreement L0026087.
- 12. On or about 1 July 2009, the First and Second Defendants defaulted under Loan Agreement L0026087 by failing to pay the L0026087 Instalment when due and payable.

PARTICULARS

The First and Second Defendants failed to pay the L0026087 Instalment due on the last Business Day of the month of June 2009.

13. By reason of the foregoing paragraph:
 - (a) the First and Second Defendants were at all times from 1 July 2009 in default under Loan Agreement L0026087; and
 - (b) the L0026087 Total Amount Owing under Loan Agreement L0026087 was payable on demand.
14. On 19 March 2010 the Plaintiff made a demand for the L0026087 Total Amount Owing under Loan Agreement L0026087 as at 2 March 2010 to be paid by the First and Second Defendants within 7 days of service of the demand (**First L0026087 Demand**).

PARTICULARS

The First L0026087 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 and Second Defendants 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 and Second Defendants, *inter alia*, confirming that that they remained in default of their payment obligations under Loan Agreement L0026087, advising the L0026087 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 (**L0026087 Notice of Intention to Sue**).

PARTICULARS

The L0026087 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 and Second Defendants are and remain indebted to the Plaintiff for the L0026087 Total Amount Owing, as at 30 April 2014 being the sum of \$90,501.68 plus costs and interest calculated at the L0026087 Higher Interest Rate thereupon at 13.2% per annum being \$32.73 per day.

Claim Against the Third 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 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 and Second Defendants to the Plaintiff's Further Amended Statement of Claim, dated 30 June 2016 (the **Defence**) pleads, *inter alia*, that by reason of the matters referred to in paragraphs 3A to 12 therein (and the paragraphs to which they refer), the Plaintiff made no loan to the First and Second Defendants (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 First and Second Defendants' Defence dated 30 June 2016 (**Reply**).

23. In relation to the no loan defence, the First and Second Defendants allege 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 505731 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 L0026087.
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, but, in the event that one or more of the First and Second Defendants' 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 2008 Olive Early Project on terms that the loan money be paid to TSL (or as it directs) as payment of:
- (a) the balance of the borrower's application money for grovelots payable under the management agreement or licence agreement; and
 - (b) the borrower's 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, in relation to the 2008 Olive Project, that if TSL:
- (a) did not receive and hold that part of the payment relating to the 2008 Olive Project on behalf of the First and Second Defendants as payment of the

balance of their application money to TSL as responsible entity, in accordance with Loan Agreement L0026087;

(b) further or alternatively, did not apply that part of the payment relating to the 2008 Olive Project in discharge of the First and Second Defendants' liability under the Grovelot Management Agreement;

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

then the First and Second Defendants might deny that the Plaintiff made any loan to them 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 and Second Defendants as payment of the balance of their application moneys to TSL as responsible entity of the scheme, in accordance with Loan Agreement L0026087;

(b) applying the payment in discharge of the First and Second Defendants' liability under the scheme agreements of the scheme;

(c) acting in accordance with the scheme constitution and or PDS, 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 2008 Olive Early 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 and Second Defendants as payment of the balance of their application moneys to TSL as responsible entity of the scheme, in accordance with Loan Agreement L0026087;

(b) apply the payment in discharge of the First and Second Defendants' liability under the scheme agreements of the scheme;

(c) act in accordance with the scheme constitution and or PDS.

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 the First and Second Defendants' application money for grovelots, TSL breached its duty to the Plaintiff.

31. If, by reason of the First and Second Defendants' allegations in paragraph 5A of the Defence, the First and Second Defendants are 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 AND SECOND DEFENDANTS:

- A. \$90,501.68
- B. Interest at the L0026087 Higher Rate of Interest as defined in Loan Agreement L0026087 being \$32.73 per day, alternatively pursuant to statute.
- C. Costs of the proceeding on a full indemnity basis pursuant to the terms of the L0026087 Loan Agreement as defined.
- D. Such further or other orders as this Honourable Court deems fit.

AND THE PLAINTIFF CONTINGENTLY CLAIMS AGAINST THE THIRD DEFENDANT

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

Dated: 8 September 2016

D.J. Batt

C. O. H. Parkinson

H.A. Tiplady

MILLS OAKLEY

Solicitors for the Plaintiff