

FURTHER AMENDED COMMERCIAL LIST STATEMENT

(Filed pursuant to leave granted by Justice Ball Hammerschlag on ~~3 August 2018~~ 14 August 2020)

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
List	Commercial List
Registry	Sydney
Case number	2018/76580

TITLE OF PROCEEDINGS

First Plaintiff	Giabal Pty Ltd ACN 009 863 807
Second Plaintiff	Geoffry Edward Underwood
First Defendant	Gunns Plantations Ltd (in Liquidation) ACN 091 232 209
Second Defendant	Gunns Ltd (in Liquidation) (Receivers and Managers Appointed) ACN 009 478 148
<u>Third Defendant</u>	<u>Wayne Leonard Chapman</u>
Number of Defendants	11 Refer to Party Details at rear for full list of parties

FILING DETAILS

Filed for	Giabal Pty Ltd , ACN 009 863 807 First Plaintiff Geoffry Edward Underwood , Second Plaintiff
Legal representative	Gordon Grieve Piper Alderman
Legal representative reference	GTG.MDM.402437
Contact name and telephone	Gordon Grieve Tel: +61 2 9253 9999
Contact email	ggrieve@piperalderman.com.au

A NATURE OF DISPUTE

1. This proceeding is commenced as a representative proceeding under Part 10 of the *Civil Procedure Act* 2005 (NSW) by the Plaintiffs on their own behalves and on behalf of other persons who or which:
 - 1.1 acquired an interest in one or more of the managed investment schemes known as the "Woodlot Projects" operated by ~~the First Defendant~~, Gunns Plantations Limited (ACN 091 232 209) (in Liquidation) (Receivers and Managers Appointed) (**GPL**), in the periods 2002-2003, 2005-2006 and 2008-2009 (**Gunns Woodlot Schemes**);

1.2 suffered loss or damage because of the conduct of the Defendants pleaded below; and

1.3 have entered into litigation funding agreements with LCM Operations Pty Ltd (ACN 616 451 033),

(Group Members).

2. As at the date of commencement of this proceeding, there were more than seven Group Members.
3. As at the date of commencement of this proceeding, the First Defendant was GPL and the Second Defendant was Gunns Limited (ACN 009 478 148) (in Liquidation) (Receivers and Managers Appointed) (Gunns Ltd). Leave was granted for the commencement and maintenance of the proceedings against those entities pursuant s.500 of the Corporations Act 2001 (Cth) (Act) on 13 April 2018. On 4 December 2019, that leave was revoked due to the exhaustion of funds under a primary policy of insurance that had been used to defend the proceedings. The first excess layer insurer, the Twelfth Defendant (Catlin), and another excess layer insurer, the Thirteenth Defendant (Chubb) have denied indemnity to GPL and the Third and Fifth to Ninth Defendants and the late John Eugene Gay (Mr Gay) (together, GPL Directors). The Plaintiffs challenge those denials of indemnity pursuant to the Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW) (Third Party Claims Act), and seek to recover directly from Catlin and Chubb the loss they have suffered as a result of GPL's and the GPL Directors' conduct pleaded below.
4. As at the date of the commencement of this proceeding, Mr Gay was the Fourth Defendant. Pursuant to Uniform Civil Procedure Rules r 6.30(2), the Court ordered on 19 July 2019 that this proceeding be continued against Robert Watson and Erica Gay as the legal personal representatives for the estate of Mr Gay in his place.

B ISSUES LIKELY TO ARISE

1. The issues in the proceeding include ~~concern~~ whether the Third and Fifth to Eleventh Defendants, Mr Gay, GPL and Gunns breached their various duties as directors, auditors and trustees as set out below, in respect of which the following common questions of fact and law arise:

(as to the Gunns Woodlot Schemes)

1.1 whether the Gunns Woodlot Schemes operated as pleaded in section C2 below;

(as to the ~~claims against GPL~~)

1.2 whether GPL owed the duties pleaded in paragraphs 65 to 67A below;

1.3 if GPL owed the duties pleaded in paragraphs 65 to 67A, whether GPL breached the duties by engaging in the conduct pleaded in paragraphs 79 to 80 below;

1.4 if GPL breached the duties as pleaded in paragraphs 79 to 80A, whether the breaches caused the Plaintiffs' loss as pleaded in paragraphs 86A 87 to 90A and 102 to 104 below;

(as to the ~~claims against Gunns Ltd~~)

1.5 whether Gunns Ltd the ~~Second Defendant~~ (~~Gunns Ltd~~) owed the duties pleaded in paragraph 68 below;

~~1.6 if Gunns Ltd owed the duties pleaded in paragraph 68 below, whether Gunns Ltd breached the duties by engaging in the conduct pleaded in paragraph 81 below;~~

~~1.7 if Gunns Ltd breached the duties as pleaded in paragraph 81 below, whether the breaches caused the Plaintiffs' loss as pleaded in paragraphs 95 to 97 and 102 to 104 below;~~

(as to the ~~claims against the GPL Directors~~)

1.8 whether the GPL Directors ~~Third to Ninth Defendants~~ (~~GPL Directors~~) owed the duties pleaded in paragraph 69 below;

1.9 if the GPL Directors owed the duties pleaded in paragraph 69 below, whether the GPL Directors breached the duties by engaging in the conduct pleaded in paragraphs 82 to 85 below;

1.10 if the GPL Directors breached the duties as pleaded in paragraphs 82 to 85 below, whether the breaches caused the Plaintiffs' loss as pleaded in paragraphs 90B94 to 94A and 102 to 104 below;

(as to the claims against KPMG)

- 1.11 whether the Tenth and Eleventh Defendants (**KPMG**) owed the duties pleaded in paragraphs 70 to 72 below;
- 1.12 if KPMG owed the duties pleaded in paragraphs 70 to 72 below, whether KPMG breached the duties by engaging in the conduct pleaded in paragraph 86 below;
- 1.13 if KPMG breached the duties as pleaded in paragraph 86 below, whether the breaches caused the Plaintiffs' loss as pleaded in paragraphs 98 to 101 and 102 to 104 below;

(as to the relief sought by the Plaintiffs)

- 1.14 what the correct principles are for measuring the Plaintiffs' and Group Members' compensable loss and damage as pleaded herein; and
 - 1.15 what relief other than monetary relief may be available to the Plaintiffs and Group Members.
2. In addition, issues in the proceeding arise as to:
- 2.1 whether GPL and the GPL Directors are 'insured persons' with 'insured liabilities' within the meaning of ss.3-4 of the Third Party Claims Act in respect of the matters pleaded by the Plaintiffs and Group Members in these proceedings; and
 - 2.2 whether the Plaintiffs and Group Members may recover the amount of GPL's and the GPL Directors' insured liabilities directly from Catlin and Chubb under s.4 of the Third Party Claims Act.

C PLAINTIFF'S CONTENTIONS**C1 GPL, GUNNS LTD AND THE DEFENDANTS****GPL**

- 1. GPL, was at all material times:
 - 1.1 a company registered pursuant to the Act and capable of being sued in its corporate name and style;

- 1.2 a wholly-owned subsidiary of Gunns Limited (ACN 009 478 148) (in Liquidation) (Receivers and Managers Appointed) (**Gunns Ltd**);
- 1.3 the responsible entity (**RE**) of the Gunns Woodlot Schemes; and
- 1.4 the licensee of Australian Financial Services Licence No. 238701 (**AFSL**).

Gunns Ltd

2. ~~The Second Defendant~~, Gunns Ltd, was at all material times:
 - 2.1 a company registered pursuant to the Act and capable of being sued in its corporate name and style;
 - 2.2 a member of the Gunns group of companies (**Gunns Group**);
 - 2.3 the parent company of GPL; and
 - 2.4 as pleaded below, the “Custodian” of the Gunns Woodlot Schemes.
3. Gunns Ltd was listed on the Australian Stock Exchange until trading in its shares was suspended in March 2012.

Directors and Officers of Gunns Ltd and GPL

4. The Third Defendant, Wayne Leonard Chapman, was the secretary for GPL from 21 February 2000 to 11 August 2010, and is the secretary for Gunns Ltd and was appointed on 1 January 1998.
5. ~~The Fourth Defendant, John Eugene Mr Gay~~, was a director of GPL from 21 February 2000 to 3 June 2010, and was a director of Gunns Ltd from 4 July 1986 to 27 May 2010.
6. The Fifth Defendant, Rodney John Loone, was a director of GPL from 21 February 2000 to 27 November 2012.
7. The Sixth Defendant, Leslie Ralph Baker, was a director of GPL from 21 February 2000 to 13 August 2010.
8. The Seventh Defendant, Robert Henry Graham, was a director of GPL from 16 April 2008 to 27 November 2012.

9. The Eighth Defendant, Robin Gray, was a director of GPL from 24 February 2009 to 3 February 2011, and was a director of Gunns between 29 August 1996 to 5 May 2010.
10. The Ninth Defendant, Paul Desmond Teisseire, was a director of GPL from 3 June 2010 to 27 November 2012, and was a director of Gunns from 27 March 2008 to 20 July 2012.
11. In respect of each of the Gunns Woodlot Schemes, the Third and Fifth to Ninth Defendants and Mr Gay are referred to herein as the “**GPL Directors**” as at the times they were directors of GPL.

KPMG

12. The Tenth to Eleventh Defendants were at the relevant times:
- 12.1 partners of KPMG (a firm), which was at all material times:
- (a) operating from offices at 3/100 Melville Street, Hobart, Tasmania, 33 George Street, Launceston, Tasmania providing audit, advisory and tax services in Australia under the partnership name “KPMG”;
 - (b) the auditors for Gunns Ltd and GPL; and
 - (c) as pleaded below, the compliance plan auditors for the Gunns Woodlot Schemes; and
- 12.2 responsible for the conduct of the compliance plan audits for the compliance plans referred to at paragraphs 53 to 55 below.

Particulars

2002 Gunns Woodlot Scheme

- (a) — In relation to M H Cooke:
 - (1) — 2 October 2002,
- (b) In relation to Matthew Gary Wallace:
 - (1) 30 September 2003
 - (2) 30 September 2004,
- (c) In relation to Andrew Gray:

- (1) 29 September 2005
- (2) 29 September 2006
- (3) 29 September 2007
- (4) 30 September 2008
- (5) 30 September 2009
- (6) 30 September 2010
- (7) 30 September 2011

2003 Gunns Woodlot Scheme

(d) In relation to Matthew Gary Wallace:

- (1) 30 September 2003
- (2) 30 September 2004,

(e) In relation to Andrew Gray:

- (1) 29 September 2005
- (2) 29 September 2006
- (3) 29 September 2007
- (4) 30 September 2008
- (5) 30 September 2009
- (6) 30 September 2010
- (7) 30 September 2011

2005 Gunns Woodlot Scheme

(f) In relation to Andrew Gray:

- (1) 29 September 2005
- (2) 29 September 2006
- (3) 29 September 2007
- (4) 30 September 2008
- (5) 30 September 2009
- (6) 30 September 2010

(7) 30 September 2011

2006 Gunns Woodlot Scheme

(g) In relation to Andrew Gray:

(1) 29 September 2006

(2) 9 October 2007

(3) 30 September 2008

(4) 30 September 2009

(5) 30 September 2010

(6) 30 September 2011

2008 Gunns Woodlot Scheme

(h) In relation to Andrew Gray:

(1) 30 September 2008

(2) 30 September 2009

(3) 30 September 2010

(4) 30 September 2011

2009 Gunns Woodlot Scheme

(i) In relation to Andrew Gray:

(1) 30 September 2009

(2) 30 September 2010

(3) 30 September 2011

13. The Tenth to Eleventh Defendants are hereafter referred to as “**KPMG**”.

CATLIN

13A. Catlin was at all material times:

13A.1 a company registered pursuant to the Act and capable of being sued in its corporate name and style; and

13A.2 the underwriter of the first excess layer of Investment Management Insurance issued to GPL.

CHUBB

13B. Chubb was at all material times:

13B.1 a company registered pursuant to the Act and capable of being sued in its corporate name and style; and

13B.2 the underwriter of an excess layer of insurance issued to GPL (“the Chubb Policy”).

C2. OPERATION OF THE GUNNS WOODLOT SCHEMES**Background of Woodlot Schemes**

14. The Gunns Woodlot Schemes were managed investment schemes within the meaning of Chapter 5C of the Act.
15. The six Gunns Woodlot Schemes the subject of this proceeding were among nine such schemes established by GPL, one in each year from 2002 to 2009 (except 2004 and 2007) and had terms of up to 25 years.

Particulars

- (a) 2002 Gunns Woodlot Scheme;
 - (b) 2003 Gunns Woodlot Scheme;
 - (c) 2005 Gunns Woodlot Scheme;
 - (d) 2006 Gunns Woodlot Scheme;
 - (e) 2008 Gunns Woodlot Scheme; and
 - (f) 2009 Gunns Woodlot Scheme.
16. At all relevant times, the Gunns Group was a group of companies that carried on Australia’s largest integrated hardwood and softwood forest products business.

Particulars

- (a) The timber products business involved the manufacture and supply of value added hardwood and softwood products for use in the building industry; and
- (b) The forest products business involved the management of natural forests and plantations, which involved general forest management, road construction and maintenance, timber harvesting and haulage, pulp wood processing and marketing of products for export markets.

17. Each of the Gunns Woodlot Schemes was governed by scheme documents comprising their respective:

17.1 Constitutions;

17.2 Management Agreements;

17.3 Maintenance Services Sub-contracting Agreements, Maintenance and Planting Services Sub-contracting Agreements, or Maintenance and Pruning Services Sub-contracting Agreements;

17.4 Forestry Right Deeds;

17.5 Sub-Forestry Right Deeds or Forestry Right Lease Deeds; and

17.6 Compliance Plans,

which were in materially the same terms (**Scheme Documents**).

Particulars

2002 Gunns Woodlot Scheme

- (a) Constitution dated 12 February 2002;
- (b) Supplemental Constitution dated 3 July 2002;
- (c) Management Agreements annexed as Schedule 2 to the Constitution;

- (d) Maintenance and Planting Services Sub-contracting Agreement (date to be provided upon discovery);
- (e) Forestry Right Deed annexed as Schedule 1 to the Constitution;
- (f) Forestry Right Lease Deed annexed as Schedule 3 to the Constitution;
- (g) Compliance Plan Gunns Plantations Woodlot Project 2002 lodged with the Australian Securities and Investments Commission (**ASIC**) on ~~27~~ 13 February 2002; and
- (h) Amended 2002 Compliance Plan lodged with ASIC on 12 October 2010.

2003 Gunns Woodlot Scheme

- (i) Constitution dated 24 March 2003;
- (j) Supplemental Constitution dated 10 April 2003;
- (k) Management Agreements annexed as Schedule 2 to the Constitution;
- (l) Maintenance and Planting Services Sub-contracting Agreement (~~date to be provided upon discovery~~) dated 1 May 2003;
- (m) Forestry Right Deed annexed as Schedule 1 to the Constitution;
- (n) Forestry Right Lease Deed annexed as Schedule 3 to the Constitution;
- (o) Compliance Plan Gunns Plantations Woodlot Project 2003 lodged with ASIC on 25 March 2003; and
- (p) Amended 2003 Compliance Plan lodged with ASIC on 12 October 2010.

2005 Gunns Woodlot Scheme

- (q) Constitution dated 1 March 2005;
- (r) Management Agreements annexed as Schedule 2 to the Constitution;
- (s) Maintenance Services Sub-contracting Agreement dated 1 March 2005;
- (t) Forestry Right Deed annexed as Schedule 1 to the Constitution;

- (u) Forestry Right Lease Deed annexed as Schedule 3 to the Constitution;
- (v) Compliance Plan Gunns Plantations Woodlot Project 2005 lodged with ASIC on 23 February 2005; and
- (w) Amended 2005 Compliance Plan lodged with ASIC on 12 October 2010.

2006 Gunns Woodlot Scheme

- (x) Constitution dated 7 March 2006;
- (y) Management Agreements annexed as Schedule 2 to the Constitution;
- (z) Maintenance Services Sub-contracting Agreement (date to be provided upon discovery);
- (aa) Forestry Right Deed annexed as Schedule 1 to the Constitution;
- (bb) Sub-Forestry Right Lease Deed annexed as Schedule 3 to the Constitution;
- (cc) Compliance Plan Gunns Plantations Woodlot Project 2006 lodged with ASIC on 9 March 2006; and
- (dd) Amended 2006 Compliance Plan lodged with ASIC on 12 October 2010.

2008 Gunns Woodlot Scheme

- (ee) Constitution dated 27 December 2007;
- (ff) Management Agreements annexed as Schedule 2 to the Constitution;
- (gg) Maintenance Services Sub-contracting Agreement dated (date to be provided upon discovery);
- (hh) Forestry Right Deed annexed as Schedule 1 to the Constitution;
- (ii) Sub-Forestry Right Lease Deed annexed as Schedule 3 to the Constitution;
- (jj) Compliance Plan Gunns Plantations Woodlot Project 2008 lodged with ASIC on 13 December 2007; and

- (kk) Amended 2008 Compliance Plan lodged with ASIC on 30 November 2010.

2009 Gunns Woodlot Scheme

- (ll) Constitution dated 6 February 2009;
- (mm) Supplemental Constitution dated 5 ~~5~~ 3 March 2009;
- (nn) Management Agreements annexed as Schedule 2 to the Constitution;
- (oo) Maintenance and Pruning Services Sub-contracting Agreement dated (date to be provided upon discovery);
- (pp) Forestry Right Deed annexed as Schedule 1 to the Constitution;
- (qq) Sub-Forestry Right Lease Deed annexed as Schedule 3 to the Constitution; and
- (rr) 2009 Compliance Plan lodged with ASIC on 12 October 2010.

18. The parties' respective roles under the Scheme Documents were as follows:

18.1 the Plaintiffs and Group Members were:

- (a) "Members" under the 2002 to 2009 (except for the 2004 and 2007) Constitutions; and
- (b) "Growers" under the 2002 to 2009 (except for the 2004 and 2007) Constitutions, upon entering into the Management Agreements and the Forestry Right Lease Deeds with GPL for each of the Gunns Woodlot Schemes,

Particulars

The First Plaintiff (Investor Number 20500456) became a Member of the following Gunns Woodlot Schemes:

- (i) 2002 Gunns Woodlot Scheme on:
 - (1) 2 March 2009 – 2 x Woodlots for Option 1 Eucalypt Pulpwood;

- (2) 13 March 2003 – 6 x Woodlots for Option 1 Eucalypt Pulpwood;
and
- (3) 26 June 2002 – 8 x Woodlots for Option 1 Eucalypt Pulpwood;
- (ii) 2005 Gunns Woodlot Scheme on 28 June 2005 – 2 x Woodlots for
Option 1 Eucalypt Pulpwood; and
- (iii) 2008 Scheme on 30 June 2008 – 2 x Woodlots for Option 2 Eucalypt
Veneer & Pulpwood.

The Second Plaintiff (Investor Number 20500117) became a Member of the following Schemes:

- (i) 2002 Gunns Woodlot Scheme on:
 - (1) 24 April 2009 – 5 x Woodlots for Option 1 Eucalypt Pulpwood;
 - (2) 1 October 2009 – 10 x Woodlots for Option 1 Eucalypt
Pulpwood; and
 - (3) 1 October 2009 – 20 x Woodlots for Option 2 Eucalypt Veneer
& Pulpwood,
- (ii) 2003 Gunns Woodlot Scheme on:
 - (1) 30 June 2009 – 10 x Woodlots for Option 1 Eucalypt Pulpwood;
and
 - (2) 30 June 2009 – 20 x Woodlots for Option 2 Eucalypt Veneer &
Pulpwood,
- (iii) 2005 Gunns Woodlot Scheme on 29 June 2005 – 5 x Woodlots for
Option 2 Eucalypt Veneer & Pulpwood;
- (iv) 2006 Gunns Woodlot Scheme on 30 June 2007 – 10 x Woodlots for
Option 1 Eucalypt Pulpwood;
- (v) 2008 Gunns Woodlot Scheme on 30 June 2008 – 12 x Woodlots for
Option 2 Eucalypt Veneer & Pulpwood; and

- (vi) 2009 Gunns Woodlot Scheme on:
- (1) 30 June 2009 – 6 x Woodlots for Option 1 Eucalypt Pulpwood;
 - (2) 30 June 2009 – 3 x Woodlots for Option 2 Eucalypt Veneer & Pulpwood; and
 - (3) 30 June 2009 – 3 x Woodlots for Option 3 Radiata Pine Sawlog & Pulpwood.

Further particulars will be provided by way of discovery and evidence.

18.2 GPL was:

- (a) the RE under the Constitutions;
- (b) the “Manager” under the Management Agreements;
- (c) a party to the Maintenance Services Sub-contracting Agreements with Gunns Ltd;
- (d) the holder of the “Forestry Rights” granted by landowners under the Forestry Right Deeds;
- (e) the “Lessor” of the Forestry Rights to Growers under the Forestry Right Lease Deeds;
- (f) the RE under the Original and Amended Compliance Plans (as defined below); and
- (g) the agent for Growers, as appointed under the Management Agreements, in respect of the Draft Wood Sale Agreements with Gunns Ltd.

18.3 Gunns Ltd was:

- (a) the Custodian for the purposes of the Constitutions as appointed under the Management Agreements;

Particulars

Gunns Ltd was appointed as Custodian for each of the Schemes no later than the date of issue of the PDS for each of the Schemes, being:

- (i) 2002 Gunns Woodlot Scheme – 27 February 2002;
 - (ii) 2003 Gunns Woodlot Scheme – 11 April 2003;
 - (iii) 2005 Gunns Woodlot Scheme – 1 March 2005;
 - (iv) 2006 Gunns Woodlot Scheme – 14 March 2006;
 - (v) 2008 Gunns Woodlot Scheme – 18 January 2008; and
 - (vi) 2009 Gunns Woodlot Scheme – 8 April 2009.
- (b) a party to the Management Agreements for the purpose of the off-take arrangements provided for under those agreements and the Draft Wood Sale Agreements;

Particulars

Further particulars will be provided by way of evidence.

- (c) an agent of GPL for the purposes of performing the Maintenance Services (as defined below) and paying the Forestry Right Fees on behalf of the RE as required by the Management Agreements; and

Particulars

Gunns Ltd became responsible for the Maintenance Services for each of the Gunns Woodlot Schemes on each of the following dates under the following agreements:

- (i) 2002 Maintenance Services Sub-contracting Agreement – prior to 2003;
- (ii) 2003 Maintenance Services Sub-contracting Agreement – 1 May 2003;

- ~~(iii) 2004 Maintenance Services for Sub-contracting Agreement – 26 April 2004;~~
 - (iv) 2005 Maintenance Services Sub-contracting Agreement – 1 March 2005;
 - (v) 2006 Maintenance Services Sub-contracting Agreement – 14 March 2006;
 - (vi) 2008 Maintenance Services Sub-contracting Agreement – 27 December 2007; and
 - (vii) 2009 Maintenance Services Sub-contracting Agreement – 6 February 2009.
- (d) the would-be purchaser of wood from Growers under the Draft Wood Sale Agreements, upon execution of the Management Agreements.

Particulars

Management Agreements, cl.12.

19. The Gunns Woodlot Schemes were offered on the basis that:
- 19.1 an investor would become a Grower of eucalyptus wood on “Woodlots” located in Tasmania;
 - 19.2 Growers were offered up to three options for investing in the Gunns Woodlot Schemes: a thirteen (13) year pulpwood option (**Option 1**), a twenty (20) year pulpwood and veneer option (**Option 2**), or a twenty five (25) year sawlog and pulpwood option (**Option 3**);
 - 19.3 fees payable by Growers (on application, and for pruning if Option 1 was not selected) were to be tax deductible;
 - 19.4 GPL would manage the growing and harvesting of the plantations;
 - 19.5 Gunns Ltd was committed to purchasing Growers’ wood after the relevant period of the option selected by Growers; and

- 19.6 Growers would receive payment from wood sale proceeds, after the deduction of certain other fees payable to GPL in accordance with the Scheme Documents.

Particulars

“Key Features” described in the Prospectus for the 2002 Gunns Woodlot Scheme and the Product Disclosure Statements for the other Gunns Woodlot Schemes.

20. The land on which the plantations were located was owned by entities which were either members of the Gunns Group or third parties.

Particulars

- (a) There were approximately eight hundred (800) leases which related to the land on which the Gunns Woodlot Schemes were conducted; and
- (b) The major landholders of these leases were:
- (1) Gunns Ltd – at least 194 leases;
 - (2) Associated Forest Holdings Pty Ltd (a company in the Gunns Group) – approximately 184 leases;
 - (3) Forestry Tasmania – approximately 20 leases; and
 - (4) Australian Forestry Plantations Trust and Australian Forestry Plantations Trust No. 2. – approximately 13 leases.

21. For the purposes of the Gunns Woodlot Schemes, GPL entered into Forestry Right Deeds with landowners.

22. Under the Forestry Right Deeds, GPL was to pay “Forestry Right Fees” to landowners for each year the landowners’ land would be used for the purposes of the Gunns Woodlot Schemes.

Particulars

Forestry Right Deeds, cl.6.

23. The landowners the subject of the Forestry Right Deeds would grant the following “Forestry Rights” to GPL upon payment of the Forestry Right Fees:

23.1 the right to establish, plant, tend, maintain and harvest trees on the woodlots;

23.2 all right, title and interest in the trees;

23.3 all right title and interest in any benefit resulting from the trees having the ability to absorb greenhouse gases (**Carbon Rights**); and

23.4 the right to access the relevant land for the purpose of carrying out the activities identified in subparagraph 23.1 above.

Particulars

Forestry Right Deeds, cl.1.1, 3.1, 3.2 and 6.1.

24. A party to a Forestry Right Deed could terminate the Forestry Right Deed if the other party breached a provision of the Forestry Right Deed and that breach was unremedied for 60 days from the date that the first mentioned party gave the other party written notice of the breach.

Particulars

Forestry Right Deeds, cl.11.1.

25. It was a term of the Forestry Right Deed that GPL was able to licence or lease some or all of the rights granted to it under the Forestry Right Deed to a third party.

Particulars

Forestry Right Deeds, cl.9.2.

26. GPL granted or leased its ~~the~~ rights ~~granted to it~~ under the Forestry Right Deeds to Growers by entering into leases or licences for the “Forestry Rights” under the Sub-Forestry Right Deeds or Forestry Right Lease Deeds.

Particulars

(a) For the 2002, 2003 and 2005 Gunns Woodlot Schemes, Forestry Right Lease Deeds, cl.3.

(b) For the 2006, 2008 and 2009 Gunns Woodlot Schemes, Sub-Forestry Right Deeds, cl.3.

27. The Sub-Forestry Right Deeds and Forestry Right Lease Deeds terminated automatically if the Forestry Right Deeds terminated for any reason.

Particulars

(a) For the 2002, 2003 and 2005 Gunns Woodlot Schemes, Forestry Right Lease Deeds, cl.5.3.

(b) For the 2006, 2008 and 2009 Gunns Woodlot Schemes, Sub-Forestry Right Deeds, cl.5.3.

Establishment and Management of the Woodlots

28. Under the Management Agreements, GPL's responsibilities in relation to the Gunns Woodlot Schemes were divided into two phases:

28.1 establishing the Woodlots (**Establishment and Planting Services**); and

28.2 rearing and maintaining the trees in the Woodlots (**Maintenance Services**).

Particulars

Management Agreements, cl.4-5.

29. The Establishment and Planting Services were the tasks required to establish the plantation and included the ploughing and cultivation required for the purpose of planting the seedlings, including the procuring of those seedlings.

Particulars

Management Agreements, cl.4.1(a).

30. The Establishment and Planting Services were to be completed in accordance with a timetable set out in the Management Agreements, ~~before 12 months from the date the "Establishment Fee" was paid or GPL was first permitted under the Forestry Right Deed to access the land for the purposes of commencing the Establishment and Planting Services, whichever was the later.~~

Particulars

Management Agreements, cl.4cll.4.1(b)(1) and 4.2(b)(1).

- ~~31. If the period referred to in paragraph 30 above was to extend beyond 30 June of the financial year immediately following the year in which the Establishment Fee was paid, the Establishment and Planting Services were to be completed by that 30 June.~~

Particulars

~~Management Agreements, cll.4.1(b)(2) and 4.2(b)(2).~~

32. GPL was required, inter alia, to:

~~32.1 insure the Gunns Woodlots Schemes with public liability insurance; and~~

32.2 pay Forestry Right Fees to landowners.

Particulars

(a) For the 2002, 2003 and 2005 Gunns Woodlot Schemes, Forestry Right Lease Deeds, cl.5.2(a) and 6.1;

(a1) For the 2006, 2008 and 2009 Gunns Woodlot Schemes, Sub-Forestry Right Deeds, cl.5.2(a) and 6.1; and

(b) Forestry Right Deeds, cl.7(f).

33. GPL delegated the Maintenance Services to Gunns Ltd under the Maintenance Services Sub-contracting Agreements.

Particulars

(a) For the 2002 and 2003 Gunns Woodlot Schemes, Maintenance and Planting Services Sub-contracting Agreements, cl.3.1, 3.2.

(b) For the 2005, 2006 and 2008 Gunns Woodlot Schemes, Maintenance Services Sub-contracting Agreements, cl.3.1, 3.2.

(c) For the 2009 Gunns Woodlot Scheme, Maintenance and Pruning Services Sub-Contracting Agreement, cl.3.1, 3.2.

34. In consideration for GPL entering into the Maintenance Services Sub-contracting Agreements, Gunns Ltd agreed to assume all of GPL's obligations to pay Forestry Right Fees under the Forestry Right Deeds.

Particulars

Maintenance Services Sub-contracting Agreements, cl.4.4.

35. GPL was the beneficiary of a bank guarantee pursuant to which Australia and New Zealand Banking Group Ltd (ANZ Bank) ANZ Bank agreed to pay GPL \$4M on demand (**GPL Bank Guarantee**).

Particulars

Bank Guarantees issued by ANZ Bank in favour of GPL on 11 July 2011 and 20 April 2012.

36. The GPL Bank Guarantee was arranged in order to provide finance to GPL:
- 36.1 in the event of Gunns Ltd failing to pay the Forestry Right Fees and/or being unable to perform the Maintenance Services; and/or
- 36.2 to enable GPL to meet its obligations in relation to the Gunns Woodlot Schemes while replacement service providers were secured.

Particulars

Letters from GPL to ASIC dated 26 March 2010, 9 July 2010, and 13 October 2010.

RE Remuneration under the Schemes

37. GPL was appointed as agent for Growers in respect of the sale of wood harvested from the trees in the Woodlots and Carbon Rights.

Particulars

Management Agreements, cl.11.1 and 11.2.

38. For its role as RE of each of the Gunns Woodlot Schemes, and its proper performance of its duties, GPL was entitled to:

38.1 payment of the “Woodlot Establishment Expenses”, being the RE’s reasonable costs and expenses of performing the duties and obligations under clause 4.1 of the Management Agreements, from the “Application Money”;

Particulars

Proper Construction of the Constitutions, cll.1.1, 7-8.

38.2 the income earned from the “Application Portion” of the “Fund”, being the interest on sums paid into a trust Bank account in accordance with clauses 3.4(b) and 5.1, and 12.1 of the Constitutions;

Particulars

Constitutions, cll.1.1, 9.

38.3 reimbursement for payment of the Baseline Pruning Expenses by Growers who chose Options 2 and Option 3;

Particulars

Constitutions, cll.1.1, 11.1.

38.4 fees, comprising the Planting Fee, Maintenance Fee Sales Commission and Rental Fee, amounting to between 9% and 12% of the Wood Sales Proceeds;

Particulars

Constitutions, cll.1.1, 24, 29.4(a).

38.5 50% of the Carbon Rights Proceeds, being the proceeds of commercial exploitation of any benefit resulting from the trees in the Woodlots having the ability to absorb greenhouse gases procured or obtained by GPL as agent for the Growers under clause 11.2 of the Management Agreements; and

Particulars

Constitutions, cll.1.1, 24, 29.4(b).

38.6 reimbursement out of the relevant “Section” of the “Woodlot Proceeds Portion” for costs and expenses in relation to the proper performance of its duties in accordance with the Constitution, Management Agreements and Forestry Right Lease Deeds, and taxes, duties and fees payable to regulatory authorities.

Particulars

Constitutions, cll.1.1, 28.2.

Growers’ Interests in the Gunns Woodlot Schemes

39. Each of the Growers’ financial contribution to a Gunns Woodlot Scheme consisted of an “Application Fee” per Woodlot constituting each of the Growers’ “Application Money” paid to the Custodian (as appointed by the RE) or the RE, to be held upon trust.

Particulars

- (a) Constitutions, cll.3.3, 3.4, 4.1; and
- (b) Management Agreements, cl.1.1.

40. The amount of the Application Fee per Woodlot was provided for under the Management Agreements for each of the 2002, 2003, 2005, 2006 and 2008 Gunns Woodlot Schemes and under the Constitution for the 2009 Gunns Woodlot Scheme.

Particulars

The respective Application Fees per Woodlot were:

- (a) \$4,345 (inclusive of GST) for the 2002 Gunns Woodlot Scheme;
- (b) \$4,400 (inclusive of GST) for the 2003 Gunns Woodlot Scheme;
- (c) \$6,820 (inclusive of GST) for the 2005 Gunns Woodlot Scheme;
- (d) \$6,820 (inclusive of GST) for the 2006 Gunns Woodlot Scheme;
- (e) \$6,820 (inclusive of GST) for the 2008 Gunns Woodlot Scheme; and
- (f) \$7,480 (inclusive of GST) for woodlots not chosen as part of a Blended Option for the 2009 Gunns Woodlot Scheme.

41. The First Plaintiff invested \$83,765 in the Gunns Woodlot Schemes.

Particulars

- (a) 2002 Gunns Woodlot Scheme – 13 lots x \$4,345 per lot = \$56,485;
- (b) 2005 Gunns Woodlot Scheme – 2 lots x \$6,820 per lot = \$13,640; and
- (c) 2008 Gunns Woodlot Scheme – 2 lots x \$6,820 per lot = \$13,640.
- (d) The particulars for subparagraph 18.1 above are repeated.

42. The Second Plaintiff invested \$608,047 in the Gunns Woodlot Schemes.

Particulars

- (a) 2002 Gunns Woodlot Scheme – 35 lots x \$4,345 per lot = \$152,075;
- (b) 2003 Gunns Woodlot Scheme – 30 lots x \$4,400 per lot = \$132,000;
- (c) 2005 Gunns Woodlot Scheme – 20 lots x \$6,820 per lot = \$136,400;
- (d) 2006 Gunns Woodlot Scheme – 5 lots x \$6,820 per lot = \$34,100;
- (e) 2008 Gunns Woodlot Scheme – 10 lots x \$6,820 per lot = \$68,200; and
- (f) 2009 Gunns Woodlot Scheme – 12 lots x \$7,106 per lot = \$85,272.
- (g) The particulars for subparagraph 18.1 above are repeated.

43. GPL was trustee for the Growers in respect of their Application Moneys:

- 43.1 the “Assets” of the scheme were to be held by the RE on trust for Members; and
- 43.2 a Grower’s Application Money was lodged in a trust “Bank” account to create the Application Portion.

Particulars

Constitutions, cl.3.2, 3.4, 13.1(a).

44. GPL was to place the Application Moneys, or ensure that the Application Moneys were placed, in the Application Portion until they could be released in accordance with clause 8 of the Constitution.

Particulars

Constitutions, cl.5.1.

45. The Plaintiffs held a “Proportional Interest” in the Application Portion, being the proportion of the Application Fees paid by all Growers (excluding any part of the Application Fee released pursuant to clause 8 of the Constitution, any Application Money held pending receipt of a completed application, and any interest on the Application Money) comprised by the Plaintiffs’ Application Money.

Particulars

Constitutions, cll.1.1, 3.6.

46. Upon GPL being satisfied of “certain matters” and being in possession of “certain executed documents”, GPL could release or instruct the Custodian to release that part of the Application Money necessary to pay the Woodlot Establishment Expenses, being GPL’s reasonable costs and expenses of performing the duties and obligations under clause 4.1 of the Management Agreements.

Particulars

Proper construction of the:

- (a) Constitutions, cll.1.1, 7-8; and
- (b) Management Agreements, cl.10.1.

47. The Woodlot Establishment Expenses under the Constitution were the reasonable costs and expenses of performing the Establishment and Planting Services, for which the Establishment Fee was paid under the Management Agreements.

Particulars

Proper construction of the:

- (a) Constitutions, cll.1.1; and

(b) Management Agreements, cl.1.1, 4.1, 10.1.

48. The Establishment Fee payable by a Grower for the performance of the "Establishment Services" was not to exceed the Application Fee.

Particulars

(a) Management Agreements, cl. 1.1, 4.1, 10.1.

(b) Further particulars will be provided by way of evidence.

Growers' Trust Funds

49. To the extent GPL's reasonable costs and expenses of performing the duties and obligations under clause 4.1 of the Management Agreements did not exceed the Application Fee, but rather were less than the amount of the Application Fee, the balance remained part of the Application Portion (**Growers' Express Trust Funds**).

Particulars

Proper construction of the:

(a) Constitutions, cl.1.1, 7-8; and

(b) Management Agreements, cl.1.1, 4.1, 10.1.

50. The Application Portion, including any Growers' Express Trust Funds, was to be invested in an interest bearing account with a Bank nominated by GPL and not in any other form of investment.

Particulars

Constitutions, cl.12.1(b).

51. GPL was able to on an interim basis, and was to in the event of termination of the "Project," divide the balance of, inter alia, the Application Portion according to the Growers' Proportional Interests.

Particulars

Constitutions, cl.1.1, 34.1(b), 34.5.

52. After the harvesting of the wood, and the deduction of all relevant costs and fees payable to GPL, Growers were entitled to distribution of their Proportional Interest in the “Wood Proceeds Portion” and the “Carbon Rights Proceeds Portion.”

Particulars

Constitutions, cl.29.1, 29.4.

- 52A. In the alternative to paragraphs 49 to 52 above, to the extent that GPL released or instructed the Custodian to release the Application Money to pay the Woodlot Establishment Expenses, but the amount necessary for that purpose was less than the amount released, the residue was held on resulting trust for Growers (Growers’ Resulting Trust Funds).

Particulars

This consequence arises in accordance with the principle that, where property has been conveyed to trustees for certain purposes and the property conveyed has been found to be more than sufficient for those purposes, leaving a surplus after those purposes have been fulfilled, the surplus is held on resulting trust for the person who conveyed the property (see, e.g., *Jacob’s Law of Trusts in Australia*, 8th ed., at pp.209-211 [12-07]-[12-08]; Young, Croft, Smith, *On Equity* (2009) at pp.468-470 [6.1000]-[6.1020]).

- 52B. Together Growers’ Express Trust Funds and Growers’ Resulting Trust Funds are referred to as “Growers’ Trust Funds”.

GPL Unauthorised Retention of Growers’ Trust Funds

- 52C In the alternative to paragraphs 49 to 52A above, to the extent that GPL released or instructed the Custodian to release the Application Money to pay the Woodlot Establishment Expenses, but the amount necessary for that purpose was less than the amount released, and that residue amount was retained by GPL, it was an unauthorised retention of the Growers’ Trust Funds (GPL Unauthorised Retention of Growers’ Trust Funds).

Particulars

The pleadings and particulars at paragraphs 38 above are repeated.

Auditor oversight and the Compliance Plans

53. As the auditor of the Gunns Woodlot Schemes, KPMG:
- 53.1 examined the compliance plans for each of the Gunns Woodlot Schemes for each year as set out in paragraphs 54 and 55 below (**Compliance Plans**); and
 - 53.2 carried out an audit of GPL's compliance (as the RE) with each of the Compliance Plans.

Particulars

The Plaintiffs repeats the particulars provided in paragraph 12 above and paragraph 77 below.

54. In the relevant periods up to about 12 October 2010, each of the Gunns Woodlot Schemes had a Compliance Plan containing the same compliance rules.

Particulars

- (a) Compliance Plan Gunns Plantations Woodlot Project 2002 lodged with ASIC on 27 February 2002;
- (b) Compliance Plan Gunns Plantations Woodlot Project 2003 lodged with ASIC on 25 March 2003;
- (c) Compliance Plan Gunns Plantations Woodlot Project 2005 lodged with ASIC on 23 February 2005;
- (d) Compliance Plan Gunns Plantations Woodlot Project 2006 lodged with ASIC on 9 March 2006; and
- (e) Compliance Plan Gunns Plantations Woodlot Project 2008 lodged with ASIC on 13 December 2007,

(Original Compliance Plans).

55. Between about 12 October and about 30 November 2010, pursuant to s.601HB of the Act, the compliance plan for the Gunns Plantations Ltd Woodlot Project 2009 (ARSN 135 490 292) was incorporated into each of the Gunns Woodlot Schemes' Compliance Plans, replacing the Original Compliance Plans.

Particulars

- (a) Replacement for the 2002 Compliance Plan lodged with ASIC on 12 October 2010;
- (b) Replacement for the 2003 Compliance Plan lodged with ASIC on 12 October 2010;
- (c) Replacement for the 2005 Compliance Plan lodged with ASIC on 12 October 2010;
- (d) Replacement for the 2006 Compliance Plan lodged with ASIC on 12 October 2010;
- (e) Replacement for the 2008 Compliance Plan lodged with ASIC on 30 November 2010; and
- (f) Replacement for the 2009 Compliance Plan lodged with ASIC on 12 October 2010,

(Amended Compliance Plans).

External Administration and Distributions

55A. On or about 24 December 1998, an International Swap Dealers Association, Inc Master Agreement (**ISDA Master Agreement**) was entered into between the ANZ Bank and Gunns Ltd to govern existing or anticipated transactions between them.

55B. On or about 29 May 2001:

55B.1 a Security Trust Deed (**2001 Security Trust Deed**) was entered into between Gunns Ltd, the ANZ Bank and ANZ Capel Court Ltd (**ANZ Capel Court**) acting as security trustee; and

55B.2 a Fixed and Floating Charge was entered into between Gunns Ltd and ANZ Capel Court as security trustee.

55C. On or about 31 January 2007:

55C.1 a Working Capital Facility Agreement (2007 Working Capital Agreement) was entered into by the ANZ Bank and Gunns Ltd and certain of its subsidiaries, relevantly including GPL, for the provision of financial accommodation for certain approved purposes;

55C.2 a Facility Agreement was entered into (2007 Facility Agreement):

- (a) for Gunns Ltd, arranged by ANZ Investment Bank with the ANZ Bank acting as agent for certain lenders and ANZ Capel Court acting as security trustee;
- (b) pursuant to which \$720 million was made available to Gunns Ltd in the form of letters of credit and loan notes under three facilities:
 - (i) a \$400 million loan titled 'Facility A', which was to be drawn down by Gunns Ltd so as to refinance an existing syndicated debt facility; assist with the development costs for a pulp and paper mill development at Bell Bay, Tasmania (Bell Bay Project); provide letters of credit support for the Bell Bay Project; and be used for general corporate purposes;
 - (ii) a \$270 million loan titled 'Facility B', which was to be drawn down by Gunns Ltd for the purpose of providing for the Bell Bay Project development costs; and
 - (iii) a \$50 million loan titled 'Facility C', which was to be drawn down by Gunns Ltd so as to provide performance guarantees to support obligations in relation to the Bell Bay Project; and
- (c) pursuant to which Gunns Ltd and certain of its subsidiaries, relevantly including GPL, were described as 'original guarantors' which would provide fixed and floating charges in favour of the security trustee, ANZ Capel Court.

Particulars

2007 Facility Agreement cll. 1.1, 2.1, 3.1 and Sch. 1.

55C.3 a Security Trust Deed (entitled 'Deed of Amendment No. 3') (2007 Security Trust Deed) was entered into:

- (a) between the ANZ Bank both in its own right and as agent, Gunns Ltd and certain of its subsidiaries, relevantly including GPL, ANZ Capel Court acting as security trustee, and ANZ National Bank Limited;
- (b) which amended and restated the 2001 Security Trust Deed; and
- (c) which provided in its amended form for each 'Security Provider', which relevantly included GPL, to guarantee the payment by each 'Debtor', which relevantly included Gunns Ltd, of obligations including under the 2007 Facility Agreement; and

Particulars

2007 Security Trust Deed cll. 2.1; and Annexure A cll. 1.1 and 11.1.

55C.4 a Fixed and Floating Charge was entered into (2007 Charge):

- (a) between Gunns Ltd and certain of its subsidiaries, relevantly including GPL, as security providers, and ANZ Capel Court as security trustee;
- (b) which provided for a charge in favour of ANZ Capel Court of the security providers' property to secure the punctual payment of monies, including those provided for under the 2007 Facility Agreement;
- (c) which further provided that the Secured Property included all of GPL's property but excluded in the case only of Gunns Ltd that property which it held as custodian of a Gunns Woodlot Scheme or which was 'Growers' Property'; and
- (d) which further provided, in the event of enforcement of the charge, for the security trustee to appoint a receiver of the 'Secured Property' of a 'Secured Party'.

Particulars

2007 Charge cl. 1.1, 2.1, 6.1.

55D. On or about 8 February 2010:

55D.1 a Fixed and Floating Charge was entered into (2010 Charge):

- (a) between Gunns Ltd and certain of its subsidiaries, relevantly including GPL, as security providers, and ANZ Capel Court as security trustee;
- (b) which provided for a charge in favour of ANZ Capel Court of the security providers' property to secure the punctual payment of monies, including those provided for under the 2007 Facility Agreement; and
- (c) which further provided, in the event of enforcement of the charge, for the security trustee to appoint a receiver of the 'Secured Property' of a 'Secured Party'.

Particulars

2010 Charge cl. 1.1, 2.1, 6.1.

55E. On or about 2 June 2010, Gunns requested cancellation of the Facility B and Facility C loans under clause 10.3 of the 2007 Facility Agreement.

Particulars

Cancellation Notice dated 1 June 2010 sent by email from Malcolm Matthews to Theona Mitsakos on 2 June 2010 at or about 11.15 am.

55F. On or around 18 June 2010 Gunns made a voluntary repayment of \$20 million to its Facility A loan under clause 10.4 of the 2007 Facility Agreement, thereby reducing the amount drawn down on the facility to \$380 million.

55G. On or about 16 February 2011, the 2007 Facility Agreement was amended to provide, inter alia, that:

55H.1 the total funds available to Gunns Ltd would increase by \$125 million until 30 June 2011 to provide additional short term working capital to refinance the purchase of the Bell Bay Project assets; and

55H.2 security was provided over the Bell Bay Project assets.

55H. On or about 30 January 2012:

55H.1 an Amendment and Restatement Deed was entered into (**2012 Facility Agreement**):

- (a) between Gunns Ltd, the ANZ Bank acting as agent for certain lenders and ANZ Capel Court acting as security trustee;
- (b) which amended and restated the 2007 Facility Agreement; and
- (c) the purposes of which included to refinance the existing syndicated debt facility to a 'Total Facility Commitment' of \$340 million;

Particulars

2012 Facility Agreement cll. 1.1, 2.2, 3.1; and Schedule 1, Part 2.

55H.2 a Security Trust Deed (entitled 'Deed of Amendment No. 4') (**2012 Security Trusts Deed**) was entered into:

- (a) between the ANZ Bank both in its own right and as agent, Gunns Ltd and certain of its subsidiaries, relevantly including GPL, ANZ Capel Court acting as security trustee, and ANZ National Bank Limited;
- (b) which further amended and restated the 2001 Security Trust Deed as amended in the form of the 2007 Security Trust Deed; and
- (c) which provided in its amended form for each Security Provider, which relevantly included GPL, to guarantee the payment by each Debtor, which relevantly included Gunns Ltd, of obligations including under the 2007 Facility Agreement as amended in the form of the 2012 Facility Agreement; and

Particulars

2012 Security Trust Deed cll. 2.1; and Annexure A cll. 1.1 and 11.1.

55I. Together paragraphs 55C to 55H above describe the "**Gunns Financing and Security Arrangements**".

55J. Prior to the establishment of the Gunns Financing and Security Arrangements, GPL had not provided security in respect of borrowings by Gunns Ltd.

56. From at least 8 March 2012, GPL was aware of media reports indicating delays in payments of Forestry Right Fees for the Gunns Woodlot Schemes to landowners.

Particulars

(a) ASIC Letter dated 8 March 2012 to the GPL Directors.

(b) Further particulars will be provided by way of evidence.

57. On 8 November 2012, landowners sent default notices to GPL in respect of unpaid Forestry Right Fees for the Gunns Woodlot Schemes.

Particulars

(a) Fourth Affidavit of Daniel Mathew Bryant dated 26 November 2012 in the Supreme Court of Victoria matter no. SCI 2012 5485.

(b) Further particulars will be provided by way of evidence.

58. On or about 25 September 2012:

58.1A ANZ issued to the borrowers under the 2007 Working Capital Agreement (as amended in the intervening period) a notice terminating its obligations to provide all facilities under that agreement and requiring immediate payment of moneys owing;

58.1B ANZ issued to the borrowers under the 2007 Facility Agreement, as amended in the form of the 2012 Facility Agreement, a notice cancelling the facility and terminating its obligations in relation to the facility, and stating that the total amount owing was immediately due and payable;

58.1 Messrs Mark Korda and Bryan Webster of Korda Mentha were appointed as receivers and managers to the Gunns Group (**Receivers**) by ANZ Capel Court Ltd in its capacity as security trustee for the Gunns Financing Security Trust pursuant to the 2001 Security Trust Deed ~~a security trust deed~~ originally dated 29 May 2001; and

58.2 Administrators were appointed to Gunns Ltd and each of its wholly owned subsidiaries, including GPL (**Administrators**).

58A. On or about 27 September 2012, ANZ issued to Gunns Ltd a notice designating early termination of the ISDA Master Agreement.

59. On or about 8 November 2012, the Receivers (on behalf of Gunns Ltd and its associated entities as landowners) sent correspondence to the Administrators alleging various breaches by GPL of the Forestry Right Deeds.

Particulars

- (a) Letters from Korda Mentha to Mr Ian Carson, Mr Daniel Bryant and Mr David Crosbie in their capacity as Administrators of GPL dated 8 November 2012 titled "Notice of Breach under Clause 11.1 of the Forestry Right Deeds in the Projects as more particularly described in the schedule to this letter".
- (b) The Receivers alleged:
 - (1) Breach of the Forestry Right Deeds by non-payment of Forestry Right Fees to the entities identified in particular (a) to paragraph 75 below;
 - (2) Breaches of clause 7(c) of Forestry Right Deeds;
 - ~~(3) Breaches of clause 7(f) of Forestry Right Deeds in respect to maintenance of a public risk insurance policy; and~~
 - (4) Outstanding maintenance on Gunns Woodlot Schemes of approximately \$887,000.

60. On or about 5 March 2013, the Administrators were appointed liquidators of Gunns Ltd and each of its wholly owned subsidiaries, including GPL (**Liquidators**).

61. Concerned that Growers would lose all rights in the assets of the Gunns Woodlot Schemes due to the default notices received from the Receivers (on behalf of Gunns Ltd and its associated entities as landowners) and other landowners, the Liquidators obtained directions from the Supreme Court of Victoria to procure GPL to amend the

Constitutions to enable the Liquidators to terminate Growers' rights and sell the assets of the Gunns Woodlot Schemes.

Particulars

- (a) Affidavit of Daniel Mathew Bryant dated ~~June~~ 6 June 2013; and
- (b) Orders dated 31 May 2013 and 21 June 2013 in Supreme Court of Victoria matter no. S CI 2013 02095.

62. On or about 11 August 2014, all rights of Growers in the assets of the Gunns Woodlot Schemes were terminated.

Particulars

- (a) Orders dated 11 August 2014 in Supreme Court of Victoria matter no. S CI 2013 02095; and
- (b) The Court determined that the Liquidators were acting properly and reasonably in entering the joint sale process with the Receivers.

63. On or about 5 September 2014, the sale of the Gunns Woodlot Scheme assets on land leased from Gunns Ltd and its associated entities was completed.

64. Liquidation distributions were made to Growers in late 2016 to early 2017.

Particulars

- (a) Total joint sale proceeds for the sale of the Gunns Woodlot Scheme assets on land leased from Gunns Ltd and its associated entities was 12.5% or \$40.6 million, and was allocated to investors in the Gunns Woodlot Schemes;
- (b) The remaining Gunns Woodlot Scheme assets located on land owned by other landowners were sold to those third party landowners to settle their claims for unpaid past and future rent;
- (c) The sale proceeds from the sale agreements with third party landowners were to benefit the pool of Growers in each of the relevant schemes; and

- (d) On or around late 2016 or early 2017, the First Plaintiff received a liquidation distribution for its investment in the Woodlot Schemes of \$14,432.44, and the Second Plaintiff received a liquidation distribution for his investment in the Woodlot Schemes of \$35,644.45 (**Liquidation Distributions**).

C3. THE DUTIES OF GPL, GUNNS LTD AND THE DEFENDANTS' DUTIES

GPL

GPL Management Duties

65. GPL had the following duties in relation to managing the Gunns Woodlot Schemes:

- 65.1 under the Constitutions, to ensure that any goods or services which were required to be provided or performed under the terms of the Forestry Right Lease Deeds and Management Agreements were provided or performed in accordance with the relevant material agreements and the Constitutions;

Particulars

Constitutions, cl.13.4.

65.2 under the Management Agreements:

- (a) to do all things necessary to rear the trees and maintain the Growers' Woodlots in accordance with good silvicultural practice; and
- ~~(b) to insure the land the subject of the Gunns Woodlot Schemes against public risk; and~~
- (c) to ensure that the Establishment and Planting Services, Maintenance Services and "Pruning Services" were carried out in a proper and diligent manner,

Particulars

Management Agreements, cl.5, 13.2, 14(b) and 14(c).

65.3 under the Forestry Right Lease Deeds:

- (a) not to breach the Forestry Right Deeds; and
- (b) not to do anything that may end the Forestry Right Deeds or the registration of the Forestry Right Deeds,

Particulars

- (i) For the 2002, 2003 and 2005 Gunns Woodlot Schemes, Forestry Right Lease Deeds, cl.5.1.
- (ii) For the 2006, 2008 and 2009 Gunns Woodlot Schemes, Sub-Forestry Right Deeds, cl.5.1.

65.4 under the Forestry Right Deeds, and as a consequence of the obligations pleaded in subparagraph 65.3 above:

- (a) to pay the Forestry Right Fees to landowners quarterly in arrears on each of the payment dates specified in the Forestry Right Deeds; and
- ~~(b) to keep current with a reputable insurer a public risk insurance policy covering GPL's liability in respect of its interest in the land the subject of the Forestry Rights Deeds,~~

Particulars

Forestry Right Deeds, cl.6.1(a), 7(c), 7(f), Schedule 1.

65.5 under the Original Compliance Plans:

- (a) Rule 1: to comply with, inter alia:
 - (1) the scheme related cash needs requirement; and
 - (2) the insurance requirements,
- (b) Rule 8: to provide the establishment, maintenance and tending services for Growers' woodlots in a proper and efficient manner;

- (c) Rule 10: to ensure that all conditions for the release of the Application Money out of the Application Portion to pay for the Establishment Expenses were satisfied;
- ~~(d) Rule 12: to ensure that as RE it was only paid fees, or reimbursed for expenses or liabilities, out of the scheme property in accordance with the Constitution, Management Agreement and prospectus;~~
- (e) Rule 15: to not give a financial benefit to ~~itself or, inter alia,~~ a related party, out of scheme property or that could diminish or endanger scheme property (unless an exception applied or the benefit was approved by the scheme members or "applicants and growers");
- (f) Rule 16: to ensure that suitably qualified agents were appointed;
- (g) Rule 17: to ensure that scheme money was invested and spent in accordance with the disclosure document and the Constitution;
- (h) Rule 22: to ensure that a Gunns Woodlot Scheme's property was clearly identified as scheme property and held separately from property of GPL and property of any other scheme;
- (i) Rule 26: to ensure that all payments out of Gunns Woodlot Scheme property were made in accordance with the Constitution and the "Law"; and
- (j) Rule 27: to ensure that any breach of the Law that related to a Gunns Woodlot Scheme that had had, or was likely to have, a materially adverse effect on the interests of the Growers, was reported to ASIC as soon as practicable after GPL became aware of the breach; and to report to ASIC any breach of the Constitution.

65.6 under the Amended Compliance Plans:

- (a) Rule 1: to comply with the conditions of the AFSL including:
 - (1) being able to pay debts as and when they became due and payable (cl.5(a) of the AFSL);

- (2) the Gunns Woodlot Scheme-related cash needs (cl.5(c) of the AFSL);
and
- (3) the insurance requirements (cl.15 of the AFSL);
- (b) Rule 5: to ensure that all of the conditions for the release of the Application Money out of the Application Portion were satisfied;
- (c) Rule 7: to provide establishment, maintenance and harvesting services for the project in a proper and efficient manner;
- ~~(d) Rule 10: to not pay itself fees, or be reimbursed for expenses or liabilities, out of the Gunns Woodlot Scheme property other than in accordance with the Constitution, "Land Rights Agreement", Management Agreement and product disclosure statement;~~
- (e) Rule 13: to not give a financial benefit to ~~itself or, inter alia,~~ a related party out of Gunns Woodlot Scheme property or that could diminish or endanger Gunns Woodlot Scheme property (unless an exception applied or the benefit was approved by Growers);
- (f) Rule 15: to ensure the Gunns Woodlot Scheme property was invested and spent in accordance with the disclosure document and the Constitution;
- (g) Rule 19: to ensure that a Gunns Woodlot Scheme's property was clearly identified as scheme property and held separately from the property of GPL and property of any other managed investment scheme;
- (h) Rule 23: to ensure that all payments out of Gunns Woodlot Scheme property were made in accordance with the Constitution and the Act; and
- (i) Rule 24: to report to ASIC any breach of the Act that related to the Gunns Woodlot Schemes and which had, or was likely to have, a materially adverse effect on the interest of the Growers; and report any breach of the Constitution.

66. Further, GPL was subject to the following statutory duties:

- 66.1 by s.601FC(1)(b) of the Act, to exercise the degree of care and diligence that a reasonable person would exercise in the RE's position;

~~66.2 by s.601FC(1)(c) of the Act, to act in the best interests of the members and, if there was a conflict between the members' interests and its own interests, to give priority to the members' interests;~~

66.3 by s.601FC(1)(h) of the Act, to comply with the Gunns Woodlot Schemes' Compliance Plans; and

66.4 by s.601FC(1)(l) of the Act, to report to ASIC any breach of the Act that related to the scheme and had, or was likely to have, a materially adverse effect on the interests of members, as soon as practicable after it became aware of the breach; and;

66.4A by s.601LC of the Act, to disclose to and seek approval from the scheme members for the giving of a financial benefit to a related party.

(together paragraphs 65 and 66 above describe the **GPL Management Duties**).

GPL Trust Fund Duties

67. In relation to the Growers' Trust Funds, GPL had the following duties:

67.1 to preserve the Growers' Trust Funds as trust property;

Particulars

(a) GPL, as the Responsible Entity of the Gunns Woodlot Schemes under the Act, acted as both trustee for the scheme members and was responsible for the conduct of the schemes.

(b) The Plaintiffs repeat paragraphs 43 to 51 above and 73 to 74 below.

67.2 to act in good faith and in the best interests of the Growers;

~~67.3 to avoid any conflict between interest and duty;~~

67.4 by s.601FC(1)(h) of the Act, to comply with the Gunns Woodlot Schemes Compliance Plans;

67.5 by s.601FC(1)(i) of the Act, to ensure that Gunns Woodlot Scheme property was:

(a) clearly identified as scheme property; and

- (b) held separately from property of the RE and property of any other scheme,
- 67.6 by s.601FC(1)(k) of the Act, to ensure that all payments out of scheme property were made in accordance with the Gunns Woodlot Scheme Constitutions and the Act;
- 67.7 by s.601FC(1)(m) of the Act, to carry out or comply with any other duty, not inconsistent with the Act, that was conferred on GPL by the Gunns Woodlot Schemes Constitutions;
- 67.8 by s.601FC(2) of the Act, to hold the Gunns Woodlot Scheme property on trust for the Growers;
- 67.9 by s.601LC of the Act, to disclose to and seek approval from the scheme members for the giving of a financial benefit to a related party;
- 67.10 under the Original Compliance Plans:
- (a) Rule 10: to ensure that all conditions for the release of the Application Money out of the Application Portion to pay for the Establishment Expenses were satisfied;
- ~~(b) Rule 12: to ensure that as RE it was only paid fees, or reimbursed for expenses or liabilities, out of the scheme property in accordance with the Constitution, Management Agreement and prospectus;~~
- (c) Rule 15: to not give a financial benefit to ~~itself or~~ inter alia, a related party, out of scheme property or that could diminish or endanger scheme property (unless an exception applied or the benefit was approved by the scheme members or "applicants and growers");
- (d) Rule 17: to ensure that scheme money was invested and spent in accordance with the disclosure document and the Constitution;
- (e) Rule 22: to ensure that a Gunns Woodlot Scheme's property was clearly identified as scheme property and held separately from property of GPL and property of any other scheme;

- (f) Rule 26: to ensure that all payments out of Gunns Woodlot Scheme property were made in accordance with the Constitution and the Law; and
- (g) Rule 27: to ensure that any breach of the Law that related to a Gunns Woodlot Scheme that had had, or was likely to have, a materially adverse effect on the interests of the Growers, was reported to ASIC as soon as practicable after GPL became aware of the breach; and to report to ASIC any breach of the Constitution,

67.11 under the Amended Compliance Plans:

- (a) Rule 5: to ensure that all of the conditions for the release of the Application Money out of the Application Portion were satisfied;
- ~~(b) Rule 10: to not pay itself fees, or be reimbursed for expenses or liabilities, out of the Gunns Woodlot Scheme property other than in accordance with the Constitution, Land Rights Agreement, Management Agreements and product disclosure statement;~~
- (c) Rule 13: to not give a financial benefit, ~~to itself, or~~ inter alia, to a related party out of Gunns Woodlot Scheme property or that could diminish or endanger Gunns Woodlot Scheme property (unless an exception applied or the benefit was approved by Growers);
- (d) Rule 15: to ensure the Gunns Woodlot Scheme property was invested and spent in accordance with the disclosure document and the Constitution;
- (e) Rule 19: to ensure that a Gunns Woodlot Scheme's property was clearly identified as scheme property and held separately from the property of GPL and property of any other managed investment scheme;
- (f) Rule 23: to ensure that all payments out of Gunns Woodlot Scheme property were made in accordance with the Constitution and the Act; and
- (g) Rule 24: to report to ASIC any breach of the Act that related to a Gunns Woodlot Scheme and which had, or was likely to have, a materially

adverse effect on the interest of the Growers; and report any breach of the Constitution,

(GPL Trust Funds Duties).

GPL duties arising from its position as RE

67A. Further or in the alternative to paragraph 67 above, GPL:

67A.1 as a fiduciary had a duty to act in good faith and in the best interests of Growers; and

Particulars

GPL was a fiduciary in its roles as the RE under the Constitutions and the Manager under the Management Agreements.

67A.2 by s.601FC(1)(h) of the Act, had a duty to comply with the Gunns Woodlot Schemes Compliance Plans

(GPL RE Duties).

Gunns Ltd

68. As the Custodian of the Gunns Woodlot Schemes, Gunns Ltd had the following fiduciary duties:

68.1 to preserve the Growers' Trust Funds as trust property, in particular:

- (a) to hold the Application Money until it was disbursed in payment of the Establishment Expenses;
- (b) to hold the proceeds from the sale of harvested wood until they were disbursed to Growers;
- (c) to hold the proceeds from the sale of Carbon Rights, if any, until they were disbursed to Growers; and
- (d) to hold any Pruning Services fees paid by Growers, which the Custodian would pay to GPL in accordance with the Constitutions;

Particulars

The Plaintiffs repeat the particulars provided at subparagraph 18.3.

68.2 to act in good faith and in the best interests of the Growers; and

68.3 to avoid any conflict between interest and duty,

(Gunns Duties).

The GPL Directors

69. The GPL Directors in their capacities as officers of the RE of the Gunns Woodlot Schemes were subject to the following duties:

69.1 by s.601FD(1)(b) of the Act, to exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position;

69.2 by s.601FD(1)(c) of the Act, to act in the best interests of the scheme members and, if there was a conflict between the scheme members' interests and the interests of the RE, to give priority to the scheme members' interests;

69.3 by s.601FD(1)(e) of the Act, not to make improper use of their position as an officer to cause detriment to the members of the Gunns Woodlot Schemes;

69.4 by s.601FD(1)(f) of the Act, to take all steps that a reasonable person would take in the officer's position to ensure that GPL as RE complied with:

(a) the Act;

(b) any conditions imposed on the RE's AFSL;

(c) the Scheme Documents; and

(d) the Original and Amended Compliance Plans;

69.5 under the common law, to act with the due care and diligence that a reasonable person would exercise in the GPL Directors' positions as the directors of an RE; and

69.6 to ensure that GPL complied with the GPL Management Duties, ~~and the GPL Trust Funds Duties~~ and the GPL RE Duties.

(Directors Duties).

Particulars

The Plaintiffs repeat paragraphs 65 to 67A as particularised above.

KPMG

70. The Plaintiffs repeat paragraphs 53 to 55, 65.5 to 65.6 and subparagraphs 67.10 to 67.11 above.

71. KPMG in its capacity as the auditor of the Compliance Plans, was subject to the following statutory duties:

71.1 by s.601HG(3) of the Act, within 3 months after the end of a financial year of the scheme, to:

- (a) examine the relevant Compliance Plan;
- (b) carry out an audit of GPL's compliance with the relevant Compliance Plan during each relevant financial year; and
- (c) give to GPL a report stating, inter alia, whether in KPMG's opinion GPL had complied with the relevant Compliance Plan during each relevant financial year,

71.2 to exercise reasonable care, skill and diligence in carrying out an audit of, and reporting upon, GPL's compliance with the Compliance Plans in accordance with s.601HG(3)(b)-(c); and

71.3 by s.601HG(4A) of the Act, to notify ASIC in writing as soon as practicable and in any case within 28 days after the lead auditor became aware of circumstances that provided reasonable grounds to suspect that there had been a significant contravention of the Act.

72. KPMG in its capacity as the auditor of the Compliance Plans had a duty at common law to exercise reasonable care, skill and diligence in auditing the Compliance Plans of the

Gunns Woodlot Schemes, so as to avoid reasonably foreseeable damage to the Growers' interests:

72.1 at all relevant times, KPMG held itself out as an auditor with the necessary knowledge, skills and experience to carry out the audits of the Compliance Plans;

Particulars

- (a) By accepting the engagement as the Compliance Plan auditor and filling the Compliance Plan Audits of the Gunns Woodlot Schemes with ASIC, KPMG represented to GPL, the GPL Directors, the Growers and to ASIC that KPMG were qualified to conduct these audits.
- (b) The Plaintiffs rely upon the terms of the "Auditor's Responsibility" contained in the filed Compliance Plan Audits by KPMG, as particularised in paragraph 77 below.
- (c) Further particulars will be provided by way of evidence.

72.2 at all relevant times KPMG voluntarily accepted its appointment and engagement as the auditor of the Compliance Plans, and by doing so accepted a general professional obligation to ensure that the tasks of carrying out audits of the Compliance Plans and issuing reports in respect of those audits were undertaken with reasonable care, skill and diligence;

Particulars

The Plaintiffs repeat the particulars provided in subparagraph 72.1 above and provided in subparagraph 72.5 below.

72.3 KPMG was paid for its professional services in carrying out the audits of the Compliance Plans and reporting on those audits;

72.4 in accordance with s.601HG(5)-(6) of the Act, KPMG:

- (a) had a right of access to the books of the Gunns Woodlot Schemes in the conduct of the audits of their Compliance Plans; and
- (b) could require any officer of GPL to give it information, explanations or other assistance for the purposes of the audits of the Compliance Plans;

72.5 KPMG was obliged to conduct its audits of the Compliance Plans in accordance with the relevant professional auditing principles and practices, including Accounting Professional & Ethical Standard (**APES**) 3100 and APES 013.

Particulars

In accordance with ASAE 3100 and APES 013, KPMG was obligated to:

- (a) Perform the audits of the Compliance Plans with an attitude of professional scepticism recognising that circumstances may have existed that would cause GPL to be non-compliant with its requirements as measured by the suitable criteria; and
- (b) Obtain an understanding of GPL and the Gunns Woodlot Schemes, the requirements, suitable criteria and other compliance engagement circumstances, sufficient to identify and assess the risks of GPL's non-compliance and sufficient to design and perform further evidence-gathering procedures considering the elements of the compliance framework, including:
 - (1) Identifying where special consideration may be necessary, for example factors indicative of fraud, and the need for specialised skills or the work of an expert;
 - (2) Establishing and evaluating the continued appropriateness of quantitative materiality levels (where appropriate), and/or considering qualitative materiality factors;
 - (3) Designing and performing further evidence-gathering procedures to reduce compliance engagement risk to an acceptable level; and
 - (4) Evaluating evidence, including the reasonableness of the responsible party's oral and written representations on which to base KPMG's conclusions on in relation to compliance by GPL with the Compliance Plans.

72.6 KPMG represented in its reports of its audits of the Compliance Plans that they were conducted in accordance with Australian Auditing Standards;

Particulars

- (a) The Plaintiffs repeat the particulars provided in paragraph 77 below.
- (b) Further particulars will be provided by way of evidence.

72.7 at all material times, KPMG was aware, or ought to have been aware, that:

- (a) Compliance Plan audit reports would be lodged with ASIC, and be available to members of the Gunns Woodlot Schemes and potential acquirers of interests in the Gunns Woodlot Schemes; and
- (b) the contents of the Compliance Plan audit reports would have a material effect on the market for, and the price or value of interests in, the Gunns Woodlot Schemes;

Particulars

- (i) KPMG's knowledge of the requirement of, and consequences of, lodgement of its Compliance Plan audit reports with ASIC is to be inferred from its participation in the circumstances leading to the relevant lodgements particularised in paragraph 77 below.
- (ii) Further particulars will be provided by way of discovery and evidence.

72.8 members of the Gunns Woodlot Schemes and potential acquirers of interests in the Gunns Woodlot Schemes:

- (a) were not at any time in a position to undertake, or cause to be undertaken, the same or corresponding tasks of carrying out audits of the Compliance Plans;
- (b) were vulnerable in that they were not able to protect themselves from the consequences of KPMG failing to exercise reasonable care and skill in carrying out audits of the Compliance Plans; and
- (c) could suffer loss or damage if KPMG failed to exercise reasonable care and skill in carrying out the audits of the Compliance Plans, and reporting on those audits.

Particulars

The “potential acquirers of interest” being the persons who were not Growers of the Gunns Woodlot Schemes (but later became Growers or were potentially considering becoming Growers) at the time the relevant Compliance Plan Audits were performed and filed by KPMG.

(Together paragraphs 70 to 72 above describe the **KPMG Duties**).

C4. CONDUCT OF GPL, GUNNS LTD AND KPMG

Payments of ~~Growers’ Trust Funds~~ to Gunns Ltd

73. In respect of each of the Gunns Woodlot Schemes, there were Growers’ Trust Funds.

Particulars

(a1) The Application Fees paid by Growers exceeded the costs and expenses of performing the duties and obligations of the RE under cl.4.1. of the Management Agreements.

(a) The GPL annual reports set out amounts wrongly claimed as income or profit, being the balance between Application Fees paid by Growers and the costs and expenses of performing the duties and obligations of the RE under cl.4.1. of the Management Agreements;

(b) Percentage of Application Fee used for the Woodlot Establishment Expenses:

Scheme Year	Percentage
2002	36.53%
2003	33.93%
2005	44.23%
2006	28.26%
2008	48.62%
2009	54.11%

(c) Further particulars will be provided by way of expert evidence.

74. ~~Without Growers' consent~~, GPL paid, or caused to be paid (by the release of funds held by Gunns Ltd), some or all of the Growers' Trust Funds to Gunns Ltd.

Particulars

(a) Amounts accounted for as loans by GPL to Gunns Ltd:

Year	Amount
2002	\$2,584,000
2003	\$36,330,000
2004	\$71,420,000
2005	\$112,797,000
2006	\$29,053,000
2008	\$2,163,000
2009	\$89,826,000
2010	\$71,669,000
2011	\$70,315,000

(~~Growers' Trust Funds~~ GPL Advances)

(b) Amounts paid by GPL to Gunns Ltd as purported dividends:

- (1) \$8M for the year ending 30 June 2004;
- (2) \$50M for the year ending 30 June 2006;
- (3) \$50M for the year ending 30 June 2007; and
- (4) \$10M for the year ending 30 June 2009,

(GPL Dividends).

(c) Further particulars will be provided by way of evidence.

74A In the alternative to paragraphs 73 and 74 above, in respect of each of the Gunns Woodlot Schemes, there were the amounts comprising the GPL Unauthorised Retention of Growers' Trust Funds.

Particulars

The particulars to paragraph 73 above are repeated.

74B GPL paid, or caused to be paid (by the release of funds held by Gunns Ltd), some or all of the amounts comprising the GPL Unauthorised Retention of Growers' Trust Funds to Gunns Ltd.

Particulars

The particulars to paragraph 74 above are repeated.

Forestry Right Fees and Insurances

75. GPL did not make all required payments of the Forestry Right Fees pursuant to its obligation to do so set out in subparagraphs 65.1 to 65.4 above.

Particulars

- (a) Forestry Right Deed, Schedule 1.
- (b) No Forestry Rights Fees were paid at any time to the following landowners (which were subsidiaries of Gunns Ltd at all relevant times):
 - (1) Gunns Ltd;
 - (2) Associated Forest Holdings Pty Ltd (ACN 004 352 078);
 - (3) East Coast Pastoral Co Pty Ltd (ACN 009 519 528);
 - (4) Gunns Forest Products Pty Ltd (ACN 004 208 904);
 - (5) Kauri Timber Company Ltd (ACN 004 085 714); and
 - (6) Tasmanian Pulp & Forest Holdings Ltd (ACN 009 488 733); and
- (c) Forestry Rights Fees were not paid to the remaining holders of land from at least March 2012.

~~76. GPL did not purchase public liability insurances pursuant to the obligation to do so set out at subparagraphs 65.2(b) and 65.4(b) above.~~

KPMG Compliance Plan audit reports

77. KPMG issued Compliance Plan audit reports for each of the Gunns Woodlot Schemes, in respect of each relevant financial year, which did not raise any issue regarding the conduct pleaded in paragraphs 74 to 76 above and subparagraphs 80.10 and 80.11 below.

Particulars

For the financial year ended in 2003:

- (a) Compliance Plan Audit Report of 2002 Gunns Woodlot Scheme dated 30 September 2003; and
- (b) Compliance Plan Audit Report of 2003 Gunns Woodlot Scheme dated 30 September 2003.

For the financial year ended in 2004:

- (a) Compliance Plan Audit Report of 2002 Gunns Woodlot Scheme dated 30 September 2004; and
- (b) Compliance Plan Audit Report of 2003 Gunns Woodlot Scheme dated 30 September 2004.

For the financial year ended in 2005:

- (a) Compliance Plan Audit Report of 2002 Gunns Woodlot Scheme dated 29 September 2005;
- (b) Compliance Plan Audit Report of 2003 Gunns Woodlot Scheme dated 29 September 2005; and
- (c) Compliance Plan Audit Report of 2005 Gunns Woodlot Scheme dated 29 September 2005.

For the financial year ended in 2006:

- (a) Compliance Plan Audit Report of 2002 Gunns Woodlot Scheme dated 29 September 2006;

- (b) Compliance Plan Audit Report of 2003 Gunns Woodlot Scheme dated 29 September 2006;
- (c) Compliance Plan Audit Report of 2005 Gunns Woodlot Scheme dated 29 September 2006; and
- (d) Compliance Plan Audit Report of 2006 Gunns Woodlot Scheme dated 29 September 2006.

For the financial year ended in 2007:

- (a) Compliance Plan Audit Report of 2002 Gunns Woodlot Scheme dated 28 September 2007;
- (b) Compliance Plan Audit Report of 2003 Gunns Woodlot Scheme dated 28 September 2007;
- (c) Compliance Plan Audit Report of 2005 Gunns Woodlot Scheme dated 28 September 2007; and
- (d) Compliance Plan Audit Report of 2006 Gunns Woodlot Scheme dated 9 October 2007.

For the financial year ended in 2008:

- (a) Compliance Plan Audit Report of 2002 Gunns Woodlot Scheme dated 30 September 2008;
- (b) Compliance Plan Audit Report of 2003 Gunns Woodlot Scheme dated 30 September 2008;
- (c) Compliance Plan Audit Report of 2005 Gunns Woodlot Scheme dated 30 September 2008
- (d) Compliance Plan Audit Report of 2006 Gunns Woodlot Scheme dated 30 September 2008; and
- (e) Compliance Plan Audit Report of 2008 Gunns Woodlot Scheme dated 30 September 2008.

For the financial year ended in 2009:

- (a) Compliance Plan Audit Report of 2002 Gunns Woodlot Scheme dated 30 September 2009;
- (b) Compliance Plan Audit Report of 2003 Gunns Woodlot Scheme dated 30 September 2009;
- (c) Compliance Plan Audit Report of 2005 Gunns Woodlot Scheme dated 30 September 2009;
- (d) Compliance Plan Audit Report of 2006 Gunns Woodlot Scheme dated 30 September 2009;
- (e) Compliance Plan Audit Report of 2008 Gunns Woodlot Scheme dated 30 September 2009; and
- (f) Compliance Plan Audit Report of 2009 Gunns Woodlot Scheme dated 30 September 2009.

For the financial year ended in 2010:

- (a) Compliance Plan Audit Report of 2002 Gunns Woodlot Scheme dated 30 September 2010;
- (b) Compliance Plan Audit Report of 2003 Gunns Woodlot Scheme dated 30 September 2010;
- (c) Compliance Plan Audit Report of 2005 Gunns Woodlot Scheme dated 30 September 2010;
- (d) Compliance Plan Audit Report of 2006 Gunns Woodlot Scheme dated 30 September 2010;
- (e) Compliance Plan Audit Report of 2008 Gunns Woodlot Scheme dated 30 September 2010; and
- (f) Compliance Plan Audit Report of 2009 Gunns Woodlot Scheme dated 30 September 2010.

For the financial year ended in 2011:

- (a) Compliance Plan Audit Report of 2002 Gunns Woodlot Scheme dated 30 September 2011;
- (b) Compliance Plan Audit Report of 2003 Gunns Woodlot Scheme dated 30 September 2011;
- (c) Compliance Plan Audit Report of 2005 Gunns Woodlot Scheme dated 30 September 2011;
- (d) Compliance Plan Audit Report of 2006 Gunns Woodlot Scheme dated 30 September 2011;
- (e) Compliance Plan Audit Report of 2008 Gunns Woodlot Scheme dated 30 September 2011; and
- (f) Compliance Plan Audit Report of 2009 Gunns Woodlot Scheme dated 30 September 2011.

78. In respect of each relevant financial year, KPMG did not notify ASIC in writing within 28 days after the lead auditor became aware of circumstances that provided reasonable grounds to suspect that there had been a significant contravention of the Act, or at all.

Particulars

- (a) The Plaintiffs repeats the particulars provided in paragraphs 12, ~~86.2~~ 53 and 77 above, and 86.2 below.
- (b) Further particulars will be given after discovery.

C5. BREACHES OF DUTY ~~BY THE DEFENDANTS~~

GPL

GPL Management Duties

79. GPL breached the GPL Management Duties set out in paragraphs 65 to 66 above by failing:

79.1 under the Constitutions, to ensure that any goods or services which were required to be provided or performed under the terms of a Forestry Right Lease Deed and the Management Agreements were provided or performed in accordance with the relevant agreement and the Constitution;

Particulars

- (a) GPL did not pay, or cause to be paid, the Forestry Right Fees ~~and did not purchase public liability insurances~~ for the Gunns Woodlot Schemes in accordance with the Forestry Right Deeds;
- (b) Schedule A to the Default Notices for each of the Gunns Woodlot Schemes 2002, 2003, 2005, 2006, 2008 and 2009 issued by the Receivers to GPL dated 8 November 2012;
- (c) GPL did not ensure that Gunns Ltd as agent of GPL paid the Forestry Right Fees;
- (d) GPL did not issue any notice to Gunns Ltd of a breach of the Maintenance Services Sub-contracting Agreements due to Gunns Ltd's failure to pay the Forestry Right Fees when GPL knew or ought to have known that Gunns Ltd was not complying with the terms of the Maintenance Services Sub-contracting Agreements;
- (e) GPL did not exercise its right to terminate the Maintenance Services Sub-contracting Agreements due to Gunns Ltd's failure to pay the Forestry Right Fees as agent of GPL; and
- (f) Further particulars will be given after discovery.

79.2 under the Management Agreements to:

- (a) insure the land the subject of the Gunns Woodlot Schemes against public risk; and
- (b) ensure that the Establishment Services, Maintenance Services and Pruning Services were carried out in a proper and diligent manner;

Particulars

The particulars at subparagraph 79.1 above are repeated.

79.3 under the Forestry Right Lease Deeds to:

- (a) refrain from breaching the Forestry Right Deed; and
- (b) refrain from doing anything that may end the Forestry Right Deed or the registration of the Forestry Right Deed;

Particulars

The particulars at subparagraph 79.1 above are repeated.

79.4 under the Forestry Right Deeds to:

- (a) pay the Forestry Right Fees to landowners quarterly in arrears on each of the payment dates specified in the Forestry Right Deed; and
- (b) keep current with a reputable insurer a public risk insurance policy covering GPL's liability in respect of its interest in the land the subject of the Gunns Woodlot Schemes,

Particulars

The particulars at subparagraph 79.1 above are repeated.

79.5 to comply with obligations under the Original Compliance Plans (pleaded in subparagraph 65.5 above) by:

- (a) contrary to Rule 1: failing to ensure that the scheme related cash needs and insurance requirements were maintained;

Particulars

GPL failed to retain sufficient assets to be able to pay the Forestry Right Fees when they became due and payable.

- (b) contrary to Rule 10: failing to ensure that all conditions for the release of the Application Money out of the Application Portion to pay for the Establishment Expenses were satisfied;

Particulars

As pleaded in paragraphs 73 ~~to~~ and 74B above, GPL improperly released Application Money out of the Application Portion in making the ~~Growers' Trust Funds~~ GPL Advances and paying the GPL Dividends.

- (e) ~~contrary to Rule 12: paying itself, or reimbursing itself for expenses or liabilities, out of the scheme property not in accordance with the Constitution, Management Agreements and prospectus;~~

Particulars

- (i) ~~The pleading and particulars at paragraph 73 above are repeated.~~
- (ii) ~~The balance between Application Fees paid by Growers and the costs and expenses of performing the duties and obligations of the RE under cl.4.1. of the Management Agreements was treated by GPL wrongly as its own property and paid to its own account.~~
- (d) contrary to Rule 15: giving ~~itself, or~~ a related party, a financial benefit out of scheme property, or that could diminish or endanger scheme property, where no exception applied and/or the benefit was not approved by Growers;

Particulars

- (i) ~~The particulars at subparagraph 79.5(c) above are repeated.~~
- (ii) ~~The pleading and particulars at paragraph 74 above are repeated.~~
- (iii) ~~GPL diminished or endangered scheme property by making the Growers' Trust Fund Advances and paying the GPL Dividends, which resulted in it failing to retain sufficient assets to be able to pay the Forestry Right Fees, the public liability insurances, and perform the outstanding Maintenance Services.~~
- (i) In making the GPL Advances and paying the GPL Dividends:
- a. GPL gave a financial benefit to a related party under the Act, Gunns Ltd;

- b. GPL did not have the prior approval of the Growers;
- c. GPL's conduct was not within an exception set out in ss.210-216 of the Act; and
- d. GPL diminished or endangered scheme property by failing to retain sufficient assets to be able to pay the Forestry Right Fees and perform the outstanding Maintenance Services.

(ii) By entering into the Gunns Financing and Security Arrangements:

- a. GPL gave a financial benefit to a related party under the Act, Gunns Ltd;
- b. GPL did not have the prior approval of the Growers;
- c. GPL's conduct was not within an exception set out in ss.210-216 of the Act; and
- d. GPL exposed itself to the insolvency of Gunns in a manner which endangered scheme property by reason of GPL's obligations to, among other things, pay Forestry Rights Fees, failure in respect of which threatened Growers' interests.

- (e) contrary to Rule 17: failing to ensure that scheme money was invested and spent in accordance with the disclosure document and the Constitution;

Particulars

The pleadings and particulars at paragraphs 50, 73 ~~to~~ and 74B above are repeated.

- (f) contrary to Rule 22: failing to ensure that Gunns Woodlot Scheme property was clearly identified as scheme property and held separately from property of GPL and property of any other scheme;

Particulars

The particulars at subparagraph 79.5(c) above are repeated. The pleadings and particulars at paragraphs 50, 73 to 74B above are repeated.

- (g) contrary to Rule 26: failing to ensure that all payments out of Gunns Woodlot Scheme property were made in accordance with the Constitution and the Law; and

Particulars

The pleadings and particulars at paragraphs 50, 73 to and 74B above are repeated.

79.6 to comply with obligations under the Amended Compliance Plans (pleaded in subparagraph 65.6 above) by:

- (a) contrary to Rule 1: failing to ensure that the cash needs of the project were maintained; ~~and failing to ensure that the insurance requirements were maintained;~~

Particulars

GPL failed to retain sufficient assets to be able to pay the Forestry Right Fees ~~and public liability insurances~~ when they became due and payable.

- (b) contrary to Rule 5: failing to ensure that all of the conditions for the release of the Application Money out of the Application Portion were satisfied;

Particulars

The pleading and particulars at subparagraph 79.5(b) above are repeated.

- ~~(c) contrary to Rule 10: paying itself fees, or reimbursing itself for expenses or liabilities, out of the Gunns Woodlot Scheme property not in accordance with the Constitution, Forestry Right Deeds, Management Agreements and PDS;~~

Particulars

~~The pleading and particulars at subparagraph 79.5(c) above are repeated.~~

- (d) contrary to Rule 13: giving ~~itself~~, or a related party, a financial benefit out of scheme property, or that could diminish or endanger scheme property, where no exception applied and/or the benefit was not approved by Growers;

Particulars

~~The particulars at subparagraph 79.579.5(c) above are repeated. The pleadings and particulars at paragraphs 50, 73 to 74B above are repeated.~~

- (e) contrary to Rule 15: failing to ensure the Gunns Woodlot Scheme property was invested and spent in accordance with the disclosure document and the Constitution;

Particulars

The particulars at subparagraph 79.5(e) above are repeated.

- (f) contrary to Rule 19: failing to ensure that Gunns Woodlot Scheme property was clearly identified as scheme property and held separately from the property of GPL and property of any other managed investment scheme; and

Particulars

The particulars at subparagraph 79.5(f) above are repeated.

- (g) contrary to Rule 23: failing to ensure all payments out of the Gunns Woodlot Scheme property were made in accordance with the Constitution and the Act.

Particulars

The particulars at subparagraph 79.5(g) above are repeated.

79.7 to exercise the degree of care and diligence that a reasonable person would exercise if they were in the RE's position (as required by s.601FC(1)(b) of the Act);

Particulars

(a) The GPL Bank Guarantee was not, but should have been, called on before GPL and Gunns Ltd were placed into external administration:

- (1) By the roles of the Third Defendant and Mr Gay ~~Fourth Defendants' positions~~ as directors and/or officers of both GPL and Gunns Ltd, GPL and the GPL Directors knew or should have known that Gunns Ltd was not paying Forestry Rights Fees;
- (2) At the time the GPL Bank Guarantee was called upon, Gunns Ltd's secured creditor asserted that the guarantee fell within the creditor's security interests and in settlement of that dispute the GPL Bank Guarantee was compromised and only \$500,000 was paid to GPL; and
- (3) The amount of \$500,000 was insufficient to fund the ongoing operations of the Gunns Woodlot Schemes,

(b) GPL failed to retain sufficient assets to be able to pay the Forestry Right Fees and ~~public liability insurances~~ when they became due and payable,

~~79.8 to act in the best interest of the members (as required by s.601FC(1)(c) of the Act);~~

Particulars

~~The particulars at subparagraph 79.7 above are repeated.~~

79.9 to comply with the Gunns Woodlot Schemes Compliance plans (as required by s.601FC(1)(h) of the Act); ~~and~~

Particulars

The pleadings and particulars at subparagraphs 79.5 to 79.6 above are repeated.

79.10 to report to ASIC any breach of the Act that related to the Gunns Woodlot scheme and has had, or was likely to have, a materially adverse effect on the interests of Gunns Ltd, as soon as practicable after it became aware of the breach (as required by s.601FC(1)(l) of the Act); and-

Particulars

- (a) No notification was made to ASIC of any breach of the Act; and
- (b) As to the breaches of the Act, subparagraphs 79.7 to 79.9 above, and 80.4 to 80.9 below are repeated.

79.10A disclose to and seek approval from the scheme members for (as required by s.601LC of the Act) the giving of a financial benefit to a related party;

Particulars

The particulars to paragraph 75(d) are repeated.

GPL Trust Fund Duties

80. GPL breached the GPL Trust Funds Duties set out at paragraph 67 above by failing to:

80.1 preserve the Growers' Trust Funds as trust property;

Particulars

The pleadings and particulars at paragraphs 73 and 74B above are repeated.

80.2 act in good faith and in the best interests of the Growers;

Particulars

The particulars at subparagraph 80.1 above are repeated.

~~80.3 avoid any conflict between interest and duty; and~~

Particulars

~~(a) — The particulars to subparagraph 80.1 above are repeated; and~~

~~(b) — GPL put the interests of its parent company, Gunns Ltd, ahead of the interests of the Growers.~~

80.4 comply (as required by s.601FC(1)(h) of the Act) with the Gunns Woodlot Schemes Compliance Plans as pleaded in subparagraphs 80.10 to 80.11 below.

80.5 ensure (as required by s.601FC(1)(i) of the Act) that Gunns Woodlot Scheme property was clearly identified as scheme property, and held separately from property of the RE and property of any other scheme,

Particulars

The pleading and particulars at subparagraph 79.5(f) above are repeated.

80.6 ensure (as required by s.601FC(1)(k) of the Act) that all payments out of scheme property were made in accordance with the Gunns Woodlot Scheme Constitutions and the Act;

Particulars

The pleading and particulars at subparagraph 79.5(g) above are repeated.

80.7 carry out or comply with (as required by s.601FC(1)(m) of the Act) any other duty, not inconsistent with this Act, conferred on GPL by the Gunns Woodlot Schemes Constitutions;

Particulars

The pleadings and particulars at paragraphs 39, 43 to 52A 44, 50, and 73 to and 74B above are repeated.

80.8 hold (as required by s.601FC(2) of the Act) the Gunns Woodlot Scheme property on trust for the Growers;

Particulars

The particulars at subparagraph 80.1 above are repeated.

- 80.9 disclose to and seek approval from the scheme members for (as required by s.601LC of the Act) the giving of a financial benefit to a related party;

Particulars

The particulars at paragraph 79.5(d) are repeated.

- ~~(a) — Gunns Ltd was a related party of GPL under the Act;~~
- ~~(b) — Making the Growers' Trust Funds Advances and paying the GPL Dividends to Gunns Ltd bestowed benefits on Gunns Ltd;~~
- ~~(c) — GPL did not obtain the approval of the Growers before making the Growers' Trust Funds Advances and paying the GPL Dividends to Gunns Ltd; and~~
- ~~(d) — Making the Growers' Trust Funds Advances and paying the GPL Dividends to Gunns Ltd were not within an exception set out in ss.210-216 of the Act.~~

- 80.10 comply with the Original Compliance Plans (pleaded in subparagraph 67.10 above) by:

- (a) contrary to Rule 10: failing to ensure that all conditions for the release of the Application Money out of the Application Portion to pay for the Establishment Expenses were satisfied;

Particulars

The pleading and particulars at subparagraph 79.5(b) above are repeated.

- ~~(b) — contrary to Rule 12: paying itself, or reimbursing itself for expenses or liabilities, out of the scheme property not in accordance with the Constitution, Management Agreements and prospectus;~~

Particulars

~~The pleading and particulars at subparagraph 79.5(c) above are repeated.~~

- (c) contrary to Rule 15: giving ~~itself, or~~ inter alia a related party, a financial benefit out of scheme property, or that could diminish or endanger

scheme property, where no exception applied and/or the benefit was not approved by Growers;

Particulars

The pleading and particulars at subparagraphs 79.5(d) above are repeated.

- (d) contrary to Rule 17: failing to ensure that scheme money was invested and spent in accordance with the disclosure document and the Constitution;

Particulars

The pleading and particulars at subparagraph 79.5(e) above are repeated.

- (e) contrary to Rule 22: failing to ensure that Gunns Woodlot Scheme property was clearly identified as scheme property and held separately from property of GPL and property of any other scheme;

Particulars

The pleading and particulars at subparagraph 79.5(f) above are repeated.

- (f) contrary to Rule 26: failing to ensure that all payments out of Gunns Woodlot Scheme property were made in accordance with the Constitution and the Law; and

Particulars

The pleading and particulars at subparagraph 79.5(g) above are repeated.

80.11 comply with the Amended Compliance Plans (pleaded in subparagraph 67.11 above) by:

- (a) contrary to Rule 5: failing to ensure that all of the conditions for the release of the Application Money out of the Application Portion were satisfied;

Particulars

The pleading and particulars at subparagraph 79.5(b) above are repeated.

- ~~(b) contrary to Rule 10: paying itself fees, or reimbursing itself for expenses or liabilities, out of the Gunns Woodlot Scheme property not in accordance with the Constitution, Forestry Right Deeds, Management Agreements and PDS;~~

Particulars

~~The pleading and particulars at subparagraph 79.5(c) above are repeated.~~

- (c) contrary to Rule 13: giving itself, or inter alia a related party, a financial benefit out of scheme property, or that could diminish or endanger scheme property, where no exception applied and/or the benefit was not approved by Growers;

Particulars

The pleading and particulars at subparagraph 79.5(d) above are repeated.

- (d) contrary to Rule 15: failing to ensure the Gunns Woodlot Scheme property was invested and spent in accordance with the disclosure document and the Constitution;

Particulars

The particulars at subparagraph 79.5(e) above are repeated.

- (e) contrary to Rule 19: failing to ensure that Gunns Woodlot Scheme property was clearly identified as scheme property and held separately from the property of GPL and property of any other managed investment scheme;

Particulars

The particulars at subparagraph 79.5(f) above are repeated.

- (f) contrary to Rule 23: failing to ensure all payments out of the Gunns Woodlot Scheme property were made in accordance with the Constitution and the Act; and

Particulars

The particulars at subparagraph 79.5(g) above are repeated.

GPL duties arising from its position as RE

80A. Further or in the alternative to paragraph 80 above, GPL breached the duties arising from its position as an RE set out at paragraph 67A above by failing to:

80A.1 as a fiduciary, act in good faith and in the best interests of Growers; and

80A.2 comply (as required by s.601FC(1)(h) of the Act) with the Gunns Woodlot Schemes Compliance Plans.

Gunns Ltd

~~81. Gunns Ltd breached the Gunns Duties set out in paragraph 68 above, by failing to:~~

~~81.1 preserve the Growers' Trust Funds as trust property;~~

Particulars

~~(a) In its capacity as Custodian, Gunns Ltd released the Growers' Trust Funds to its own account by making the Growers' Trust Funds Advances and paying the GPL Dividends.~~

~~(b) Further particulars will be provided by way of evidence.~~

~~81.2 act in good faith and in the best interests of the Growers; and~~

Particulars

~~The particulars at subparagraph 81.1 above are repeated.~~

~~81.3 avoid any conflict between interest and duty.~~

Particulars

~~The particulars at subparagraph 81.1 above are repeated.~~

The GPL Directors

82. In relation to GPL's failure to ensure payment of the Forestry Rights Fees ~~and maintenance of public liability insurances~~, the GPL Directors breached the Directors Duties by failing to:

82.1 exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer's position (as required by s.601FD(1)(b) of the Act);

Particulars

- (a) The GPL Directors failed to ensure that GPL paid the Forestry Right Fee, performed the Maintenance Services ~~and paid public liability insurances~~;
- (b) The GPL Directors failed to ensure that GPL had funds available to cover liabilities including the Forestry Right Fees, performance of the Maintenance Services ~~and public liability insurances~~;
- (c) The GPL directors failed to ensure that GPL's agent, Gunns Ltd, paid the Forestry Right Fees and performed the Maintenance Services;
- (d) The GPL Directors failed to cause GPL to issue any notice to Gunns Ltd of a breach of the Maintenance Services Sub-contracting Agreements due to Gunns Ltd's failure to pay the Forestry Right Fees and perform the Maintenance Services;
- (e) The GPL Directors failed to exercise GPL's right to terminate the Maintenance Services Sub-contracting Agreements with Gunns Ltd due to Gunns Ltd's failure to pay the Forestry Right Fees and perform the Maintenance Services;
- (f) The GPL Directors failed to cause GPL to call upon the GPL Bank Guarantee in a timely manner; and

(g) In relation to the matters set out in (a)-(f) above, the relevant periods for the GPL Directors are as follows:

- (1) For the Third Defendant, while a director of GPL from 21 February 2000 to 11 August 2010;
- (1A) For Mr Gay, while a director of GPL from 21 February 2000 to 3 June 2010;
- (2) For the Fifth Defendant, while a director of GPL from 2000 to 2012;
- (3) For the Sixth Defendant, while a director of GPL from 21 February 2000 to 13 August 2010;
- (4) For the Seventh Defendant while a director of GPL from 16 April 2008 to 27 November 2012;
- (5) For the Eighth Defendant, while a director of GPL from 24 February 2009 to 3 February 2011; and
- (6) For the Ninth Defendant, while a director of GPL from 3 June 2010 to 27 November 2012.

82.2 refrain from making improper use of their positions as officers to cause detriment to the members of the Gunns Woodlot Schemes (as required by s.601FD(1)(e) of the Act);

Particulars

The particulars at subparagraph 82.1 above are repeated.

82.3 take all steps that a reasonable person would take in the officers' position to ensure (as required by s.601FD(1)(f) of the Act) that GPL as RE complied with its obligations under the Act, the AFSL, and the Scheme Documents; and the Compliance Plans;

Particulars

The particulars at subparagraph 82.1 above are repeated.

- 82.4 act with the due care, skill and diligence that a reasonable person would exercise if the person were in GPL Directors' position as the Directors of the responsible entity; and

Particulars

The particulars at subparagraph 82.1 above are repeated.

- 82.5 ensure that GPL complied with its obligations under the Management Agreements, Forestry Rights Lease Deeds and the Forestry Right Deeds.

Particulars

The particulars at subparagraph 82.1 above are repeated.

83. In relation to the Growers' Trust Funds, the GPL Directors breached the Directors Duties by failing to:

- 83.1 exercise the degree of due care, skill and diligence that a reasonable person would exercise if they were in the officer's position (as required by s.601FD(1)(b) of the Act);

Particulars

- (a) The GPL Directors failed to ensure GPL preserved the Growers' Trust Funds;
- (b) The GPL Directors approved the use by GPL of the Growers' Trust Funds for each of the years 2004, 2006, 2007 and 2009 for its own purposes;
- (c) The Third, Fifth and Sixth Defendants and Mr Gay approved the use by GPL of the Growers' Trust Funds for its own purposes for the years 2004, 2006 and 2007 and the Third and Fifth to Eighth Defendants approved the use by GPL of the Growers' Trust Funds for its own purposes for 2009;
- (d) The GPL Directors as set out in (c) ~~(b)~~ above resolved to declare and caused to be paid the GPL Dividends from funds that were Growers' Trust Funds and not properly classifiable as profit of GPL; and

- (e) The GPL Directors as set out in (c) above permitted GPL to (or alternatively failed to ensure that GPL did not) make the ~~Growers' Trust Funds~~ GPL Advances with Growers' Trust Funds in the periods as follows:
- (1) In relation to the Third Defendant, while a director of GPL from 21 February 2000 to 11 August 2010;
 - (1A) In relation to Mr Gay, while a director of GPL from 21 February 2000 to 3 June 2010
 - (2) In relation to the Fifth Defendant, while a director of GPL from 2000 to 2012;
 - (3) In relation to the Sixth Defendant, while a director of GPL from 21 February 2000 to 13 August 2010;
 - (4) In relation to the Seventh Defendant, while a director of GPL from 16 April 2008 to 27 November 2012;
 - (5) In relation to the Eighth Defendant, while a director of GPL from 24 February 2009 to 3 February 2011; and
 - (6) In relation to the Ninth Defendant, while a director of GPL from 3 June 2010 to 27 November 2012.

83.2 ensure that GPL sought member approval for the ~~Growers' Trust Funds~~ GPL Advances and paying the GPL Dividends to Gunns Ltd in accordance with s.208 of the Act as replaced by s.601LC;

Particulars

The particulars to paragraph 83.1 are repeated

83.3 act in the best interests of the scheme members and, if there was a conflict between the scheme members' interests and the ~~interests~~ duty of the RE, to give priority to the scheme members' interests (as required by s.601FD(1)(c) of the Act);

Particulars

- (a) The GPL Directors permitted GPL to (or alternatively failed to ensure that GPL did not) make the ~~Growers' Trust Funds~~ GPL Advances and pay the GPL Dividends to Gunns Ltd;
- (1) The Third, Fifth and Sixth Defendants and Mr Gay approved the GPL Dividends for the years 2004, 2006 and 2007, and the Third and Fifth to Eighth Defendants and Mr Gay approved the use by GPL of the Growers' Trust Funds for 2009 for its own purposes; and
- (2) In relation to the ~~Growers' Trust Funds~~ GPL Advances, the particular (d) to paragraph 83.1 above is repeated.
- (b) Gunns Ltd was a related party of GPL under the Act;
- (c) Making the ~~Growers' Trust Funds~~ GPL Advances and paying the GPL Dividends to Gunns Ltd bestowed a benefit on Gunns Ltd;
- (d) GPL did not obtain the approval of the Growers before making the ~~Growers' Trust Funds~~ GPL Advances and paying the GPL Dividends to Gunns Ltd;
- (e) Making the ~~Growers' Trust Funds~~ GPL Advances and paying the GPL Dividends to Gunns Ltd was not within an exception set out in ss.210-216 of the Act; and
- (f) By permitting GPL to make the ~~Growers' Trust Funds~~ GPL Advances and pay the GPL Dividends to Gunns Ltd, the GPL Directors caused GPL to breach its duty to the scheme members fail to act in their best interests ~~put Gunns Ltd's interests ahead of the Growers.~~
- 83.4 refrain from making improper use of their position (as required by s.601FD(1)(e) of the Act) as an officer to cause detriment to the members of the Gunns Woodlot Schemes;

Particulars

The particulars at subparagraphs 83.1 and 83.3 above are repeated.

83.5 take all steps that a reasonable person would take in the officer's position to ensure that GPL as RE complied with (as required by s.601FD(1)(f) of the Act) the Act, the AFSL, the Scheme Documents, and the Compliance Plans;

Particulars

The particulars at subparagraph 83.1 above are repeated.

83.6 act with the due care, skill and diligence that a reasonable person would exercise in the GPL Directors' positions as the directors of an RE (as required by the common law); and

Particulars

The particulars at subparagraph 83.1 above are repeated.

83.7 ensure that GPL complied with the GPL Trust Obligations.

Particulars

The pleadings and particulars at subparagraphs 83.1 to 83.6 above are repeated.

83A. In the alternative to paragraph 83 above, in relation to the GPL Unauthorised Retention of Growers' Trust Funds, the GPL Directors breached the Directors Duties by failing to:

83A.1 exercise the degree of due care, skill and diligence that a reasonable person would exercise if they were in the officer's position (as required by s.601FD(1)(b) of the Act);

Particulars

- (a) The GPL Directors approved the use by GPL of the GPL Unauthorised Retention of Growers' Trust Funds for each of the years 2004, 2006, 2007 and 2009 for its own purposes;
- (b) The Third, Fifth and Sixth Defendants and Mr Gay approved the use by GPL of the GPL Unauthorised Retention of Growers' Trust Funds for its own purposes for the years 2004, 2006 and 2007 and the Third and Fifth to Eighth Defendants and Mr Gay approved the use by GPL of the GPL

Unauthorised Retention of Growers' Trust Funds for its own purposes for 2009;

- (c) The GPL Directors as set out in (b) above resolved to declare and caused to be paid the GPL Dividends from funds that were GPL Unauthorised Retention of Growers' Trust Funds and not properly classifiable as profit of GPL; and
- (d) The GPL Directors as set out in (b) above permitted GPL to (or alternatively failed to ensure that GPL did not) make the GPL Advances with the GPL Unauthorised Retention of Growers' Trust Funds in the periods as follows:
 - (1) In relation to the Third Defendant, while a director of GPL from 21 February 2000 to 11 August 2010;
 - (2) In relation to Mr Gay, while a director of GPL from 21 February 2000 to 3 June 2010;
 - (3) In relation to the Fifth Defendant, while a director of GPL from 2000 to 2012;
 - (4) In relation to the Sixth Defendant, while a director of GPL from 21 February 2000 to 13 August 2010;
 - (5) In relation to the Seventh Defendant, while a director of GPL from 16 April 2008 to 27 November 2012;
 - (6) In relation to the Eighth Defendant, while a director of GPL from 24 February 2009 to 3 February 2011; and
 - (7) In relation to the Ninth Defendant, while a director of GPL from 3 June 2010 to 27 November 2012.

83A.2 ensure that GPL sought member approval for the GPL Advances and paying the GPL Dividends to Gunns Ltd in accordance with s.208 of the Act as replaced by s.601LC;

Particulars

The particulars to paragraph 83A.1 are repeated

83A.3 act in the best interests of the scheme members and, if there was a conflict between the scheme members' interests and the duty of the RE, to give priority to the scheme members' interests (as required by s.601FD(1)(c) of the Act);

Particulars

- (a) The GPL Directors permitted GPL to (or alternatively failed to ensure that GPL did not) make the GPL Advances and pay the GPL Dividends to Gunns Ltd;
 - (1) The Third, Fifth and Sixth Defendants approved the GPL Dividends for the years 2004, 2006 and 2007, and the Third and Fifth to Eighth Defendants approved the use by GPL of the GPL Unauthorised Retention of Growers' Trust Funds for 2009 for its own purposes; and
 - (2) In relation to GPL Advances, particular (d) to paragraph 83.1 above is repeated.
- (b) Gunns Ltd was a related party of GPL under the Act;
- (c) Making the GPL Advances and paying the GPL Dividends to Gunns Ltd bestowed a benefit on Gunns Ltd;
- (d) GPL did not obtain the approval of the Growers before making the GPL Advances and paying the GPL Dividends to Gunns Ltd;
- (e) Making the GPL Advances and paying the GPL Dividends to Gunns Ltd was not within an exception set out in ss.210-216 of the Act; and
- (f) By permitting GPL to make the GPL Advances and pay the GPL Dividends to Gunns Ltd, the GPL Directors caused GPL to breach its duty to the scheme members and fail to act in their best interests.

83A.4 refrain from making improper use of their position (as required by s.601FD(1)(e) of the Act) as an officer to cause detriment to the members of the Gunns Woodlot Schemes;

Particulars

The particulars at subparagraphs 83A.1 and 83A.3 above are repeated.

83A.5 take all steps that a reasonable person would take in the officer's position to ensure that GPL as RE complied with (as required by s.601FD(1)(f) of the Act) the Act, the AFSL, the Scheme Documents, and the Compliance Plans; and

Particulars

The particulars at subparagraph 83A.1 above are repeated.

83A.6 act with the due care, skill and diligence that a reasonable person would exercise in the GPL Directors' positions as the directors of an RE (as required by the common law).

Particulars

The particulars at subparagraph 83A.1 above are repeated.

83B. In relation to the Gunns Financing and Security Arrangements, the GPL Directors breached the Directors Duties by failing to:

83B.1 exercise the degree of due care, skill and diligence that a reasonable person would exercise if they were in the officer's position (as required by s.601FD(1)(b) of the Act);

Particulars

- (a) GPL entering into the Gunns Financing and Security Arrangements exposed GPL to the insolvency of Gunns in a manner which endangered scheme property by reason of GPL's obligations to, among other things, pay Forestry Rights Fees, failure in respect of which threatened Growers' interests;

- (b) GPL did not obtain any benefit by its participation in the Gunns Financing and Security Arrangements;
- (c) The GPL Directors approved GPL's participation in the Gunns Financing and Security Arrangements in the periods as follows:
- (1) In relation to the Third Defendant, while a director of GPL from 21 February 2000 to 11 August 2010;
 - (2) In relation to Mr Gay, while a director of GPL from 21 February 2000 to 3 June 2010
 - (3) In relation to the Fifth Defendant, while a director of GPL from 2000 to 2012;
 - (4) In relation to the Sixth Defendant, while a director of GPL from 21 February 2000 to 13 August 2010;
 - (5) In relation to the Seventh Defendant, while a director of GPL from 16 April 2008 to 27 November 2012;
 - (6) In relation to the Eighth Defendant, while a director of GPL from 24 February 2009 to 3 February 2011; and
 - (7) In relation to the Ninth Defendant, while a director of GPL from 3 June 2010 to 27 November 2012.

83B.2 act in the best interests of the scheme members and, if there was a conflict between the scheme members' interests and the duty of the RE, to give priority to the scheme members' interests (as required by s.601FD(1)(c) of the Act); and

Particulars

The particulars at 83B.1 above are repeated.

83B.3 act with the due care, skill and diligence that a reasonable person would exercise in the GPL Directors' positions as the directors of an RE (as required by the common law);

Particulars

The particulars at 83B.1 above are repeated.

84. The GPL Directors are liable to discharge the whole or a part of the liability of GPL for the matters pleaded in paragraphs 79 to 80 above (pursuant to s.197 of the Act).

Particulars

- (a) GPL have not discharged, and cannot discharge, the liability or part of it as set out in paragraphs 79 to 80 above; and
- (b) GPL is not entitled to be fully indemnified against the liability out of the Gunns Woodlot Schemes.

The Fourth Defendant's liability for Gunns Ltd

- ~~85. The Eighth and Ninth Defendants and Mr Gay are The Fourth Defendant is liable to discharge the whole or part of the liability of Gunns Ltd for the matter pleaded in paragraphs 81 above (pursuant to s.197 of the Act).~~

Particulars

- ~~(a) Gunns Ltd has not discharged and cannot discharge, the liability or part of it as set out in paragraphs 81 above; and~~
- ~~(b) Gunns Ltd is not entitled to be fully indemnified against the liability out of the Gunns Woodlot Schemes.~~

KPMG

86. KPMG breached the KPMG Duties set out in paragraphs 71 and 72 above by:

- 86.1 not exercising due skill and care in the provision of the audit reports of the Compliance Plans in accordance with s.601HG(3)(b)-(c) of the Act;

Particulars

- (1) KPMG provided audit reports in which the lead auditor provided an opinion that GPL complied with the Compliance Plans, where that was not the case. In this respect, the pleadings and particulars at

paragraphs 12, 77, 78, 79.5, 79.6, 80.10 and 80.11 above are repeated;

- (2) The lead auditor for each of the Compliance Plans was:
 - (A) The Tenth Defendant for the years 2005 to 2011; and
 - (B) The Eleventh Defendant for the years 2003 to 2004,
- ~~(3) The particulars at paragraph 77 above are repeated.~~

86.2 contrary to s.601HG(4A)(a)(i), where the lead auditor for the audit was aware of circumstances that gave the lead auditor reasonable grounds to suspect a contravention of the Act by GPL, and the contravention was a significant one, the lead auditor not notifying ASIC in writing of those circumstances as soon as practicable, and in any case within 28 days, after the lead auditor became aware of those circumstances;

Particulars

- (a1) The Plaintiffs repeats the particulars provided in paragraph 12 and subparagraph 86.1 above, and the particulars provided in subparagraph 86.3 below.
- (a) In conducting an audit of the Compliance Plans, the lead auditor reviewed GPL's financial documents, Woodlot Scheme Documents, Board Minutes, report(s) from Gunns Ltd as Manager and Custodian of the Gunns Woodlot Schemes, and financial and company reports prepared by GPL annually;
- (b) A review of the documents set out in (a) above reveals the following significant contraventions of the Act by GPL:
 - (1) GPL made the ~~Growers' Trust Funds~~ GPL Advances and paid the GPL Dividends to Gunns Ltd in breach of trust, and contravened the Act, the Constitution and the Compliance Plans; and
 - (2) the Forestry Right Fees had not been paid by GPL in accordance with the Forestry Right Deeds with such a failure

being a contravention of the Act, the Constitution and the Compliance Plans; and

~~(3) public liability insurances had not been paid by GPL in accordance with the Forestry Right Deeds with such a failure being a contravention of the Act, the Constitution and the Compliance Plans;~~

(c) The lead auditor did not notify ASIC in writing that the lead auditor had become aware of the circumstances set out in the particulars at (b)(1) above that provided reasonable grounds to suspect that there had been significant contraventions of the Act:

(1) where the lead auditor had knowledge of the fact that the total of the Application Monies in fact exceeded the reasonable cost of the Woodlot Establishment Expenses, resulting in an unused surplus;

(2) where the lead auditor had knowledge of the fact that under the Constitutions, such monies constituted trust monies and were to be held in a separate trust account on trust for the Growers;

(3) where the lead auditor had knowledge of the fact that there was (i) no such trust account; or (ii) in the alternative, that such surplus monies were not in the trust account; and

(4) where the lead auditor had knowledge of the fact that the unused surplus trust monies were not returned to the Growers;

(d) The lead auditor did not notify ASIC in writing that the lead auditor had become aware of the circumstances set out in the particulars at (b)(2) above that provided reasonable grounds to suspect that there had been significant contraventions of the Act:

(1) where the lead auditor had knowledge that the Forestry Right Fees had not been paid by GPL in accordance with the Forestry Right Deeds;

- (2) where the lead auditor had knowledge that GPL consequently had not complied with the Compliance Plans;
 - (3) where the lead auditor had knowledge or awareness that in the matters set out above at (d)(1) and (d)(2), the lead auditor had reasonable grounds to suspect GPL had acted in contravention of the Act, the Constitution and the Compliance Plans; and
- (e) The lead auditor did not notify ASIC in writing that the lead auditor had become aware of the circumstances set out in the particulars at (b)(3) above that provided reasonable grounds to suspect that there had been significant contraventions of the Act:
- ~~(1) where the lead auditor had knowledge that GPL had not purchased the public liability insurances in accordance with the Forestry Right Deeds;~~
 - (2) where the lead auditor had knowledge that GPL consequently had not complied with the Compliance Plans; and
 - (3) where the lead auditor had knowledge or awareness that in the matters set out above at (e)(1) to (e)(2), the lead auditor had reasonable grounds to suspect GPL had acted in contravention of the Act, the Constitution the Compliance Plans.

86.3 failing to act with the requisite degree of skill, care and diligence that an auditor would exercise in KPMG's position as the auditor of the Compliance Plans;

Particulars

(a1) The Plaintiffs repeats the particulars provided in subparagraphs 86.1 and 86.2 above.

- (a) KPMG failed to perform the audits of the Compliance Plans in accordance with its professional obligations, including complying with ASAE 3100 and APES 013, by:
 - (1) Failing to perform a compliance engagement with an attitude of professional scepticism recognising that circumstances may

exist that cause the entity to be non-compliant with the requirements as measured by the suitable criteria; and

- (2) Failing to obtain an understanding of GPL and the Gunns Woodlot Schemes, the requirements, suitable criteria and other compliance engagement circumstances, sufficient to identify and assess the risks of GPL's non-compliance and sufficient to design and perform further evidence-gathering procedures considering the elements of the compliance framework.
- (b) KPMG failed to identify in their audits of the Compliance Plans the breaches by GPL of the Scheme Documents, and the Compliance Plans as set out in subparagraphs 79.5 and 79.6 and 80.10 and 80.11 above.
- (c) Further particulars will be provided by way of evidence.

C6. CAUSATION AND LOSS

GPL

86A. But for GPL entering into the Gunns Financing and Security Arrangements, which exposed GPL to the insolvency of Gunns and endangered scheme property by reason of GPL's obligations to, among other things, perform the Maintenance Services and pay the Forestry Right Fees, failure in respect of which threatened Growers' interests, the Plaintiffs would not have suffered the loss claimed at subparagraphs 104.1 and 104.3 below.

87. But for GPL's failure to ensure performance of the Maintenance Services and payment of the Forestry Right Fees, ~~and take out public liability insurances~~ for the Gunns Woodlot Schemes (by not maintaining funds to cover these costs, and/or ensuring that any agent appointed to do so was performing those services), the Plaintiffs would not have suffered the loss claimed at subparagraphs 104.1 and 104.3 below.

88. Further and in the alternative, but for GPL's failure to, by no later than 8 March 2012, call upon the GPL Bank Guarantee, in order to pay any outstanding Forestry Rights Fees and provide the Maintenance Services ~~and take out public liability insurances~~, the

Plaintiffs would not have suffered the loss claimed at subparagraphs 104.1 and 104.3 below.

89. As a direct consequence of GPL's failure to fulfil its obligations to pay the Forestry Rights Fees and, provide the Maintenance Services ~~and take out public liability insurances~~, the Growers lost the value of their interests in the Gunns Woodlot Schemes.

90. In addition to paragraphs 87 to 88 above, because of GPL's breaches of the GPL Trust Duties by not:

90.1 preserving the Growers' Trust Funds; and/or

90.2 arranging the return of these amounts to Growers,

the Plaintiffs were not returned their Proportional Interest in the amount of Growers' Trust Funds and suffered the loss claimed at subparagraph 104.2 below.

90A In the alternative to paragraph 90 above, in addition to paragraphs 87 to 88 above, because of the breach of fiduciary duty in respect of the GPL Unauthorised Retention of Growers' Trust Funds, the Plaintiffs suffered the loss claimed at subparagraph 104.2A below.

Particulars

Further particulars will be provided by way of evidence.

GPL Directors

90B. But for the GPL Directors approving GPL's entry into the Gunns Financing and Security Arrangements, which exposed GPL to the insolvency of Gunns and endangered scheme property by reason of GPL's obligations to, among other things, perform the Maintenance Services and, pay the Forestry Right Fees, failure in respect of which threatened Growers' interests, the Plaintiffs would not have suffered the loss claimed at subparagraphs 104.1 and 104.3 below.

91. But for the GPL Directors' failure to ensure performance of the Maintenance Services and payment of the Forestry Right Fees ~~and taking out of insurances~~ for the Gunns Woodlot Schemes (by requiring that sufficient funds be maintained to cover these costs, and/or ensuring that any agent appointed to do so was performing those services), the

Plaintiffs would not have suffered the loss claimed at subparagraphs 104.1 and 104.3 below.

Particulars

Further particulars will be provided by way of evidence.

92. Further and in the alternative, but for the GPL Directors' failure to cause GPL to, by no later than 8 March 2012, call upon the GPL Bank Guarantee in order to pay any outstanding Forestry Rights Fees and Maintenance Services ~~and public liability insurances~~, the Plaintiffs would not have suffered the loss claimed at subparagraphs 104.1 and 104.3 below.

Particulars

- (a) Paragraphs 82 and 83 above are repeated here.
- (b) Further particulars will be provided by way of evidence.

93. As a direct consequence of the conduct of the GPL Directors set out in paragraphs 82 to 83B above, GPL failed to fulfil its obligations to pay the Forestry Rights Fees and provide the Maintenance Services ~~and take out public liability insurances~~, and the Growers lost the value of their interests in the Gunns Woodlot Schemes.

Particulars

Further particulars will be provided by way of evidence.

94. In addition to paragraphs 90B 94 to 92 above, but for the GPL Directors' failure to ensure that GPL did not breach the GPL Trust Fund Duties by not:

94.1 preserving the Growers' Trust Funds; and/or

94.2 arranging the return of these amounts to Growers,

the Plaintiffs were not returned their Proportional Interest in the amount of Growers' Trust Funds and suffered the loss claimed at subparagraph 104.2 below.

Particulars

- (a) Paragraph 83 above is repeated here.

(b) Further particulars will be provided by way of evidence.

94A In the alternative to paragraph 92 above, in addition to paragraphs 88B to 90 above, because of the breach of fiduciary duty in respect of the GPL Unauthorised Retention of Growers' Trust Funds, the Plaintiffs suffered the loss claimed at subparagraph 104.2A below.

Particulars

(a) Paragraph 83A above is repeated here.

(b) Further particulars will be provided by way of evidence.

Gunns Ltd

~~95. But for Gunns Ltd's failure to:~~

~~96. act in good faith and in the best interests of the Growers; and~~

~~96.1 avoid any conflict between its interest and its duty;~~

~~the Plaintiffs would not have suffered the losses claimed at subparagraphs 104.1 and 104.3 below.~~

~~97. In addition to paragraph 95 above, but for Gunns Ltd's breaches of trust in relation to the Growers' Trust Funds by not:~~

~~97.1 preserving the Growers' Trust Funds; and/or~~

~~97.2 arranging the return of these amounts to Growers;~~

~~the Plaintiffs were not returned their Proportional Interest in the amount of Growers' Trust Funds and suffered the loss claimed at subparagraph 104.2 below.~~

KPMG

98. But for KPMG's breaches (pleaded in paragraph 86 above) of the KPMG Duties (pleaded in paragraphs 71 and 72 above), GPL, the GPL Directors, the Growers and ASIC would have been on notice that:

98.1 the ~~Growers' Trust Funds~~ GPL Advances were paid in breach of trust and the Act;

98.2 the GPL Dividends were not classifiable as a GPL profit and were made in breach of trust and the Act;

98.2A GPL's retention of the GPL Unauthorised Retention of Growers' Trust Funds was in breach of its fiduciary obligations;

98.3 GPL was acting in contravention of its duties under the Act;

98.4 GPL was acting in breach of its obligations under the Compliance Plans; and

98.5 GPL did not ensure performance of the Maintenance Services and payment of the Forestry Right Fees, ~~and public liability insurance~~ for the Gunns Woodlot Schemes.

Particulars

The Plaintiffs repeat paragraphs 79-80A and the particulars provided in paragraph 12 above.

99. In the premises, if the KPMG Duties (pleaded in paragraphs 71 and 72 above) had been performed, that would have caused:

99.1 KPMG to request GPL to rectify the breaches in connection with the conduct pleaded at paragraphs 73 to 76 above; and, if GPL had refused so to do, KPMG would have qualified the audit reports of the Compliance Plans;

99.2 KPMG to have notified ASIC pursuant to s.601HG(4A) of the Act of GPL's breaches of the Compliance Plans;

99.3 ASIC to have required GPL to rectify its breaches of the Act, the Constitution, and the Compliance Plans; and/or

99.4 ASIC, if GPL had not rectified the breaches of the Act, to seek relief:

- (a) pursuant to s.1324(1) of the Act, to ensure the breaches were rectified, and the Court to grant such relief; and/or
- (b) pursuant to ss.601FN and 601FP of the Act, to have GPL replaced with an RE which would have complied with the Compliance Plans, and the Court to grant such relief,

therefore ensuring the performance of the Maintenance Services and payment of the Forestry Right Fees, ~~and taking out of public liability insurance~~ for the Gunns Woodlot Schemes.

Particulars

- (a) The “relief” that would have been sought had the KPMG Duties been performed would have taken the form of a Court order that GPL be replaced as RE.
- (b) Further particulars will be provided by way of evidence.

100. Had the conduct set out in paragraphs 98 and 99 above occurred, the Plaintiffs would not have suffered the damage claimed at paragraph 104 below.

101. Alternatively to paragraph 100 above, because the conduct set out in paragraphs 98 and 99 above did not occur, and as a result of KPMG’s conduct pleaded at paragraph 86 above, the Plaintiffs lost the chance to avoid the loss of their interests in the Gunns Woodlot Schemes.

The Plaintiffs’ loss

102. By reason of the matters pleaded in paragraphs ~~86A 85A~~ 87 to 101 above and as a direct consequence of the conduct of GPL, Gunns Ltd and the Third and Fifth to Eleventh Defendants and Mr Gay, the Gunns Woodlot Schemes assets, being the Gunns Woodlot Schemes’ woodlots and the Growers’ interests therein, were exposed to the Gunns Ltd insolvency.

Particulars

The Plaintiffs repeat and rely upon the pleadings and particulars provided in paragraphs 97 and 98 above.

103. By reason of the matters pleaded in paragraphs 90, 94, 97 to 99 above, the Growers Trust Funds were not preserved and were not returned to Growers.
104. By reason of the matters pleaded in paragraphs ~~86A~~ ~~85A-87~~ to 100 above, but for the actions of GPL, Gunns Ltd and the Third and Fifth to Eleventh Defendants and Mr Gay, the Plaintiffs and the Group Members would not have suffered the damage comprised by:
- 104.1 the loss of their respective Proportional Interests in the Wood Proceeds Portion and the Carbon Rights Portion for each of the Gunns Woodlot Schemes, less the Liquidation Distributions;
- 104.2 the loss of the Plaintiffs' and each of the Group Members' portion of the Growers' Trust Funds;
- 101.2A the loss of funds comprising the GPL Unauthorised Retention of Growers' Trust Funds; and
- 104.3 the loss of their respective initial investments in the Gunns Woodlot Schemes.

Particulars

Further particulars will be provided by way of evidence.

CLAIMS AGAINST CATLIN AND CHUBB

Primary IMI Policy

105. GPL and Chartis Australia Insurance Ltd (**Chartis**) are parties to a contract of liability insurance described as 'Investment Management Insurance' and numbered 107092 (**Primary IMI Policy**).

Particulars

The Primary IMI Policy, which comprises a Schedule, a policy wording and 15 Endorsements, bears a 'Date of Policy Issuance' of 6 February 2012, and a 'Policy Period' of 30 November 2011 to 30 November 2012.

106. The Primary IMI Policy is the primary layer of investment management insurance arrangements effected on behalf of GPL for the period 30 November 2011 to 30 November 2012 with a 'Limit of Liability' of \$2.5 million and a 'Retention' for a 'Non-US Claim/Direct Financial Loss' of \$250,000.
107. The Primary IMI Policy relevantly provided the following cover in respect of 'Investment Manager Management Liability':

The Insurer will:

- (i) pay the Loss of any Insured Person;*
- (ii) reimburse any Insured Entity for any Loss it pays on behalf of an Insured Person;*

which arises out of a Claim first made during the Policy Period for a Wrongful Managerial Act and notified to the Insurer as soon as practicable during the Policy Period.

Particulars

The terms 'Insurer', 'Loss', 'Insured Person', 'Insured Entity', 'Policy Period', and 'Wrongful Managerial Act' are defined in the 'Definitions' section of the Primary IMI Policy. The Plaintiffs refer to those definitions as if set out in full in this pleading.

108. GPL and the GPL Directors are each an 'Insured' under the Primary IMI Policy.

Particulars

- (a) GPL is an 'Insured Entity' as the 'Policyholder' identified in the Schedule to the Primary IMI Policy.
- (b) The GPL Directors are each an 'Insured Person' as a 'Director or Officer of ... an Insured Entity'.

109. The matters pleaded above in relation to GPL and the GPL Directors constitute 'Claims' for 'Wrongful Managerial Acts' within the meaning of the Primary IMI Policy.

Particulars

- (a) In respect of GPL, paragraphs 65-67, 79-80, 88A-90A and 101-103 are referred to.
- (b) In respect of the GPL Directors, paragraphs 69, 82-83B, 90B-94 and 101-103 are referred to.

First Excess IMI Policy

110. GPL and Catlin are parties to a contract of liability insurance described as 'Financial and Professional Risks Excess Insurance' and numbered 923424 (First Excess IMI Policy).

Particulars

The First Excess IMI Policy, which comprises a Schedule and a policy wording, bears a certificate date of 1 February 2012, and a 'Period of Insurance' from 30 November 2011 to 30 November 2012.

111. The First Excess IMI Policy is the first excess layer of investment management insurance arrangements effected on behalf of GPL with a 'Limit' of AUD 10,000,000.
112. The First Excess IMI Policy relevantly provided the following cover:

... the Insurer will indemnify the Insured against their legal liability to pay damages or compensation for and/or arising out of any event covered by the Underlying Policies and in the manner and to the extent stated herein.

Particulars

The terms 'Insurer', 'Insured', and 'Underlying Policies' are defined in the 'Definitions' section of the First Excess IMI Policy. The Plaintiffs refer to those definitions as if set out in full in this pleading.

113. GPL and the GPL Directors were each an 'Insured' under the First Excess IMI Policy.

Particulars

- (a) GPL is the 'Insured' identified in the Schedule to the First Excess IMI Policy and as a 'party indemnified by the Underlying Policies'.
- (b) The GPL Directors are each an 'Insured' as a 'party indemnified by the Underlying Policies'.
- (c) The pleadings and particulars at paragraph 107 are repeated.

114. The Primary IMI was an Underlying Policy under the First Excess IMI Policy.

Particulars

The Schedule to the First Excess IMI Policy identifies Chartis Australia Policy Number 107092 as the 'Underlying Insurance'.

115. The matters pleaded above in relation to GPL and the GPL Directors give rise to legal liability to pay damages or compensation for and/or arising out of events covered by an Underlying Policy, namely the Primary IMI Policy.

Particulars

The particulars at paragraph 108 above are repeated.

The Chubb Policy

116. GPL and Chubb are parties to the Chubb Policy.

Particulars

The Policy is styled as Elite Excess Investment Management Insurance and the policy period is 30 November 2011 to 30 November 2012.

117. The Chubb Policy is an excess layer of insurance effected on behalf of GPL with a limit of indemnity of AUD 2,500,000.

118. The Chubb Policy provided (in the Schedule) that the Primary IMI Policy was defined as the "Primary Policy".

119. The Chubb Policy provided (in clause 1.3) that the Chubb Policy was subject to the same terms and conditions as the Primary IMI Policy.
120. GPL and the GPL Directors were each an 'Insured' under the Chubb Policy.

Particulars

- (a) GPL is an 'Insured' in the Primary IMI Policy;
- (b) The GPL Directors are each an 'Insured' in the Primary IMI Policy;
- (c) The pleadings and particulars at paragraph 108 are repeated.
121. The matters pleaded above in relation to GPL and the GPL Directors give rise to legal liability to pay damages or compensation for and/or arising out of events covered by the Primary IMI Policy.

Particulars

The particulars at paragraph 108 above are repeated.

Leave to proceed against GPL and the indemnity position

122. These proceedings were commenced by the Plaintiffs against, relevantly, GPL on 19 March 2018, at which time GPL was in liquidation.
123. Leave was granted to the Plaintiffs for the commencement and maintenance of these proceedings against, relevantly, GPL pursuant s.500 of the Act on 13 April 2018.

Particulars

Orders of Hammerschlag J dated 13 April 2018.

124. By letters dated 3 May 2018 and 7 December 2018, Chartis confirmed indemnity under the Primary IMI Policy for the claim against GPL and the GPL Directors in these proceedings.
125. By letter dated 14 February 2019, Catlin set out its formal position on policy response to the effect that the claims in these proceeding were excluded and no indemnity would be provided to GPL or the GPL Directors.

Particulars

- (i) The exclusions relied upon were those contained in Endorsements 15 (Conflict of Interest), 4 (Lender's Liability), and clause 3.8/Endorsement 11 (Insolvency).
 - (ii) Catlin also reserved its rights in respect of exclusions in clause 3.1 (Prior Knowledge), clause 3.3 (Established Misdeeds), clause 3.13 (Contractual Liability), clause 3.14 (Fees and Commissions), Endorsement 8 (Forecast Exclusion) and Endorsement 9 (Failure to Insure).
126. By letter dated 29 May 2019, Chubb set out its formal position on policy response to the effect that the claims in these proceeding were excluded and no indemnity would be provided to GPL or the GPL Directors.

Particulars

- (i) The exclusions relied upon were those contained in Endorsements 15 (Conflict of Interest), 4 (Lender's Liability), and clause 3.8/Endorsement 11 (Insolvency).
127. On 4 December 2019, on the application of GPL, leave to proceed against GPL pursuant s.500 of the Act was revoked due to the exhaustion of funds under the Primary IMI Policy that had been used to defend the proceedings.

Particulars

Decision of Ball J delivered *ex tempore* on 4 December 2019.

128. Due to the revocation of leave to proceed against GPL on 4 December 2019, the Plaintiff and Group Members will not be able to obtain a judgment against it in respect of the matters pleaded above.

The Third Party Claims Act

129. In the premises, GPL and each of the GPL Directors is:
- 129.1 an 'Insured' within the meaning of the First Excess IMI Policy; and

- 129.2 an 'insured person' within the meaning of that term in the ss.3-4 of the Third Party Claims Act;
- 129.3 an 'Insured' within the meaning of the Chubb Policy; and
- 129.4 an 'insured person' within the meaning of that term in the ss.3-4 of the Third Party Claims Act.
130. In the premises, the matters pleaded above in relation to GPL and the GPL Directors:
- 130.1 give rise to legal liability to pay damages or compensation for and/or arising out of events covered by an Underlying Policy (namely the Primary IMI Policy) within the meaning of the First Excess IMI Policy and the Chubb Policy; and
- 130.2 constitute an 'insured liability' within the meaning of that term in ss.3-4 of the Third Party Claims Act.
131. Pursuant to s.4 of the Third Party Claims Act, the Plaintiffs and Group Members may recover directly from the Catlin and Chubb the amount of the insured liability of GPL and the GPL Directors.

D QUESTIONS APPROPRIATE FOR REFERRAL TO REFEREE

None.

E A STATEMENT AS TO WHETHER THE PARTIES HAVE ATTEMPTED MEDIATION; WHETHER THE PARTY IS WILLING TO PROCEED TO MEDIATION

The parties have not yet attempted mediation. The Plaintiffs are willing to proceed to mediation at the appropriate time.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under Schedule 2 clause 4(2) of the *Legal Profession Uniform Law Application Act 2014* that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

I have advised the plaintiff that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature



Capacity

Solicitor on record for the Plaintiffs

Date of signature

21 August 2020 ~~6 August 2018~~

NOTICE TO DEFENDANT

If you do not file a defence within 28 days of being served with this statement of claim:

- **You will be in default in these proceedings.**
- **The court may enter judgment against you without any further notice to you.**

The judgment may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you.

HOW TO RESPOND

Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the claim from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

You can respond in one of the following ways:

- 1 If you intend to dispute the claim or part of the claim,** by filing a defence and/or making a cross-claim.
- 2 If money is claimed, and you believe you owe the money claimed, by:**
 - Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.

- Filing an acknowledgement of the claim.
- Applying to the court for further time to pay the claim.

3 If money is claimed, and you believe you owe part of the money claimed, by:

- Paying the plaintiff that part of the money that is claimed.
- Filing a defence in relation to the part that you do not believe is owed.

Court forms are available on the UCPR website at www.ucprforms.justice.nsw.gov.au or at any NSW court registry.

REGISTRY ADDRESS

Street address	Law Courts Building, Queens Square, 184 Phillip Street, Sydney NSW 2000
Postal address	GPO Box 3, Sydney NSW 2001
Telephone	1300 679 272

PARTY DETAILS

PARTIES TO THE PROCEEDINGS

Plaintiffs

Giabal Pty Ltd

First Plaintiff

Geoffry Edward Underwood

Second Plaintiff

Defendants

~~**Gunns Plantations Ltd (in Liquidation)**~~

~~First Defendant~~

~~**Gunns Ltd (in Liquidation) (Receivers and Managers Appointed)**~~

~~Second Defendant~~

Wayne Leonard Chapman

Third Defendant

Robert Watson and Erica Gay as the legal personal representatives for the estate of the late John Eugene Gay in place of Mr Gay

Fourth Defendant

Rodney John Loone

Fifth Defendant

Leslie Ralph Baker

Sixth Defendant

Robert Henry Graham

Seventh Defendant

Robin Gray

Eighth Defendant

Paul Desmond Teisseire

Ninth Defendant

Andrew Gray

Tenth Defendant

Mathew Gary Wallace

Eleventh Defendant

Catlin Australia Pty Ltd

Twelfth Defendant

Chubb Insurance Australia Limited

Thirtieth Defendant

FURTHER DETAILS ABOUT PLAINTIFFS

First Plaintiff

Name Giabal Pty Ltd
 Address C/- Sands & Associates
 156 Hume Street
 TOOWOOMBA QLD 4350

Second Plaintiff

Name Geoffrey Edward Underwood
 Address Sixth Floor Wentworth Chambers
 180 Phillip Street
 SYDNEY NSW 2000

Legal representative for plaintiffs

Name Gordon Grieve
 Practising certificate number 30216
 Firm Piper Alderman
 Contact solicitor McKenzie Moore
 Address Level 23
 Governor Macquarie Tower
 1 Farrer Place
 Sydney NSW 2000
 DX address DX 10216 Sydney Stock Exchange
 Telephone +61 2 9253 9999
 Fax +61 2 9253 9900
 Email ggrieve@piperalderman.com.au

DETAILS ABOUT DEFENDANTS

First Defendant

Name ~~Gunns Plantations Limited (in Liquidation)~~
 Address ~~C/- PPB Advisory
 Level 21 181 William Street
 MELBOURNE VIC 3000~~

Second Defendant

Name ~~Gunns Limited (in Liquidation) (Receivers and
 Managers Appointed)~~

~~Address C/ PPB Advisory
Level 21 181 William Street
MELBOURNE VIC 3000~~

Third Defendant

Name Wayne Leonard Chapman
Address 15 Lord Street
LAUNCESTON TAS 7250

Fourth Defendant

Name Robert Watson and Erica Gay as the legal personal
representatives for the estate of the late John Eugene
Gay in place of Mr Gay
Address 7 Clarence Street
EAST LAUNCESTON TAS 7250

Fifth Defendant

Name Rodney John Loone
Address Unit 3, 26A Balfour Street
LAUNCESTON TAS 7250

Sixth Defendant

Name Leslie Ralph Baker
Address 40 Marieville Esplanade
SANDY BAY TAS 7005

Seventh Defendant

Name Robert Henry Graham
Address 30 Bagshaw Way
MILE END SA 5031

Eighth Defendant

Name Robin Gray
Address 11 Beech Road
NORWOOD TAS 7250

Ninth Defendant

Name Paul Desmond Teisseire
Address 4 Bickford Terrace
SOMERTON PARK SA 5044

Tenth Defendant

Name Andrew Gray
Address 33 George Street
LAUNCESTON TAS 7250

Eleventh Defendant

Name Mathew Gary Wallace

Address 33 George Street
LAUNCESTON TAS 7250

Twelfth Defendant

Name Catlin Australia Pty Limited
ABN 64 108 319 786

Address Angel Place
Level 28, 123 Pitt Street
SYDNEY NSW 2000

Thirteenth Defendant

Name Chubb Insurance Australia Limited
ABN 23 001 642 020

Address Level 38, Grosvenor Place
225 George Street
SYDNEY NSW 2000