

COMMERCIAL LIST RESPONSE

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
List	Commercial List
Registry	Sydney
Case number	2018/00076580

TITLE OF PROCEEDINGS

Plaintiff	Giabal Pty Ltd ACN 009 863 807
Second Plaintiff	Geoffry Edward Underwood
First Defendant	Gunns Plantations Ltd (in Liquidation) ACN 091 232 209
Number of Defendants	13

FILING DETAILS

Filed for	Catlin Australia Pty Limited , Twelfth Defendant
Legal representative	Matt Andrews, Kennedys
Legal representative reference	AUSX111/921843/MJA
Contact name and telephone	Matt Andrews, 02 8215 5934

A. NATURE OF DISPUTE

1. The Twelfth Defendant (**Catlin**) agrees with the description of the nature of the dispute as described by the plaintiffs in the Further Amended Commercial List Statement filed on 21 August 2020 (**FACLS**).

B. ISSUES LIKE TO ARISE

1. Catlin agrees with the description of the issues likely to arise set out in the FACLS, and the additional issues identified by each of:
 - a. the Third Defendant (**Chapman**) in the Amended Commercial List Response filed on 24 August 2018 (**Chapman's ACLR**);

- b. the Fourth Defendant (**Gay**) in the Amended Commercial List Response filed on 30 August 2018 (**Gay's ACLR**);
 - c. the Fifth Defendant (**Loone**) in the Amended Commercial List Response filed on 24 August 2018 (**Loone's ACLR**);
 - d. the Sixth Defendant (**Baker**) in the Amended Commercial List Response filed on 24 August 2018 (**Baker's ACLR**);
 - e. the Seventh Defendant (**Graham**) in the Amended Commercial List Response filed on 24 August 2018 (**Graham's ACLR**);
 - f. the Eighth Defendant (**Robin Gray**) in the Amended Commercial List Response filed on 24 August 2018 (**Robin Gray's ACLR**);
 - g. the Ninth Defendant (**Teisseire**) in the Amended Commercial List Response filed on 24 August 2018 (**Teisseire's ACLR**);
 - h. the Tenth Defendant (**Andrew Gray**) and the Eleventh Defendant (**Wallace**) in the Amended Commercial List Response filed on 27 August 2019 (**Andrew Gray/Wallace's ACLR**).
2. In addition, Catlin says that the following issues are likely to arise:
- a. In the event that the court finds that GPL and/or the GPL directors have a legal liability to the Plaintiffs and/or group members, whether the Primary Policy responds, and if so to what extent?
 - b. If the Primary Policy responds to any legal liability, whether the First Excess Policy responds, and if so to what extent?
 - c. Whether the Plaintiffs and Group Members made the investments the subject of these proceedings as part of a taxation minimisation strategy and whether they have in fact suffered the losses suffered claimed by the Plaintiffs on their own behalf and on behalf of the Group Members.

C. CONTENTIONS

In this section, Catlin has adopted the headings and definitions (unless otherwise indicated) used by the Plaintiffs in the FACLS for convenience only. Their use does not constitute any

admission by Catlin as to the accuracy of the descriptions or any other matters conveyed by them.

GPL, GUNNS LTD AND THE DEFENDANTS

GPL

1. Catlin admits paragraph 1 of the Plaintiffs' Contentions.

Gunns Ltd

2. Catlin admits paragraph 2 of the Plaintiffs' Contentions.
3. Catlin admits paragraph 3 of the Plaintiffs' Contentions.

Directors and Officers of Gunns Ltd and GPL

4. Catlin admits paragraph 4 of the Plaintiffs' Contentions.
5. Catlin admits paragraph 5 of the Plaintiffs' Contentions.
6. In answer to paragraph 6 of the Plaintiffs' Contentions, Catlin:
 - a. says that Mr Loone was also a director of GPL from 21 February 2007 to 27 November 2012;
 - b. otherwise admits the paragraph.
7. Catlin admits paragraph 7 of the Plaintiffs' Contentions.
8. Catlin admits paragraph 8 of the Plaintiffs' Contentions.
9. Catlin admits paragraph 9 of the Plaintiffs' Contentions.
10. Catlin admits paragraph 10 of the Plaintiffs' Contentions.
11. Catlin notes the matters in paragraph 11.

KPMG

12. Catlin does not admit paragraph 12 of the Plaintiffs' Contentions.
13. Catlin notes the matters in paragraph 13 of the Plaintiffs' Contentions.

Catlin

- 13A. In answer to paragraph 13A of the Plaintiffs' Contentions, Catlin:
- a. repeats paragraph 105 below;
 - b. otherwise admits the matters alleged in the paragraph.

Chubb

- 13B. Catlin admits paragraph 13B of the Plaintiffs' contentions.

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

14. Catlin admits paragraph 14 of the Plaintiffs' Contentions.
15. Catlin does not admit paragraph 15 of the Plaintiffs' Contentions.
16. Catlin does not admit paragraph 16 of the Plaintiffs' Contentions.
17. Catlin does not admit paragraph 17 of the Plaintiffs' Contentions..
18. Catlin does not admit paragraph 18 of the Plaintiffs' Contentions.
19. Catlin does not admit paragraph 19 of the Plaintiffs' Contentions.
20. Catlin does not admit paragraph 20 of the Plaintiffs' Contentions.
21. In answer to paragraph 21 of the Plaintiffs' Contentions, Catlin:
 - a. admits that from time to time, GPL entered into "*Forestry Rights Deeds*";
 - b. otherwise does not admit the paragraph.
22. In answer to paragraph 22 of the Plaintiffs' Contentions, Catlin:
 - a. admits that cl 6 of the "*Forestry Rights Deeds*" provided for the payment of a "*Forestry Rights Fee*" by GPL;
 - b. relies on the "*Forestry Rights Deeds*" for their full terms and effect as if set out in full;

- c. otherwise does not admit the paragraph.
23. In answer to paragraph 23 of the Plaintiffs' Contentions, Catlin:
- a. admits that the "*Forestry Rights Deeds*" provided for the grant of certain rights to GPL;
 - b. relies on the "*Forestry Rights Deeds*" for their full terms and effect as if set out in full;
 - c. otherwise does not admit the paragraph.
24. In answer to paragraph 24 of the Plaintiffs' Contentions, Catlin:
- a. relies on the "*Forestry Rights Deeds*" for their full terms and effect as if set out in full;
 - b. otherwise does not admit the paragraph.
25. In answer to paragraph 25 of the Plaintiffs' Contentions, Catlin:
- a. relies on the "*Forestry Rights Lease Deeds*" and the "*Sub-Forestry Rights Deeds*" for their full terms and effect as if set out in full;
 - b. otherwise does not admit the paragraph.
26. In answer to paragraph 26 of the Plaintiffs' Contentions, Catlin:
- a. relies on the "*Forestry Rights Lease Deeds*" and the "*Sub-Forestry Rights Deeds*" for their full terms and effect as if set out in full;
 - b. otherwise does not admit the paragraph.
27. In answer to paragraph 27 of the Plaintiffs' Contentions, Catlin:
- a. relies on the "*Forestry Rights Lease Deeds*" and the "*Sub-Forestry Rights Deeds*" for their full terms and effect as if set out in full;
 - b. otherwise does not admit the paragraph.

Establishment and Management of the Woodlots

28. In answer to paragraph 28 of the Plaintiffs' Contentions, Catlin:

- a. admits that clause 4 of the "*Management Agreements*" set out obligations of the "*Manager*" in relation to "*Establishment Services*";
 - b. admits that clause 5 of the "*Management Agreements*" set out obligations of the "*Manager*" in relation to "*Maintenance Services*";
 - c. relies on the "*Management Agreements*" for their full terms and effect as if set out in full;
 - d. otherwise does not admit the paragraph.
29. In answer to paragraph 29 of the Plaintiffs' Contentions, Catlin:
- a. relies on the "*Management Agreements*" for their full terms and effect as if set out in full;
 - b. otherwise does not admit the paragraph.
30. In answer to paragraph 30 of the Plaintiffs' Contentions, Catlin:
- a. relies on the "*Management Agreements*" for their full terms and effect as if set out in full;
 - b. otherwise does not admit the paragraph.
31. [Not in use]
32. In answer to paragraph 32 of the Plaintiffs' Contentions, Catlin:
- a. admits that in accordance with cl 6 of the "*Forestry Rights Lease Deeds*" and the "*Sub-Forestry Rights Deeds*", the "*Grantor*" is entitled to the "*Rental Fee*";
 - b. relies on the "*Forestry Rights Lease Deeds*" and the "*Sub-Forestry Rights Deeds*" for their full terms and effect as if set out in full;
 - c. otherwise does not admit the paragraph.
33. In answer to paragraph 33 of the Plaintiffs' Contentions, Catlin:
- a. admits that pursuant to the "*Maintenance Services Sub-Contracting Agreements*", GPL appointed Gunns as a sub-contractor to perform certain functions;

- b. relies on the "*Maintenance Services Sub-Contracting Agreements*" for their full terms and effect as if set out in full;
 - c. otherwise does not admit the paragraph.
34. In answer to paragraph 34 of the Plaintiffs' Contentions, Catlin:
- a. relies on the "*Maintenance Services Sub-Contracting Agreements*" for their full terms and effect as if set out in full;
 - b. otherwise admits the paragraph.
35. In answer to paragraph 35 of the Plaintiffs' Contentions, Catlin:
- a. admits that on 20 April 2012, the "*ANZ Bank*" issued a bank guarantee pursuant to which it undertook to pay to GPL on written demand any sum or sums up to an aggregate not exceeding \$4,000,000;
 - b. otherwise does not admit the paragraph.
36. Catlin does not admit paragraph 36 of the Plaintiffs' Contentions.

RE Remuneration under the Schemes

37. In answer to paragraph 37 of the Plaintiffs' Contentions, Catlin:
- a. admits that pursuant to clause 11.1 of the "*Management Agreements*", GPL was appointed by a "*Grower*" as the sole agent to market, enter into negotiations, and sell wood on the "*Grower's*" behalf;
 - b. admits that pursuant to clause 11.2 of the "*Management Agreements*", GPL was appointed by a "*Grower*" as the sole agent to market, enter into negotiations and commercially exploit "*Carbon Rights*" on the "*Grower's*" behalf;
 - c. relies on the "*Management Agreements*" for their full terms and effect as if set out in full;
 - d. otherwise does not admit the paragraph.
38. In answer to paragraph 38 of the Plaintiffs' Contentions, Catlin:
- a. relies on the "*Constitutions*" for their full effect as if set out in full;

- b. otherwise does not admit the matters alleged in the paragraph.

Growers' Interests in the Gunns Woodlot Schemes

- 39. In answer to paragraph 39 of the Plaintiffs' Contentions, Catlin:
 - a. relies on the "*Constitutions*" and the "*Management Agreements*" for their full effect as if set out in full;
 - b. otherwise does not admit the matters alleged in the paragraph.
- 40. In answer to paragraph 40 of the Plaintiffs' Contentions, Catlin:
 - a. admits that the Application Fee per woodlot for each of the Gunns Woodlot Schemes were provided for under the Management Agreements;
 - b. says that the amount of the Application Fee Per Woodlot was also provided for in the Constitutions;
 - c. otherwise does not admit the paragraph.
- 41. Catlin does not admit paragraph 41 of the Plaintiffs' Contentions.
- 42. Catlin does not admit paragraph 42 of the Plaintiffs' Contentions.
- 43. In answer to paragraph 43 of the Plaintiffs' Contentions, Catlin:
 - a. says that in relation to the 2002 Gunns Woodlot Scheme, cl 3.2 of the Constitution provided that the assets of the scheme were to be held by the Responsible Entity on trust for the "Applicants and Growers";
 - b. says that in relation to the 2003 Gunns Woodlot Scheme, 2004 Gunns Woodlot Scheme, 2005 Gunns Woodlot Scheme, 2006 Gunns Woodlot Scheme, 2008 Gunns Woodlot Scheme and 2009 Gunns Woodlot Scheme, cl 3.2 of the "*Constitutions*" provided that the assets of the various schemes were to be held by the Responsible Entity on trust for the Members;
 - c. admits that in accordance with cl 3.4 of the "*Constitutions*", in order to create an "*Application Portion*", the Responsible Entity was to lodge, or require to be lodged, in a trust bank account the "*Application Fees*" received by the custodian or responsible entity;

- d. relies on the "*Constitutions*" for their full terms and effect as if set out in full;
 - e. otherwise does not admit the paragraph.
44. In answer to paragraph 44 of the Plaintiffs' Contentions, Catlin:
- a. admits that in accordance with cl 5 of the "*Constitutions*", the Responsible Entity was to place, or to ensure that the "*Custodian*" placed, all cash payable at the time of application in the "*Application Portion*" until the Responsible entity releases or instructs the "*Custodian*" to release the money in accordance with clause 8 of the "*Constitutions*";
 - b. relies on the "*Constitutions*" for their full terms and effect as if set out in full;
 - c. otherwise does not admit the paragraph.
45. In answer to paragraph 45 of the Plaintiffs' Contentions, Catlin:
- a. admits that in accordance with cl 3.6 of the "*Constitutions*" an "*Applicant*" had an interest in the "*Application Portion*" equal to its proportional interest, but did not have any interest in any particular part of the "*Application Portion*" or any "*Investment*";
 - b. relies on the "*Constitutions*" for their full terms and effect as if set out in full;
 - c. otherwise does not admit the paragraph.
46. In answer to paragraph 46 of the Plaintiffs' Contentions, Catlin:
- a. admits that in accordance with cl 7 of the "*Constitutions*", the Responsible Entity had to be reasonably satisfied of certain matters before authorising or instructing the release of "*Application Fees*";
 - b. admits that in accordance with cl 8 of the "*Constitutions*", upon the Responsible Entity being satisfied of the matters in cl 7 and being in possession of a duly completed and executed "*Sub-Forestry Right Deed*" and "*Management Agreement*", the Responsible Entity will release or instruct the "*Custodian*" to release the "*Application Fees*" in payment of the "*Woodlot Establishment Expenses*";

- c. relies on the "*Constitutions*" and the "*Management Agreements*" for their full effect as if set out in full;
 - d. otherwise does not admit the paragraph.
47. In answer to paragraph 47 of the Plaintiffs' Contentions, Catlin:
- a. relies on the "*Constitutions*" and the "*Management Agreements*" for their full effect as if set out in full;
 - b. otherwise does not admit the paragraph.
48. In answer to paragraph 48 of the Plaintiffs' Contentions, Catlin:
- a. relies on the "*Constitutions*" and the "*Management Agreements*" for their full effect as if set out in full;
 - b. otherwise does not admit the paragraph.

Growers' Trust Funds

49. In answer to paragraph 49 of the Plaintiffs' Contentions, Catlin:
- a. relies on the "*Constitutions*" and the "*Management Agreements*" for their full terms and effect as if set out in full;
 - b. otherwise does not admit the paragraph.
50. In answer to paragraph 46 of the Plaintiffs' Contentions, Catlin:
- a. relies on the "*Constitutions*" and the "*Management Agreements*" for their full terms and effect as if set out in full;
 - b. otherwise does not admit the paragraph.
51. In answer to paragraph 51 of the Plaintiffs' Contentions, Catlin:
- a. relies on the "*Constitutions*" and the "*Management Agreements*" for their full terms and effect as if set out in full;
 - b. otherwise does not admit the paragraph.
52. In answer to paragraph 52 of the Plaintiffs' Contentions, Catlin:

- a. relies on the "*Constitutions*" and the "*Management Agreements*" for their full terms and effect as if set out in full;
- b. otherwise does not admit the paragraph.

52A. Catlin does not admit paragraph 52A of the Plaintiffs' Contentions.

52B. Catlin does not admit paragraph 52B of the Plaintiffs' Contentions.

GPL Unauthorised retention of Growers' Trust Funds

52C. Catlin does not admit paragraph 52C of the Plaintiffs' Contentions.

Auditor Oversight and the Compliance Plans

53. Catlin does not admit paragraph 53 of the Plaintiffs' Contentions.

54. Catlin denies paragraph 54 of the Plaintiffs' Contentions.

55. Catlin does not admit paragraph 55 of the Plaintiffs' Contentions.

External Administration and Distributions

55A. Catlin does not admit paragraph 55A of the Plaintiffs' Contentions

55B. In answer to paragraph 55B of the Plaintiffs' Contentions, Catlin:

- a. admits that on or about 29 May 2001, Gunns and ANZ Capel Court entered into an agreement headed "*Fixed and Floating Charge*" (**2001 Fixed and Floating Charge**);
- b. admits that on or about 14 March 2002, Gunns, ANZ Capel Court, and others entered into an agreement headed "*Woodlot Project Consent and Amendment Deed*", which had the effect of amending the 2001 Fixed and Floating Charge;
- c. refers to the 2001 Fixed and Floating Charge for its full terms and effect as if set out in full;
- d. otherwise does not admit the paragraph.

55C. In answer to paragraph 55C of the Plaintiffs' Contentions, Catlin:

- a. admits that on or about 31 January 2007, ANZ Bank, Gunns and others entered into an agreement headed "*Facility Agreement*" (**2007 Facility Agreement**);
- b. admits that on or about 31 January 2007, ANZ, Gunns and various others entered into an agreement headed "*Fixed and Floating Charge*" (**2007 Fixed and Floating Charge**);
- c. refers to the terms of the 2007 Facility Agreement, and the 2007 Fixed and Floating Charge for their full terms and effect as if set out in full;
- d. otherwise does not admit the paragraph.

55D. In answer to paragraph 55D of the Plaintiffs' Contentions, Catlin:

- a. admits that on or about 8 February 2020, Gunns, ANZ Capel Court and others entered into an agreement headed "*Fixed and Floating Charge*" (**2010 Fixed and Floating Charge**);
- b. refers to 2010 Fixed and Floating Charge for their full terms and effect as if set out in full;
- c. otherwise does not admit the matters alleged in the paragraph.

55E. Catlin does not admit paragraph 55E of the Plaintiffs' Contentions.

55F. Catlin does not admit paragraph 55F of the Plaintiffs' Contentions.

55G. Catlin does not admit paragraph 55G of the Plaintiffs' Contentions.

55H. In answer to paragraph 55H of the Plaintiffs' Contentions, Catlin:

- a. admits that on or about 30 January 2012, Gunns, ANZ Bank, and various others entered into an agreement headed "*Amendment and Restatement Deed (Facility Agreement)*" (**2012 Facility Agreement**);
- b. admits that on or about 30 January 2012, Gunns, ANZ, and various others entered into an agreement headed "*Deed of Amendment No.4*" (**2012 Security Trust Deed**);
- c. refers to the 2012 Facility Agreement and the 2012 Security Trust Deed for their full terms and effect as if set out in full;

- d. otherwise does not admit the paragraph.
- 55I. Catlin notes the matters in paragraph 55I of the Plaintiffs' Contentions.
- 55J. Catlin does not admit paragraph 55J of the Plaintiffs' Contentions.
56. Catlin does not admit paragraph 56 of the Plaintiffs' Contentions.
57. Catlin does not admit paragraph 57 of the Plaintiffs' Contentions.
58. Catlin does not admit the matters alleged in paragraph 58 of the Plaintiffs' Contentions.
- 58A. Catlin does not admit paragraph 58A of the Plaintiffs' Contentions.
59. Catlin admits paragraph 59 of the Plaintiffs' Contentions.
60. Catlin admits paragraph 60 of the Plaintiffs' Contentions.
61. In answer to paragraph 61 of the Plaintiffs' Contentions, Catlin:
- a. admits that the Supreme Court of Victoria made certain orders on 31 May 2013 and 21 June 2013;
 - b. refers to those orders for their full terms and effect as if set out in full;
 - c. otherwise does not admit the paragraph.
62. In answer to paragraph 62 of the Plaintiffs' Contentions, Catlin:
- a. admits that the Supreme Court of Victoria made certain orders on 11 August 2014;
 - b. refers to those orders for their full terms and effect as if set out in full;
 - c. otherwise does not admit the paragraph.
63. Catlin does not admit paragraph 63 of the Plaintiffs' Contentions.
64. Catlin does not admit paragraph 64 of the Plaintiffs' Contentions.

THE DUTIES OF GPL, GUNNS LTD AND THE DEFENDANTS

GPL

GPL Management Duties

65. In answer to paragraph 65 of the Plaintiffs' Contentions, Catlin:

- a. admits that the "*Constitutions*", "*Management Agreements*", "*Forestry Rights Deeds*" "*Forestry Rights Lease Deeds*", "*Compliance Plans*" and "*Amended Compliance Plans*" set out various obligations of GPL;
- b. relies on "*Constitutions*", "*Management Agreements*", "*Forestry Rights Deeds*" "*Forestry Rights Lease Deeds*", "*Compliance Plans*" and "*Amended Compliance Plans*" for their full terms and effect as if set out in full;
- c. otherwise does not admit the paragraph.

66. In answer to paragraph 66 of the Plaintiffs' Contentions, Catlin:

- a. admits that, to the extent that GPL acted as a Responsible Entity of registered scheme, it owed the duties prescribed by s 601FC of the *Corporations Act* when exercising its powers and carrying out its duties in that capacity;
- b. otherwise does not admit the paragraph.

GPL Trust Fund Duties

67. In answer to paragraph 67 of the Plaintiffs' Contentions, Catlin:

- a. does not admit that there were "*Grower's Trust Funds*";
- b. admits that, to the extent that GPL acted as a Responsible Entity of registered scheme, it owed the duties prescribed by s 601FC of the *Corporations Act* when exercising its powers and carrying out its duties in that capacity;
- c. relies on the "*Compliance Plans*" and "*Amended Compliance Plans*" for their full terms and effect as if set out in full;
- d. otherwise does not admit the paragraph.

67A. In answer to paragraph 67A of the Plaintiffs' Contentions, Catlin:

- a. admits that, to the extent that GPL acted as a Responsible Entity of registered scheme, it owed the duties prescribed by s 601FC of the *Corporations Act* when exercising its powers and carrying out its duties in that capacity;
- b. otherwise does not admit the paragraph.

Gunns Ltd

68. Catlin does not admit paragraph 68 of the Plaintiffs' Contentions.

The GPL Directors

69. In answer to paragraph 69 of the Plaintiffs' Contentions, Catlin:

- a. admits that to the extent that the GPL Directors were officers of GPL, and GPL acted as a responsible entity of a registered scheme, the GPL Directors owed the duties imposed on them by s 601FD of the *Corporations Act*;
- b. otherwise does not admit the paragraph.

KPMG

70. In answer to paragraph 70 of the Plaintiffs' Contentions, Catlin repeats paragraphs 53 to 55, 65, 66, and 67 above.

71. Catlin does not admit paragraph 71 of the Plaintiffs' Contentions.

72. Catlin does not admit paragraph 72 of the Plaintiffs' Contentions.

CONDUCT OF GPL, GUNNS LTD and KPMG

73. Catlin does not admit paragraph 73 of the Plaintiffs' Contentions.

74. Catlin does not admit paragraph 74 of the Plaintiffs' Contentions.

74A. Catlin does not admit paragraph 74A of the Plaintiffs' Contentions.

74B. Catlin does not admit paragraph 74B of the Plaintiffs' Contentions.

Forestry Right Fees and Insurances

75. Catlin does not admit paragraph 75 of the Plaintiffs' Contentions.

76. [NOT IN USE]

KPMG Compliance Plan audit reports

77. In answer to paragraph 77 of the Plaintiffs' Contentions, Catlin:

a. admits that KPMG issued Compliance Plan Audit Reports in respect of the Gunns Woodlot Schemes from time to time;

b. otherwise does not admit the paragraph.

78. Catlin does not admit paragraph 78 of the Plaintiffs' Contentions.

BREACHES OF DUTY

GPL

GPL Management Duties

79. Catlin does not admit paragraph 79 of the Plaintiffs' Contentions.

GPL Trust Fund Duties

80. Catlin does not admit paragraph 80 of the Plaintiffs' Contentions.

GPL duties arising from its position as RE

80A. Catlin does not admit paragraph 80A of the Plaintiffs' Contentions.

Gunns Ltd

81. [NOT IN USE]

The GPL Directors

82. Catlin does not admit paragraph 82 of the Plaintiffs' Contentions.

83. Catlin does not admit paragraph 83 of the Plaintiffs' Contentions.

83A. Catlin does not admit paragraph 83A of the Plaintiffs' Contentions.

83B. Catlin does not admit paragraph 83B of the Plaintiffs' Contentions.

84. Catlin does not admit paragraph 84 of the Plaintiffs' Contentions.

85. [NOT IN USE]

KPMG

86. Catlin does not admit paragraph 86 of the Plaintiffs' Contentions.

CASUATION AND LOSS

GPL

- 86A. Catlin does not admit paragraph 86A of the Plaintiffs' Contentions.
- 87. Catlin does not admit paragraph 87 of the Plaintiffs' Contentions.
- 88. Catlin does not admit paragraph 88 of the Plaintiffs' Contentions.
- 89. Catlin does not admit paragraph 89 of the Plaintiffs' Contentions.
- 90. Catlin does not admit paragraph 90 of the Plaintiffs' Contentions.
- 90A. Catlin does not admit paragraph 90A of the Plaintiffs' Contentions.

GPL Directors

- 90B. Catlin does not admit paragraph 90B of the Plaintiffs' Contentions.
- 91. Catlin does not admit paragraph 91 of the Plaintiffs' Contentions.
- 92. Catlin does not admit paragraph 92 of the Plaintiffs' Contentions.
- 93. Catlin does not admit paragraph 93 of the Plaintiffs' Contentions.
- 94. Catlin does not admit paragraph 94 of the Plaintiffs' Contentions.
- 94A. Catlin does not admit paragraph 94A of the Plaintiffs' Contentions.
- 95. [NOT IN USE]
- 96. [NOT IN USE]
- 97. [NOT IN USE]

KPMG

- 98. Catlin does not admit paragraph 98 of the Plaintiffs' Contentions.
- 99. Catlin does not admit paragraph 99 of the Plaintiffs' Contentions.
- 100. Catlin does not admit paragraph 100 of the Plaintiffs' Contentions.
- 101. Catlin does not admit paragraph 101 of the Plaintiffs' Contentions.

The Plaintiffs' Loss

102. Catlin does not admit paragraph 102 of the Plaintiffs' Contentions.
103. Catlin does not admit paragraph 103 of the Plaintiffs' Contentions.
104. In answer to paragraph 104 of the Plaintiffs' Contentions, Catlin:
- a. repeats paragraph 103(b) and (c) (read as responding to paragraph 104 of the Plaintiffs' Contentions) of Andrew Gray/Wallace's ACLR;
 - b. otherwise does not admit the paragraph.

CLAIMS AGAINST CATLIN AND CHUBB

Primary IMI Policy

105. In answer to paragraph 105 of the Plaintiffs' Contentions, Catlin:
- a. admits that on or about 6 February 2012, Chartis Australia Insurance Limited (**Chartis**) issued a policy of insurance, number 107092, in favour of GPL (**Primary Policy**);
 - b. admits that the Primary Policy comprised:
 - i) a schedule (**Primary Policy Schedule**);
 - ii) a policy wording headed "*Investment Management Insurance*" (**Primary Policy Wording**), and
 - iii) fifteen (15) endorsements (**Primary Policy Endorsements**);
 - c. otherwise does not admit the paragraph.
106. In answer to paragraph 106 of the Plaintiffs Contentions, Catlin:
- a. admits that the Primary IMI Policy's "*Policy Period*" was from 30 November 2011 to 30 November 2012, both at 4.00 pm at GPL's main address;
 - b. admits it was a term of the Primary Policy that the total amount payable by Chartis under the Policy shall not exceed \$2,500,000;

- c. admits that it was a further term of the Primary Policy that Chartis would only be liable under the Primary Policy for “Loss” in excess of the “Retention” of \$250,000;
- d. otherwise does not admit the paragraph.

Particulars

Primary Policy cll 5.4 and 5.5

Policy Schedule, items 5 and 8

107. In answer to paragraph 107 of the Plaintiffs’ Contentions, Catlin:

- a. admits that the Primary Policy contains a term as set out in the paragraph;
- b. says that the cover afforded by that clause:
 - i) is, in respect of an Insured Person, limited to “Loss” (as defined in the Primary Policy) arising 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;
 - ii) is, in respect of an Insured Entity, limited to the reimbursement of the Insured Entity for any “Loss” that the Insured Entity pays on behalf of an Insured Person, such “Loss” arising 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;
- c. says that for the purposes of the Primary Policy a “Wrongful Managerial Act” is a matter claimed against an “Insured Person” solely because of his or her capacity as a Director or Officer, or any actual or alleged act, error or omission by a Director or Officer in his or her capacity as such;

Particulars

Primary Policy Wording, cl 4.86

- d. says that the cover afforded by the clause relied upon by the Plaintiffs in paragraph 107 of the Plaintiffs’ Contentions does not, on the proper construction of the Primary Policy, respond to “Loss” suffered by an Insured Entity on its own account;

- e. further says that the cover afforded by the Primary Policy is subject to the terms, conditions, and exclusions of the Primary Policy as a whole;
- f. relies on the Primary Policy Schedule, the Primary Policy Wording, and the Primary Policy Endorsements for their full terms and effect as if set out in full;
- g. otherwise does not admit the paragraph.

108. In answer to paragraph 108 of the Plaintiffs' Contentions, Catlin:

- a. says that GPL was the Policyholder of the Primary Policy and accordingly, satisfied the definition of an "*Insured Entity*" for the purposes of the Primary Policy;
- b. says that for the purposes of the Primary Policy, a person who was a "*Director or Officer*" of an "*Insured Entity*" satisfies the definition of an "*Insured Person*" for the purposes of the Primary Policy;
- c. says that the words "*Director or Officer*" are defined in cl 4.20 of the Primary Policy;
- d. says that to the extent that the GPL Directors were an executive or non-executive director or officer, responsible officer or compliance committee member of an "*Insured Entity*", or became a director or officer of such an entity during the "*Period of Insurance*" (i.e. 30 November 2011 to 30 November 2012), they will satisfy the definition of a "*Director or Officer*" for the purposes of the Primary Policy;
- e. otherwise does not admit the paragraph.

109. In answer to paragraph 109 of the Plaintiffs' Contentions, Catlin:

- a. says that, on the proper construction of the Primary Policy, there is a single "*Claim*";
- b. says that for the purposes of the Primary Policy a "*Wrongful Managerial Act*" is a matter claimed against an "*Insured Person*" solely because of his or her capacity as a Director or Officer, or any actual or alleged act, error or omission by a Director or Officer in his or her capacity as such;
- c. says that, on the proper construction of the Primary Policy, a "*Wrongful Managerial Act*" is limited to matters claimed against a natural person;
- d. repeats the matters set out in paragraph 107 above;

- e. denies that any of the matters alleged as against GPL in the FACLS are within the meaning of a "*Wrongful Managerial Act*" for the purposes of the Primary Policy;
- f. does not admit that the "*Claim*" (or, in the alternative "*Claims*") against the GPL Directors were for "*Wrongful Management Acts*" within the meaning of the Primary Policy;
- g. otherwise does not admit the paragraph.

First Excess IMI Policy

110. In answer to paragraph 110 of the Plaintiffs' Contentions, Catlin:

- a. admits that on about 1 February 2012, Catlin issued a Financial and Professional Risks Excess Insurance, policy number 923424 (***First Excess Policy***);
- b. says that the First Excess Policy was constituted by:
 - i) a policy wording (***First Excess Policy Wording***); and
 - ii) a policy schedule (***First Excess Policy Schedule***);
- c. says that the purposes of the First Excess Policy, the "*Insured*" was the insured named in the First Excess Policy Schedule (namely GPL) and any party indemnified in by the "*Underlying Policies*";
- d. says that the Primary Policy was the only "*Underlying Policy*" for the purposes of the First Excess Policy;
- e. says that the period of insurance in respect of the First Excess Policy was 30 November 2011 to 30 November 2012, both at 4.00 pm at the "*Insured Address*";
- f. refers to the Primary Policy Wording, the Primary Policy Schedule, the First Excess Policy Wording, and the First Excess Policy Schedule for their full terms and effect as if set out in full;
- g. otherwise does not admit the paragraph.

111. In answer to paragraph 111 of the Plaintiffs' Contentions, Catlin:

- a. says that it was a term of the First Excess Policy that, subject to the terms and conditions of the First Excess Policy as a whole, Catlin will indemnify an "*Insured*"

up to the Limit of Indemnity for all damages or compensation including costs fees and expenses;

- b. says that the "*Limit of Liability*" for the purposes of the First Excess Policy is AUD\$10,000,000 each and every claim and in the aggregate;
- c. otherwise does not admit the paragraph.

112. In answer to paragraph 112 of the Plaintiffs' Contentions, Catlin:

- a. admits that the First Excess Policy Wording contains a term in the form quoted in the paragraph;
- b. says that it was a further term of the First Excess Policy that liability under the First Excess Policy will not attach unless and until the Underlying Insurers have paid or have admitted liability for or have been held liable to pay the Underlying Limit of Indemnity and the insured has a liability to pay a sum which exceeds the Underlying Limit of Liability;
- c. says that the Primary Policy is the only "Underlying Policy" for the purposes of the First Excess Policy;
- d. says that it was a further term of the First Excess Policy that any decision of an underling insurers to accept a claim ex-gratia or without prejudice without the prior written acceptance of Catlin is not binding on Catlin and does not operate to erode any underlying aggregate limit of indemnity for the purposes of the First Excess Policy;
- e. says that it was a further term of the First Excess Policy that it is subject to the same provisions (except as to premium, settlements, the limits of liability and as otherwise provided in the First Excess Policy Wording) as the Primary Policy prior to the happening of a loss;
- f. refers to the First Excess Policy Wording and the First Excess Policy Schedule for their full terms and effect as if set out in full;
- g. otherwise does not admit the paragraph.

113. Catlin admits paragraph 113 of the Plaintiffs' Contentions.

114. Catlin admits paragraph 114 of the Plaintiffs' Contentions.

115. In answer to paragraph 115 of the Plaintiffs' Contentions, Catlin:

The claim against GPL

- a. says that the claim for indemnity under the Primary Policy identified in paragraph 107 of the Plaintiffs' Contentions is limited to clause 1.3 of the Primary Policy only;
- b. repeats the matters set out in paragraph 107 above;
- c. denies that any legal liability that GPL may be found to have to pay damages or compensation triggers the indemnity afforded by that clause;

The Conflict of Interest Exclusion

- d. says that it was an express term of the Primary Policy Wording that (**Conflict of Interest Exclusion**):

"The Insurer shall not be liable to make any payment under any Cover or Extension in connection with any Claim made against an Insured arising out of, based upon attributable to or in any way connected with any actual or alleged conflicts of interest (including but not limited to the failure of an Insured Person to disclose any actual or alleged conflicts of interest)"

Particulars

Endorsement 15 to the Primary Policy

- e. repeats paragraph 109(a) above and says that on the proper construction of the Primary Policy, there is a single "Claim";
- f. says that if any "Insured" incurs a "Loss" (as defined in the Primary Policy, which is denied), the Primary Policy does not respond as:
 - i) any payment that Chartis would have been obliged to make in respect of that "Loss" is a payment in connection with a single "Claim";
 - ii) the "Claim" (or, in the alternative, "Claims" as alleged in paragraph 109 of the Plaintiffs' Contentions) arise/s out of, is/are based upon, is/are attributable to, or is/are connected with an actual or alleged conflict of interest;

Particulars

See the whole of the FACLS, and in particular (without limitation) paragraphs [55A]-[55J], [69], [73]-[74B], [79.5], [79.6], [79.7], [80.1], [80.8], [80.10], [80.11], [82]-[83B], [86A]-[90A], [102]-[104]. Further particulars may be provided following the service of the plaintiffs' and GPL Directors' evidence.

- iii) says that in the premises:
 - (1) the Conflict of Interest exclusion is engaged, and Chartis is not liable to make any payment under the Primary Policy; and
 - (2) the First Excess Policy does not respond.

The Lenders Liability Exclusion

- g. says that it was an express term of the Primary Policy that (***Lenders Liability Exclusion***):

"The Insurer shall not be liable to make any payment under any Cover or Extension in connection with any Claim arising out of, based upon or attributable to an actual or alleged:

- (i) loan, lease or extension of credit to the extent that such a Claim arises out of a Wrongful Professional Act in the administration of such loan, lease or extension of credit; or*
- (ii) collection, foreclosure or repossession in connection with any actual or alleged loan, lease or extension of credit"*

Particulars

Endorsement 4 to the Primary Policy

- h. repeats paragraph 109(a) above and says that on the proper construction of the Primary Policy, there is a single "Claim";
- i. says that if any "Insured" incurs a "Loss" (as defined in the Primary Policy, which is denied), the Primary Policy does not respond as:
 - i) any payment that Chartis would have been obliged to make in respect of that "Loss" is a payment in connection with a single "Claim";

- ii) the "*Claim*" (or, in the alternative, "*Claims*" as alleged in paragraph 109 of the Plaintiffs' Contentions) arise/s out of, is/are based upon, or is/are attributable to an actual or alleged loan or extension of credit;

Particulars

See the whole of the FACLS and in particular (without limitation) paragraph [74]. Further particulars may be provided following the service of the plaintiffs' and GPL Directors' evidence.

- iii) the "*Claim*" arises out of a "*Wrongful Professional Act*" (as defined in the Primary Policy Wording) in the administration of that loan, or out of the extension of that credit;

Particulars

See the whole of the FASOC, and in particular (without limitation) paragraphs [74], [74B], [79.5], [79.6, [80]-[80.11], [82], 83], [83A], [86A]-[90]. Further particulars may be provided following the service of the plaintiffs' and GPL Directors' evidence.

- iv) in the premises:

- (1) the Lenders Liability Exclusion is engaged, and Chartis is not liable to make any payment under the Primary Policy; and
- (2) The First Excess Policy does not respond;

The Insolvency Exclusion

- j. says that it was an express term of the Primary Policy that (Insolvency Exclusion):

"The Insurer shall not be liable to make any payment under either the "Fund Professional Civil Liability and Management Liability Cover or the "Investment Manage Management Liability" Cover for Loss in connection with any Claim arising out of, based upon or attributable to the actual or alleged insolvency of the Insured Entity or any Fund or any actual or alleged inability of the Insured Entity or any Fund to pay any or all of its debts as and when they fall due"

Particulars

Endorsement 11 to the Primary Policy

- k. repeats paragraph 109(a) above and says that on the proper construction of the Primary Policy, there is a single "*Claim*";
- l. says that if any "*Insured*" incurs a "*Loss*" (as defined in the Primary Policy, which is denied), the Primary Policy does not respond as:
 - i) any such "*Loss*" is in connection with a single "*Claim*";
 - ii) the "*Claim*" (or, in the alternative, "*Claims*" as alleged in paragraph 109 of the Plaintiffs' Contentions) arise/s out of, is/are based upon, or is/are attributable to the actual or alleged insolvency of GPL and/or Gunns, and/or the actual or alleged inability of GPL and/or Gunns, to pay any or all of its debts as and when they fell due;

Particulars

See the whole of the FASOC, and in particular (without limitation) paragraphs [55A]-[69], [75], [79]-[80A], [82]-[83B], [86A]-[94A], [102]-[104]. Further particulars may be provided following the service of the plaintiffs' and GPL Directors' evidence.

- m. in the premises:
 - i) the Insolvency Exclusion is engaged and Chartis is not liable to make any payment under the Primary Policy; and
 - ii) the First Excess Policy does not Respond.

Wayne Tank

- n. further says that, in the alternative:
 - i) if on the proper construction of the Primary Policy, a "*Claim*" is to be identified by reference to alleged "*Wrongful Professional Acts*" or "*Wrongful Managerial Acts*", or causes of action, and (contrary to paragraph 109(a) above) there is more than one "*Claim*" (which is denied) then:
 - (1) the proceedings include a "*Claim*" that arises out of, is based upon, or is attributable an actual or alleged conflict of interest;

- (2) for the reasons outlined in sub-paragraphs 115(d) – 115(f) above, the Conflict of Interest Exclusion is triggered by that “*Claim*”;
 - (3) in the premises the Primary Policy, and as a consequence the First Excess Policy, does not respond to that “*Claim*”;
- ii) if on the proper construction of the Primary Policy, a “*Claim*” is to be identified by reference to alleged “*Wrongful Professional Acts*” or “*Wrongful Managerial Acts*”, or causes of action, and (contrary to paragraph 109(a) above) there is more than one “*Claim*” (which is denied) then:
- (1) the proceedings include a “*Claim*” that arises out of, is based upon, or is attributable to an actual or alleged loan or extension of credit and the “*Claim*” arises out of a Wrongful Professional Act in the administration of the loan or the extension of credit;
 - (2) for the reasons outlined in sub-paragraphs 115(g) – 115(i) above, the Lenders Liability Exclusion is triggered by that “*Claim*”;
 - (3) in the premises, the Primary Policy, and as a consequence the First Excess Policy, does not respond to that “*Claim*”;
- iii) if on the proper construction of the Primary Policy, a “*Claim*” is to be identified by reference to alleged “*Wrongful Professional Acts*” or “*Wrongful Managerial Acts*”, or causes of action, and (contrary to paragraph 109(a) above) there is more than one “*Claim*” (which is denied) then:
- (1) the proceedings include a “*Claim*” that arises out of, is based upon, or is attributable to the actual or alleged insolvency of an “*Insured Entity*” or the alleged inability of an “*Insured Entity*” to pay any or all of its debts as and when they fall due;
 - (2) for the reasons outlined in sub-paragraphs 115(j) – 115(m) above, the Insolvency Exclusion is triggered by that “*Claim*”;
 - (3) in the premises, the Primary Policy, and as a consequence the First Excess Policy, does not respond to that “*Claim*”;
- iv) in the premises where the proceedings advance “*Claims*” which are excluded from cover under the Primary Policy, to the extent that any other “*Claims*”

made in the proceedings on the basis of the matters alleged in the FACLS would otherwise fall within the cover afforded by the Primary Policy (which is denied), the Primary Policy does not respond to those “*Claims*” in accordance with the principles in *Wayne Tank & Pump Co Ltd v The Employers’ Liability Assurance Corporation Ltd [1974] QB 57*.

Further matters

- o. otherwise denies the paragraph.

The Chubb Policy

- 116. Catlin does not admit paragraph 116 of the Plaintiffs’ Contentions.
- 117. Catlin does not admit paragraph 117 of the Plaintiffs’ Contentions.
- 118. Catlin does not admit paragraph 118 of the Plaintiffs’ Contentions.
- 119. Catlin does not admit paragraph 119 of the Plaintiffs’ Contentions.
- 120. Catlin does not admit paragraph 120 of the Plaintiffs’ Contentions.
- 121. In answer to paragraph 121 of the Plaintiffs’ Contentions, Catlin repeats the matters in paragraph 115 above.

Leave to Proceed against GPL and the indemnity position

- 122. Catlin admits paragraph 122 of the Plaintiffs’ Contentions.
- 123. Catlin admits paragraph 123 of the Plaintiffs’ Contentions.
- 124. In answer to paragraph 124 of the Plaintiffs’ Contentions, Catlin:
 - a. says that any decision of Chartis to “*confirm indemnity under the Primary IMI Policy*” was made without the prior written acceptance of Catlin;
 - b. by reason of the matters referred to in paragraph 112(d) above, any such decision of Chartis is:
 - i) not binding on Catlin, and
 - ii) does not operate to erode the underlying aggregate limit of liability;

- c. in the premises where the underlying aggregate limit of liability has not been eroded, no cover is available under the First Excess Policy;
- d. otherwise does not admit the paragraph.

125. In answer to paragraph 125 of the Plaintiffs' Contentions, Catlin:

- a. admits that in correspondence dated 14 February 2019, it declined indemnity under the First Excess Policy in respect of these proceedings;
- b. says that in that correspondence Catlin stated that three exclusion clauses operated;
- c. says that in that correspondence it reserved its position in respect of the application of other clauses;
- d. says that Catlin continues to reserve its position in respect of the application of those other provisions of the Primary Policy, and reserves the right to rely on them (or any other term of the Primary Policy or First Excess Policy) in the event that facts or matters emerge during the conduct of these proceedings which are relevant to the application of them;
- e. otherwise does not admit the paragraph.

126. Catlin does not admit paragraph 126 of the Plaintiffs' Contentions.

127. In answer to paragraph 127 of the Plaintiffs' Contentions, Catlin:

- a. admits that on 4 December 2019, Ball J revoked the leave given to proceed against GPL pursuant to s 500 of the *Corporations Act*;
- b. otherwise does not admit the paragraph.

128. In answer to paragraph 128 of the Plaintiffs' Contentions, Catlin:

- a. says that, as these proceedings have been discontinued as against GPL, the plaintiffs and group members will be unable to obtain judgment against GPL in these proceedings;
- b. otherwise does not admit the paragraph.

129. In answer to paragraph 129 of the Plaintiffs' Contentions, Catlin:

- a. admits paragraphs 129.1 and 129.2;
- b. otherwise does not admit the paragraph.

130. Catlin denies paragraph 130 of the Plaintiffs' Contentions.

131. Catlin denies paragraph 131 of the Plaintiffs' Contentions.

Limitation Defences

132. In further answer to the whole of the Plaintiffs' Contentions, Catlin repeats:

- a. paragraphs 104 to 106A of the Chapman ACLR;
- b. paragraphs 111 to 135 of the Gay ACLR;
- c. paragraphs 104 to 106A of the Loone ACLR;
- d. paragraphs 104 to 106A of the Baker ACLR;
- e. paragraphs 104 to 106A of the Graham ACLR;
- f. paragraphs 104 to 106A of the Gray ACLR; and
- g. paragraphs 104 to 106A of the Tessierie ACLR.

133. Catlin says that, for the reasons set out in those paragraphs, any claims advanced against Catlin in place of GPL in these proceedings are statute barred.

134. In the premises, no "*Insured*" will suffer a "*Loss*" as a consequence of these proceedings giving rise to an indemnity under the Primary Policy and/or the First Excess Policy.

Laches

135. In answer to the whole of the Plaintiffs' Contentions, Catlin repeats:

- a. paragraph 113 of the Chapman ACLR;
- b. paragraph 135 of the Gay ACLR;
- c. paragraph 113 of the Loone ACLR;
- d. paragraph 113 of the Baker ACLR;

- e. paragraph 113 of the Graham ACLR;
 - f. paragraph 113 of the Robin Gray ACLR;
 - g. paragraph 113 of the Tessierie ACLR.
136. Catlin says that, for the same reasons as set out in those paragraphs, the plaintiffs are barred from claiming the relief sought as against Catlin in place of GPL in these proceedings.
137. In the premises, no "*Insured*" will suffer a "*Loss*" as a consequence of these proceedings giving rise to an indemnity under the Primary Policy and/or the First Excess Policy.

Proportionate Liability

138. In answer to the whole of the Plaintiffs' Contentions, Catlin repeats:
- a. paragraphs 107 to 110 of the Chapman ACLR
 - b. paragraphs 107 to 110 of the Gay ACLR;
 - c. paragraphs 107 to 110 of the Loone ACLR;
 - d. paragraphs 107 to 110 of the Baker ACLR;
 - e. paragraph 107 to 110 of the Graham ACLR;
 - f. paragraphs 107 to 110 of the Robin Gray ACLR;
 - g. paragraphs 107 to 110 of the Tessierie ACLR.

Further matters

139. In further answer to the whole of the plaintiffs' claim, Catlin says if the plaintiffs and group members succeed in obtaining an award of damages in these proceedings, and the Primary Policy and First Excess Policy respond to that liability (which is denied) any liability that Catlin has cannot exceed the lesser of:
- a. the individual liability of any insured defendant(s) found to be entitled to indemnity under the First Excess Policy in respect of any award of damages made against that defendant; or

b. the limit of cover afforded by the First Excess Policy.

D. QUESTIONS APPROPRIATE FOR REFERRAL TO A REFEREE

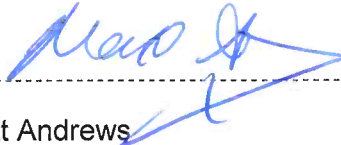
None

E. MEDIATION STATEMENT

To date, the parties have not attempted to mediate. The Twelfth Defendant would be willing to proceed to a mediation at an appropriate time.

SIGNATURE OF LEGAL REPRESENTATIVE

Signature of Legal Representative



Name

Matt Andrews

Capacity

Solicitor on record for the Twelfth Defendant

Date

12 March 2021